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OF THE

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Many Additional NOTES and REFERENCES of and to MODERN DETERMINATIONS.

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THE

ADVANCEMENT

OF LEARNING.

A

TABLE

OF THE

Several TITLES,

WITH THEIR

DIVISIONS.

VOL. II.

Damages. Page 1.

(A) IN *what Actions a Party ſhall recover Damages.* Page 1
(B) *What Perſons are intitled to, or ſhall recover Damages.* 2
(C) *Againſt whom Damages ſhall be recovered.* 3
(D) *Of aſſeſſing the Damages.*
And herein,
1. Of the *Quantum* of the Damages the Jury may give. 4
2. Whether they may give more than the Plaintiff has declared for. 4
3. Muſt be aſſeſſed purſuant to the Plaintiff's Right, or the Injury he has received; and herein, of aſſeſſing intire Damages. 5
4. Where to be aſſeſſed jointly or ſeverally, where there are ſeveral Defendants. 8
(E) *Where the Court may increaſe or mitigate the Damages.* 10
(F) *Of the Manner of aſſeſſing and recovering Damages.* 11

A Table of the ſeveral TITLES,

Debt. Page 13.

(A) *In what Caſes an Action of Debt will lie.* 13
(B) *At what Time it ſhall be ſaid to have accrued.* 15
(C) *Who may bring Debt; and herein, of the Privity of Contract and Eſtate.* 16
(D) *Againſt whom it may be brought.* 18
(E) *Where Debt is the proper Action, and not Covenant, Caſe,* &c. 20
(F) *Of the Manner of bringing the Action, and where it muſt be brought in the* Debet *and* Detinet, *or* Detinet *only.* 21
(G) *Of the Extinguiſhment of the Debt, and pleading in Bar thereof.* 24
Deceit. *Vid. Tit.* Fraud, *p.* 593.
Declaration and Demurrer. *Vid. Tit.* Pleadings, *Vol.* 4. *p.* 1.

Deodand. Page 25.

Deſcent. Page 27.

(A) *Of Lineal Deſcent; and herein, of the Excluſion of the aſcending Line.* 27
(B) *Of Collateral Deſcent.* 29
(C) *Of the Half Blood, and the* Poſſeſſio Fratris. 30
(D) *Of Deſcents according to Cuſtom.* 32
(E) *Where a Perſon ſhall be ſaid to take by Purchaſe, and not by Deſcent.* 33
(F) *Of a Deſcent, its Operation to take away an Entry.* 36
(G) *In what Caſes the Entry of the Diſſeiſee may be lawful notwithſtanding a Deſcent.* 38
(H) *Whoſe Entry is preſerved notwithſtanding a Deſcent.* 41
(I) *How the Entry may be preſerved by continual Claim.*
And herein,
1. Of the Nature of continual Claim, and the Effects of it. 42
2. What is neceſſary to a continual Claim to make it effectual. 43
3. The Time in which it is to be made. 44

Detinue. Page 45.

(A) *By and againſt whom Detinue lies.* 46
(B) *For what Things it may be brought.* 46
Devaſtavit. *Vid. Tit.* Executors and Adminiſtrators, *Vol.* 2. *p.* 430.

Deviſes. Page 48.

(A) *Who may deviſe Lands, and to whom.* 49
(B) *Of what Eſtate or Intereſt in the Deviſor he may diſpoſe.* 51
(C) *What Words paſs a Fee in a Will.* 53
(D) *What Words create an Eſtate-Tail or for Life.* 56
(E) *Of Terms for Years and uncertain Intereſts by Deviſe.* 62
(F) *Of Deviſes for Payment of Debts.* 64
(G) *Of Deviſes by Implication.* 66
(H) *Of the Diſpoſition of Goods and Chattels by Will, by what Deſcription, and to whom good.* 68

With their **DIVISIONS.**

(I) *Of Executory Deviſes of Lands of Inheritance; and herein, of Contingent Remainders and Croſs Remainders, as far as they relate to this Place.* Page 71

(K) *Of Executory Deviſes of Leaſes for Years; and herein, of the Limitation of the Truſt of a Term, as far as it relates to and agrees with a Deviſe thereof.* 71

(L) *Of void Deviſes.*

And herein,

1. By deviſing what the Law already gives, or what the Policy of the Law will not admit. 79
2. By Incertainty in the Deſcription of the Thing deviſed. 81
3. By Incertainty in the Deſcription of the Perſon to take. 84
4. By the Deviſee's dying in the Life-time of the Deviſor. 86

What Circumſtances are neceſſary by the 32 *H.* 8. *c.* 1. and the 34 & 35 *H.* 8. *c.* 5. and 29 *Car.* 2. *c.* 3. and what ſhall be a Revocation, and a new Publication. *Vid. Tit.* Will, *Vol.* 5. 34

Diſclaimer. *Vid. Tit.* Pleadings.

Diſcontinuance. Page 87.

(A) *Of Diſcontinuances made by Eccleſiaſtical Perſons.* 88

(B) *Made by Tenants in Tail.* 88

(C) *By Huſbands ſeiſed in Right of their Wives.* 91

(D) *Of Diſcontinuances by Women of Lands of the Gift of their Huſband or his Anceſtor.* 92

(E) *What Eſtate or Intereſt may be diſcontinued.* 94

(F) *By what Act or Conveyance a Diſcontinuance may be made, and the Effect thereof.* 96

Diſſeiſin. Page 97.

(A) *What Acts amount to a Diſſeiſin.* 97

(B) *What Perſons are capable of committing ſuch Diſſeiſins.* 104

Diſtribution. *Vid. Tit.* Executors and Adminiſtrators, *Vol.* 2. *p.* 426.

Diſtreſs. Page 105.

(A) *Who in reſpect of his Eſtate or Intereſt may diſtrain for Rent.* 106

(B) *What Things may be diſtrained.* 108

(C) *Of the Manner of diſtraining as to Time and Place.* 110

(D) *Of the Diſtreſs when ſeized; and herein, of the Diſtrainer's Intereſt therein, and what he is to do therewith.* 111

(E) *Where a Diſtreſs ſhall be ſaid to be wrongful and exceſſive; and herein, of the Remedy which the Party injured hath.* 115

(F) *Of diſtraining Things Damage Feaſant.* 116

(G) *Of Diſtreſſes for Amercements.* 117

Divorces. *Vid. Tit.* Marriage, *Vol.* 3. *p.* 569.

A Table of the ſeveral TITLES,

Dower. Page 118.

Of Dower at Common Law. Page 118.

Dower by Cuſtom. Page 152.

Dower ad Oſtium Eccleſiæ. Page 153.

Dower ex Aſſenſu Patris. Page 154.

Dower de la pluis Beal. Page 154.

(A) *Who may have Dower, and who not; and herein, of the Age and other Diſability of the Huſband or Wife.* 120

(B) *Of what Eſtate a Woman may have Dower.*
And herein,
1. Of the Quarentine. 122
2. Of the different Kinds of Inheritances. 123
3. Of the Nature and Quality of ſuch Eſtate, whether Sole, Joint or in Common. 125
4. Of its Continuance; wherein, of Eſtates conditional, ſuſpended, determined or extinguiſhed; and therein, of Remitters to the Heir, and Recoveries by Title Paramount. 127
5. Of the Value of the Improvement of the Huſband's Eſtate, either in his Life-time or after his Death. 129

(C) *Of the Things requiſite to the Conſummation of Dower*, viz. *Marriage, Seiſin, and Death of the Huſband.*
1. Of the Marriage, how long it muſt continue; and therein, of the ſeveral Sorts of Divorces. 129
2. Of the Seiſin, either in Fact or in Law; and therein, of the Seiſin in Fact as it is continuing, or not continuing, as inſtantaneous. 131
3. Of the Death of the Huſband. 132

(D) *Of the Aſſignment of Dower.*
1. By what Perſons. 133
2. Of the Manner; and therein, of aſſigning it by Metes and Bounds, *&c.* 134
3. By what Court. 135

(E) *Where the Wife ſhall have her Election to be endowed of one Thing or another, and where of both; and herein, of Endowment* de novo, *and the* dos de dote. 137

(F) *What ſhall be a Bar of Dower, and what not; and herein, of Acts done or ſuffered by the Huſband ſolely, or by the Huſband and Wife jointly, or by the Wife ſolely, either during the Coverture or after; and herein, of Elopement of Detinue of Charters or Heir.* 139

(G) *Where the Wife ſhall hold her Dower ſubject to the Charges of her Huſband, and where not; and herein, of the Privileges of Tenant in Dower, and the Nature of her Eſtate, as to Alienations made, or Actions brought by or againſt her.* 144

(H) *To whom the Tenant in Dower ſhall be attendant, and by what Services.* 145

(I) *Of the Proceedings and Damages in Dower*, unde nihil habet. 146

(K) *Of the Admeaſurement of Dower.* 151

Dureſs.

With their DIVISIONS.

Dureſs. Page 155.

(A) *For what Dureſs or Degree of Reſtraint or Terror a Man ſhall avoid his Deed or Contract.* 155
(B) *On whom, and by whom the Dureſs muſt be committed.* 157
(C) *What Contracts or Securities may be thus avoided.* 158
(D) *The Manner of avoiding them.* 159

Ejectment. Page 159.

(A) *Of the Nature of the Action, and ancient Manner of Proceeding in Ejectment.* 160
(B) *Of the modern Manner of Commencing and Proceeding in Ejectment.*
And herein,
1. Of ſerving the Declaration, Notice to the Tenant in Poſſeſſion, and entering into the common Rule. 161
2. Of adding proper Parties. 163
3. Of the Coſts. 164
(C) *In what Caſes the ancient Form is ſtill to be adhered to.* 165
(D) *Of the Declaration in Ejectment.*
And herein,
1. Of what Things an Ejectment will lie. 166
2. What ſhall be a ſufficient Deſcription of the Things for which it will lie. 168
3. Of the Demiſe and Right of Entry in the Leſſor of the Plaintiff, and of the Ouſter. 171
(E) *Of the Plea and General Iſſue in Ejectment.* 176
(F) *Of the Verdict and Judgment in Ejectment.* 177
(G) *Of the Writ of Execution.*
And herein,
1. Of the Time when the Writ is to be ſued. 178
2. How the Writ is to be executed. 179
3. How the Plaintiff is to be quieted, and what Relief he has when his Poſſeſſion is diſturbed. 180
(H) *Of the Meſne Profits, and how to be recovered.* 181
(I) *Of bringing a new or ſecond Ejectment.* 182

Election. Page 183.

(A) *In what Caſes an Election is given.* 183
(B) *To what Perſon; and herein, of him who is to do the firſt Act.* 184
(C) *Where it ſhall be ſaid to continue or be determined.* 185
(D) *What ſhall be a ſufficient Election.* 186

Elegit. *Vid. Tit.* Execution, *Vol.* 2. *p.* 349.
Embracery. *Vid. Tit.* Juries, *Vol.* 3. *p.* 284.

Error. Page 187.

(A) *In what Caſes a Writ of Error will lie.*
And herein,
1. In what Caſes a Writ of Error is the proper Remedy to be relieved againſt an erroneous Judgment. 189

A Table of the ſeveral TITLES,

2. On what Judgments a Writ of Error will lie. Page 191
3. In what Court the Judgment muſt be given, on which a Writ of Error will lie. 194

(B) *Who may bring a Writ of Error, and againſt whom; and herein, of the Perſons neceſſary to be made Parties thereto.* 195

(C) *Of the Time of bringing a Writ of Error.* 199

(D) *Of the Manner of bringing it.*
And herein,
1. Of the Form of the Writ, and where the Record ſhall be ſaid to be removed. 200
2. What is neceſſary to be removed; and herein, of removing the Record or a Tranſcript. 200

(E) *Of alledging Diminution, and granting a* Certiorari. 204

(F) *Of the* Scire facias. 205

(G) *Of the Proceedings after the Record is removed; and herein, of the Abatement of the Writ of Error.* 209

(H) *How far the Writ of Error is a* Superſedeas. 210

(I) *To what Court a Writ of Error lies.*
And herein,
1. Of Writs of Error into Parliament. 211
2. Of Writs of Error into the Exchequer Chamber. 212
3. Of reverſing Judgments in the Court of Exchequer. 213
4. Of the Writs of Error into the King's Bench. 213
5. Of Writs of Error into the Common Pleas, and inferior Courts. 214
6. Where a Writ of Error lies in the ſame Court in which the Record is. 215

(K) *Of aſſigning Errors.*
And herein,
1. Of the Manner of aſſigning Errors. 216
2. Of aſſigning Errors in Fact and in Law. 217
3. Of aſſigning that for Error, which appears contrary to the Record. 218
4. Of aſſigning that for Error, which is for the Party's Advantage. 220
5. Where the Matter aſſigned for Error is aided by the Appearance of the Party, and in not being taken Advantage of in proper Time. 221
6. Where Matters which might be aſſigned for Error are aided by a Releaſe and Conſent of Parties. 223

(L) *What Defence the Defendant in Error may make; and herein, of pleading a Releaſe.* 225

(M) *Of the Judgment to be given on the Writ of Error.*
And herein,
1. Where on a Writ of Error Part only or the whole Judgment ſhall be reverſed. 227
2. What Judgment ſhall be given on the Reverſal of the firſt. 230
3. To what the Parties ſhall be reſtored on the Reverſal of the firſt Judgment. 231

Eſcape in Civil Caſes. Page 233.

(A) *Where the Party ſhall be ſaid to be legally committed, ſo that the ſuffering him to go at large will be adjudged an Eſcape.*

With their DIVISIONS.

And herein,

1. Where the Authority by which he is committed ſhall be ſaid to be ſufficient for that Purpoſe. Page 234
2. Where the Form of the Commitment, or being in Cuſtody ſhall be ſaid to be regular. 236

(B) *What Degree of Liberty or going at large ſhall be deemed an Eſcape.*
And herein,

1. With what Strictneſs Priſoners are to be kept. 237
2. What on this Account ſhall excuſe the Sheriff, Gaoler, *&c.* when acting in Obedience to ſome Authority, as removing a Priſoner on a *Habeas Corpus*, *&c.* 238
3. What by Conſtruction of Law ſhall be deemed an Eſcape, though the Party be ſtill in Confinement. 239

(C) *Of the Difference between voluntary and negligent Eſcapes.* 239

(D) *Of the Difference between an Eſcape on Meſne Proceſs and Execution.* 240

(E) *What Perſons are anſwerable for, and to be charged with an Eſcape.*
And herein

1. Of the preceding or ſucceeding Sheriff, Warden, *&c.* 241
2. Where Sheriffs, Wardens, their Superiors or Deputies, are liable at the Election of him, who is injured by the Eſcape. 242
3. Where the Party injured may have his Remedy againſt the Perſon eſcaping; and herein, of eſcape Warrants. 244

(F) *Of the proper Remedy and Nature of the Action to be brought for an Eſcape.* 245

(G) *Of the Manner of laying the Action.* 246

(H) *Of the Party's Defence, who ſuffered the Eſcape; and herein, of pleading freſh Suit.* 247

Eſtate in Fee-Simple. Page 249.

(A) *Who may purchaſe or inherit ſuch Eſtate.* 249

(B) *The Import of the Word Heir that creates the Eſtate.*
And herein,

1. When it is a Word of Limitation. 252
2. When it is a Word of Purchaſe. 254

Eſtate-Tail. Page 256.

(A) *What Things may be intailed within the Statute* de donis conditionalibus. 258

(B) *What Words are requiſite to create an Eſtate-Tail in a Deed or Gift.* 259

(C) *Of the ſeveral Sorts of Eſtates-Tail.* 262

(D) *How far Tenant in Tail may charge his Eſtate, and what Acts of his relating to the Inheritance ſhall bind the Iſſue though the Entail continues.* 265

Of Entailing Copyhold Eſtates, *Vid. Tit.* Copyhold, *Vol.* 1. *p.* 459

By what Words an Entail is created in a Will, *Vid. Tit.* Deviſes, *Vol.* 2. *p.* 56.

Eſtate-Tail after Poſſibility of Iſſue extinct. Page 267.

(A) *Who may be Tenant in Tail after Poſſibility of Iſſue extinct, and how their Eſtates are to be created.* 267

(B) *The*

(B) *The Power this Tenant has over the Inheritance, and in what Reſpects he is conſidered as a bare Tenant for Life.* Page 26

Eſtate for Life and Occupancy. Page 270.

(A) *What Intereſt or Property in the Land the Law calls an Eſtate for Life, either when there are expreſs Words in the Deed, or when the Law creates it by Implication.* 270

(B) *Who upon the Death of Tenant for Life is to enjoy the Land; and herein. of Occupancy.* 273

1. Of what Things a Man may make himſelf a Title to by Occupation. 273
2. What makes an Occupant. 275
3. The Way to prevent the general Occupant; and herein, of the ſpecial Occupant, and the Alteration made in the Common Law, by the Statute 29 *Car.* 2. *cap.* 3. 277

(C) *How far Tenant for Life may diſpoſe of his Eſtate either ſingly by himſelf, or by joining with him in Reverſion; and herein, of his Forfeiture either by Common Law or Statute.* 278

Eſtate by Curteſy of *England*, *Vid. Tit.* Curteſy of *England*.
Eſtate in Dower, *Vid. Tit.* Dower, *Vol.* 2. *p.* 122.
Eſtate in Joint-tenancy and Tenancy in Common, *Vid. Tit.* Joint-tenants and Tenants in Common, *Vol.* 3. *p.* 188.
Eſtate in Coparcenary. *Vid. Tit.* Coparceners, *Vol.* 1. *p.* 443.
Eſtate for Years. *Vid. Tit.* Leaſes for Years, *Vol.* 3. *p.* 300.
Eſtate at Will. *Vid. Tit.* Tenant at Will.

Evidence. Page 284.

(A) *Who may be a Witneſs.*
And herein,

1. Whether a Huſband or Wife may be a Witneſs for or againſt each other. 286
2. Whether a Judge or a Juror may be a Witneſs. 286
3. Whether a Counſel, Attorney or Solicitor may be Witneſs againſt his Client. 287
4. Whether Plaintiffs or Defendants in the Cauſe may be Witneſſes. 287
5. Whether an Accomplice in a Crime may be a Witneſs for or againſt his Companion. 288
6. How far a Perſon is diſabled from being a Witneſs, in reſpect of his having been attainted or convicted of a Crime. 288

(B) *How far a Perſon is diſabled from being a Witneſs in reſpect of his being intereſted in the Succeſs of the Cauſe.* 289

(C) *Of the Number of Witneſſes required in our Law.* 293

(D) *Of compelling a Witneſs to appear and give Evidence.* 294

(E) *Of the Manner of giving Evidence.*
And herein,

1. Where the Examination is in open Court; and therein, of ſuch Queſtions as may be aſked a Witneſs. 295
2. Of Examinations and Proofs in Chancery. 297

(F) *Of written Evidence; and herein, of admitting Exemplifications or Copies of Records, &c. as Evidence.* 305

(G) *Whether Parol Evidence is to be admitted to explain what appears on the Face of a Deed or Will.* 309

(H) *Of*

With their DIVISIONS.

(H) *Of preſumptive Proof.* Page 311
(I) *Where the Law requires the higheſt Proof the Nature of the Thing is capable of.* 312
(K) *Of hear-ſay Evidence.* 313
(L) *Of the Parties Confeſſion.* 313
(M) *Of Similitude of Hands.* 313
(N) *Whether the Depoſitions of Witneſſes in another Cauſe may be given in Evidence.* 314

What Things muſt be pleaded, and cannot be given in Evidence, *Vid. Tit.* Pleadings, *Vol.* 4. *p.* 4.

Excommunication. Page 314.

(A) *In what Caſes the Spiritual Court may properly excommunicate.* 315
(B) *In what Caſes a Perſon ſhall be ſaid to be* ipſo facto *excommunicated.* 316
(C) *By whom Excommunication is to be pronounced and certified.* 318
(D) *What Inconveniencies and Diſabilities it lays the Party excommunicated under: And herein, of his Diſability to bring an Action.* 319
(E) *Of the Proceedings on the Writ of* Excommunicato capiendo, *both at Common Law, and by Virtue of the Statute* 5. Eliz. cap. 23. 320
(F) *Of abſolving and aſſoiling a Perſon excommunicate.* 325

Execution. Page 326.

(A) *Of the Nature of Execution, and what Things were liable thereto by the Common Law.* 328
(B) *Of the Judgment on which Execution is to be taken out; and herein, of Recognizances and Statutes, which are in Nature of Judgments.*
And herein,
1. Of the Nature of Recognizances at Common Law, and on the 23. *H.* 8. *cap.* 6. *&c.* and of the Statute Merchant and Staple. 330
2. Of the ſeveral Proceſſes on thoſe Securities, when forfeited, in order to a full Execution.

And herein,
1. Of the Manner of Execution on the Recognizance at Common Law, and wherein it differs from the Statutes, *&c.* and they from each other. 333
2. At what Time Execution may be granted on each of them. 335
3. Who ſhall have Execution on them as the Perſon alters. 335
4. Againſt whom Execution may be granted. 337
3. What Things are bound by them, and are liable to be extended for the Satisfaction of them. 339
4. What Proviſion the Law has made for Tenant by Statute Merchant, *&c.* in Caſe of Eviction. 341
5. The ſeveral Ways of vacating and diſcharging theſe Statutes, and this either before or after Execution. 342

(C) *Of the ſeveral Kinds of Judicial Writs which lie after Judgment.*
And herein,
1. Of the Form Teſte and Return of ſuch Writs. 348
2. Of the *Elegit.* 349
3. Of the *Capias ad Satisfaciendum.* 351
4. Of the *Fieri facias* and *Levari facias.* 351
5. Of the *Habere facias ſeiſinam* and *poſſeſſionem.* 353

(D) *Where the Party ſhall be concluded by the Election of one of them, and what further Remedy he has, when he hath not received entire Satisfaction on his firſt Writ, and this either againſt the Party or Sheriff.* Page 353
(E) *Of the Authority and Juriſdiction of the Court, out of which the Execution iſſues; and herein, of the Manner of executing a Judgment, where the Record has been removed from an inferior to a ſuperior Court.* 356
(F) *Who are intitled to, and may ſue out Execution.* 357
(G) *Of the Perſons againſt whom Execution may be ſued out.*
And herein,
1. Of ſuing out Execution, where there are ſeveral Parties concerned. 358
2. Of ſuing out Execution againſt the Heir and Executor. 359
3. Of ſuing out Execution againſt Infants. 359
4. Of ſuing out Execution againſt a Feme Covert. 360
5. Of ſuing out Execution againſt privileged Perſons. 360
6. Of ſuing out Execution againſt a Clerk or one in Holy Orders. 360
(H) *At what Time Execution may be ſued out; and herein, of the Neceſſity of a* Scire facias. 361
(I) *To what Time the Execution ſhall have Relation, ſo as to avoid any Alienation by the Party; and herein, of the Statute of Frauds.* 363
(K) *Of the King's Precedency in Executions.* 365
(L) *Of the proper Officers to do Execution; and herein, of the preceeding and ſucceeding Sheriff.* 366
(M) *Of the Manner of compelling him to do Execution; and herein, of the Party's Remedy againſt him for Neglect of his Duty.* 366
(N) *Of the Sheriff's Authority in doing Execution; and herein of breaking Doors,* &c. 367
(O) *Of the Offence of hindering or obſtructing an Execution.* 368
(P) *Of the Party's Remedy, when there hath been an irregular Execution, and how the ſame is tob e ſet aſide.* 369
(Q) *To what he ſhall be reſtored, when ſuch erroneous Execution is ſet aſide.* 370

Executors and Adminiſtrators. Page 371.

(A) *What Perſons may be Executors.*
And herein,
1. Of appointing the King Executor. 374
2. Whether Corporations may be Executors. 375
3. Who in reſpect of their Crimes are diſabled from being Executors. 375
4. Who in reſpect of their Country. 375
5. Who in reſpect of their Want of Underſtanding. 376
6. Who in reſpect of their Fortune and Circumſtances; and therein of obliging an Executor to give Security. 376
7. Of making Infants Executors. 376
8. Of a Feme Covert Executrix. 378
9. Of making Creditors Executors. 378
10. Of making Debtors Executors. 379
(B) *Of the different Kinds of Executors and Adminiſtrators.*
And herein,
1. Of an Adminiſtrator *durante minori ætate* of an Infant Executor or Adminiſtrator.
And herein,
1. Wha may be ſuch an Adminiſtrator. 381
2. WActs he may do. 381

With their DIVISIONS.

3. When his Authority determines. Page 382
2. Of an Adminiſtrator *de bonis non*, where the firſt Adminiſtrator dies, or the Executor dies inteſtate, or without Probate of the Will,

And herein,

1. In what Caſes Adminiſtration *de bonis non* ſhall be granted, and to whom. 385
2. What Things unadminiſtered ſuch a one is intitled to. 386
3. In what Actions commenced before his Time may an Adminiſtrator *de bonis non* proceed. 386

3. Of an Executor *de ſon Tort*.

And herein,

1. What Acts or Degree of intermeddling will make an Executor *de ſon Tort*. 387
2. What Acts of his are as valid, as if done by a lawful one. 390
3. How he is to be charged, and how far a ſubſequent Adminiſtration purges the firſt Wrong. 391

(C) *Of the Manner of appointing an Executor.*

And herein,

1. By what Words an Executor is conſtituted. 392
2. Of appointing an Executor abſolutely, or on Condition. 393
3. Of appointing a temporary Executor. 394
4. Of appointing an Executor with a limited Power, as to adminiſter ſuch a Part of the Eſtate, *&c.* 394

(D) *Of appointing Co-Executors.*

And herein,

1. What Acts done by one of them ſhall be as valid as if done by them all. 395
2. Where they muſt anſwer for each other's Acts, and what Remedy the one has againſt the other. 395
3. Where they muſt jointly ſue and be ſued; and therein, of Summons and Severance. *See Vol.* 4.

(E) *Of the Probate of Wills, and granting Adminiſtration.*

And herein,

1. To whom the Probate of Wills, and the granting of Adminiſtration did originally belong. 397
2. Of the King's Juriſdiction herein. 399
3. Of the Archbiſhop's Juriſdiction; and therein, of *bona Notabilia.*

And herein,

1. Of what Value the Goods and Effects muſt be that will make *bona Notabilia.* 399
2. Of the Nature of ſuch Effects as will make *bona Notabilia*, and how far it is neceſſary that they ſhould be in ſeveral Dioceſes. 400
4. Of the Probate of Wills, and Granting Adminiſtration by the Biſhop of the Dioceſe. 401
5. Of the Probate of Wills, and Granting Adminiſtration where the Party died within ſome peculiar Juriſdiction. 402
6. Of the Juriſdiction of ſome Lords of Manors in the Probate of Wills. 402
7. Of the Juriſdiction of ſome Mayors, in reſpect of the Burgeſſes within ſuch a Place. 402
8. The Form of proving a Will, and taking out Adminiſtration; and therein, of entering a Caveat. 403
9. Of the Executor's Refuſal. 405
10. What Acts amount to an Adminiſtration, ſo that the Party cannot afterwards refuſe. 406

11. Of

A Table of the ſeveral TITLES,

11. Of bringing in an Inventory. Page 406
12. Where Adminiſtration unduly obtained may be revoked or repealed. 410
13. How far a Repeal makes all meſne Acts void. 411
14. What Things an Executor may do before Probate of the Will. 412

(F) *What Perſons are intitled to Adminiſtration.* 412
(G) *In what Manner the Ordinary may grant it; and herein, of granting it to one or more, or for a particular Thing.* 415
(H) *What ſhall be deemed the Teſtator's perſonal Eſtate or Aſſets in the Hands of the Executor.*
And herein,
1. What ſhall be ſuch an Intereſt veſted in the Teſtator as ſhall go to his Executors. 416
2. How far Debts due to the Teſtator are Aſſets. 417
3. What ſhall be deemed his perſonal Eſtate; and therein, what Things ſhall go to the Heir, and not to the Executor. 418
4. What Things ſhall go to the Wife of the Deceaſed, and not to the Executor. 421
5. Where after Debts and Legacies paid, the Executors ſhall have the Surplus to themſelves, or are to be Truſtees for the next of Kin. 423
(I) *How the perſonal Eſtate, after Debts paid, is to be diſtributed, when the Party dies inteſtate; and herein, of the Share the Huſband or Wife are intitled to, of the aſcending, deſcending and collateral Line, and Admiſſion of the half Blood, and where the Diſtribution ſhall be* per Stirpes, *and not* per Capita. 426
(K) *Of Advancement and bringing into Hotchpot.* 429
(L) *What ſhall be a* Devaſtavit *either in Executors or Adminiſtrators; and therein, of the Order of paying Debts or Legacies.*
And herein,
1. What Manner of Waſteing will amount to a *Devaſtavit.* 430
2. Where it will be a *Devaſtavit* to pay Debts of an inferior Nature before thoſe of a ſuperior, and the Order in which Debts are to be paid. 432
3. Of paying Legacies before Debts; and therein, of the Executor's Aſſent to a Legacy. 435
4. What ſhall be allowed on Account of Funeral Expences. 436
(M) *In what Caſes an Executor may make himſelf liable* de bonis propriis.
And herein,
1. Where he ſhall be liable *de bonis propriis* by his falſe Pleading. 436
2. Where by his Promiſe to pay or diſcharge the Teſtator's Debts or Legacies he makes himſelf liable. 438
(N) *What Actions Executors or Adminiſtrators may bring in Right of thoſe they repreſent* 439
(O) *How ſuch Actions muſt be laid; and herein, of joining a Matter in Right of the Teſtator, and in their own Right in the ſame Action.* 440
(P) *Of Actions and Remedies againſt Executors and Adminiſtrators.*
And herein,
1. Upon what Contracts or Engagements of their Teſtators or Inteſtates, Executors or Adminiſtrators are liable. 442
2. Of perſonal Torts, which are ſaid to die with the Party. 444
3. Of Remedies againſt Executors or Adminiſtrators of Executors. 445
4. Where they ſhall be excuſed from Coſts. 446
5. Where excuſed from putting in Special Bail. 447

With their DIVISIONS.

Extinguiſhment. Page 447.

(A) *Of the Extinguiſhment of Rents.* 448
(B) *Of the Extinguiſhment of Copyholds.* 451
(C) *Of the Extinguiſhment of Common.* 451
(D) *Of the Extinguiſhment of Debts.* 452

Extortion. Page 453.

Fairs and Markets. Page 454.

(A) *Of the Right to a Fair or Market.*
And herein
1. How a Right to a Fair or Market muſt firſt commence. 455
2. Of the Owner's Remedy for a Diſturbance in the Enjoyment of them. 455
(B) *Of the Manner of holding Fairs and Markets.*
And herein,
1. In what Place they are to be held. 456
2. At what Time they are to be held. 456
3. How long to continue. 457
(C) *Of the Duty and Power of Owners of Fairs and Markets in Things incident to them.* 457
(D) *Of the Toll and other Duties which Owners of Fairs and Markets are intitled to.*
And herein,
1. Where ſuch Tolls, &c. ſhall be ſaid to be reaſonable, and legally due. 458
2. What Perſons are exempt from Payment thereof. 459
(E) *How far a Sale in a Fair or Market overt changes the Property of a Thing ſold therein.* 439

Fees. Page 463.

(A) *In what Caſes a Fee ſhall be ſaid to be due.* 463
(B) *How much ſhall be ſaid to be due.* 464
(C) *At what Time it ſhall be ſaid to be due.* 466
(D) *In what Court Fees are to be recovered.* 468

Felony. Page 469.

(A) *Of what Nature the Things taken muſt be to conſtitute the Offence Felony.* 469
(B) *How far the Goods ought to belong to another.* 471
(C) *What ſhall be ſaid to be a felonious and fraudulent Taking.* 472
(D) *What ſhall be ſaid to be a Carrying away.* 474
(E(*By whom the Offence may be committed.* 475
(F) *Of what Value the Goods muſt be; and herein, of the Difference between Grand and Petit Larceny.* 475
(G) *Where the Offender is or is not excluded his Clergy.* 476
(H) *Where the Offender is to be tranſported.* 478

A Table of the ſeveral TITLES,

Felo de ſe. Page 480.

(A) *Where a Perſon ſhall be ſaid to be* Felo de ſe. 480
(B) *Of the Manner of finding him ſuch.* 481
(C) *What he ſhall forfeit for this Offence.* 482

Feoffment. Page 483.

(A) *The ſeveral Sorts of Livery in our Law.*
And herein,
1. Of Livery in Deed. 483
2. Of Livery within View or in Law. 484
(B) *The Effect and Operation of Livery.*
And herein,
1. The Effect thereof to paſs a future Intereſt. 486
2. The Operation thereof, where the Feoffor is out of Poſſeſſion. 489
3. In what Caſes ſeveral Parcels will paſs by one Livery, or where ſeveral Parties may take by Livery to one. 492
(C) *Of the Charter of Feoffment; and herein, what Things are neceſſary to the Making a perfect Charter, and how far the Charter governs the Livery, which is relative to it.* 493
(D) *Who may make a Feoffment.* 499
(E) *Of making it by Letter of Attorney.* 500

Fieri Facias, *Vid. Tit.* Execution, *Vol.* 2. *p.* 351.

Fines and Amercements. Page 502.

(A) *Who have ſufficient Authority to fine and amerce.* 503
(B) *For what Offences the Party is to be fined or amerced.* 504
(C) *In what Actions or Proceedings there ought to be a Fine or Amercement.*
And herein,
1. Of the Nature of the Action in which there ought to be a Fine or Amercement. 506
2. At what Time to be awarded. 508
3. Whether to be awarded, when the Party is acquitted as to Part. 509
4. Whether to be awarded where there are ſeveral Parties, and ſome of them only acquitted. 510
5. Of awarding Fines and Amercements jointly or ſeverally. 511
6. Whether the Party can be twice amerced in the ſame Action. 512
(D) *Where a Fine ought to be awarded, and not an Amercement,* & vice verſa. 513
(E) *Who in reſpect of their Perſons are not to be fined or amerced.* 515
(F) *Of the Reaſonableneſs of the Fine; and herein, of mitigating or aggravating it.* 517
(G) *Of the Reaſonableneſs of an Amercement, and the Affeerment thereof.*
And herein,
1. Of the Neceſſity of an Affeerment. 517
2. By whom the Affeerment is to be. 519
(H) *Of the Manner of recovering Fines and Amercements.* 519

Fines

With their DIVISIONS.

Fines and Recoveries. Page 520.

(A) *Of the ſeveral Parts of a Fine, and when they begin to operate.* 522
(B) *Of the ſeveral Sorts of Fines.* 524
(C) *Who may levy Fines.* 526
(D) *Of the* Dedimus Poteſtatem. 527
(E) *Of the Operation of a Fine in barring the Iſſue in Tail.* 528
(F) *Of the Operation of a Fine in barring Strangers, or thoſe who have but an uncertain Intereſt, as a Term for Years, or barely an equitable Intereſt.* 532
(G) *Of the Remedies given to Strangers by Claim and Entry for the Preſervation of their Right.* 536
(H) *Of erroneous Fines, and the Manner of reverſing them.* 537
Of what Things a Fine may be levied, and by what Name, and what ſhall be a ſufficient Deſcription of the Thing without naming either Vill, Hamlet or Pariſh, *vide* in the next Head of *Recoveries, Letter* (B), 544, *&c.* of what Things a Recovery may be ſuffered.

Common Recoveries. Page 541.

(A) *Who may ſuffer a Recovery.* 543
(B) *Of what Things a Recovery may be ſuffered, and by what Names.* 544
(C) *What Eſtates or Intereſts may be barred by a Common Recovery; and herein, of the ſingle and double Voucher.* 545
(D) *Of erroneous and void Recoveries, who may avoid them, and by what Method.* 553
Fines payable by Copyhold Tenants, *Vid. Tit.* Copyhold, *Vol.* 1. *p.* 479.

Forcible Entry and Detainer. Page 555.

(A) *The ſeveral Statutes made relating to this Subject.* 555
(B) *What ſhall be a Forcible Entry and Detainer within theſe Statutes.* 558
(C) *Of the Nature of the Poſſeſſions, with reſpect to which one may be guilty of a Forcible Entry or Detainer.* 559
(D) *What Perſons may be guilty thereof.* 560
(E) *What ought to be the Form of a Record, grounded upon thoſe Statutes.* 561
(F) *Of the awarding of Reſtitution, by whom and in what Manner: And herein, of the Nature of the Poſſeſſions, and to whom ſuch Reſtitution is to be made.* 563
(G) *What ſhall be a Bar or Stay to ſuch Award of Reſtitution; and herein, of Superſeding and Setting it aſide after it is executed.* 564

Forgery. Page 566.

(A) *In what Caſes the making and altering of a Writing ſhall be ſaid to be ſo far falſe and fraudulent as to amount to Forgery.* 566
(B) *Of what Nature or Kind the Writing muſt be to conſtitute the Offence Forgery at Common Law.* 568

(C) *What*

(C) *What Offences of this Kind are made Forgery by Statute, and of the Puniſhment to be inflicted on Perſons guilty of Forgery.* 568

Foreſts, *Vid.* Of the Court of Foreſts, *Title* Courts and their Juriſdiction, *Vol.* 1. *p.* 637.

Foreſtalling. Page 572.

(A) *What it is at Common Law, and how puniſhed.* 572
(B) *What it is by Statute, and how reſtrained and puniſhed.* 573

Forfeiture. Page 575.

(A) *For what Crimes an Offender ſhall forfeit his Lands at Common Law.* 575
(B) *For what Crimes his Goods and Chattels.* 577
(C) *For what Crimes by Statute.* 579
(D) *To what Time the Forfeiture ſhall have Relation.* 581
(E) *What is to be done with the Offender's Goods before Conviction.* 582
(F) *Where the Wife ſhall loſe her Dower.* 583
(G) *How far the Blood of the Offender is corrupted.* 584

Formedon. Page 586.

(A) *Of the ſeveral Writs of Formedon.*
And herein,
1. Of the Formedon in Deſcender. 587
2. Of the Formedon in Remainder. 588
3. Of the Formedon in Reverter. 589
(B) *Of what Things a Formedon will lie.* 590
(C) *How the Demandant muſt ſet forth his Title.* 590
(D) *Of the Tenant's Plea in Abatement or Bar.* 591

Fraud. Page 593.

(A) *What Acts are condemned in the Common Law Courts as fraudulent, tho' not within the expreſs Proviſion of any Act of Parliament.* 594
(B) *What Acts are deemed fraudulent in the Courts of Equity.* 597
(C) *Of fraudulent Conveyances and Deviſes,* &c. *to defeat Creditors and Purchaſers within* 13 Eliz. cap. 5. 27 Eliz. cap. 4. *and* 3 W. & M. cap. 14, &c. 661
(D) *In what Court Fraud is cognizable.* 610
(E) *Where a Wrong-doer is further puniſhable than by making void the fraudulent Act.* 611

Game. Page 612.

Gaming. Page 619.

(A) *How far reſtrained by the Common Law.* 619
(B) *How far reſtrained by Statute.* 621

With their DIVISIONS.

Gaol and Gaoler. Page 626.

(A) *Gaols by what Authority erected, and to whom they belong.* 626
(B) *Who are to be at the Charge of repairing them.* 627
(C) *To what Place Offenders are to be committed; and herein, what ſhall be ſaid a Gaol, and where to be kept.* 629
(D) *Of the Duty and Power of Gaolers and Keepers of Priſons:*
And herein,
1. What Acts they may lawfully do, and for what Abuſes puniſhable. 630
2. For what Offences they ſhall forfeit their Offices. 631
(E) *At whoſe Charge Priſoners are to be carried to Gaol.* 632
(F) *How maintained there.* 633
(G) *Of the Offence of breaking Gaol.* 635

Gavelkind. Page 637.

(A) *Of the Original, Continuance, and ſeveral Properties of this Cuſtom.* 637
(B) *The particular Caſes which have been adjudged relating to this Cuſtom.* 642
General Iſſue. *Vid. Tit.* Pleadings, *Vol.* 4.

Grants. Page 644.

(A) *What Perſons may make good Grants:*
And herein,
1. Of Grants by Corporations. 646
2. Of Grants by Eccleſiaſtical Perſons. 646
3. Of Grants by Infants. 647
4. Of Grants by Feme Coverts. 648
5. Of Grants by Ideots and Perſons of Inſane Memory. 649
6. Of Grants by Perſons under Dureſs. 649
(B) *What Perſons may take by Grant.* 650
(C) *What Name or Deſcription of the Grantor or the Grantee will make the Grant certain enough.* 651
(D) *Of what Intereſt in the Grantor he may diſpoſe:*
And herein,
1. Where by Reaſon of Maintenance a Thing cannot be granted or aſſigned over. 654
2. Where the Grantor muſt have an abſolute Property, ſo that the Grant be not to the Prejudice of a third Perſon. 655
3. Whether a bare Right or Poſſibility may be granted or aſſigned over. 656
4. What Seiſin or Poſſeſſion in the Grantor will enable him to grant it over. 658
5. Where the Grantor's Right being joined with a Truſt or Confidence, is incapable of being granted or aſſigned over. 658
(E) *What Ceremony is requiſite to the Perfection of a Grant; and therein, of the Neceſſity of a Deed.* 659
(F) *What Words are ſufficient to create a good Grant.* 660
(G) *Where a Thing ſhall be ſaid to paſs by Grant or ſome other Conveyance.* 661
(H) *Where Grants ſhall be ſaid to be good or void for Incertainty:*
And herein,
1. What ſhall be a ſufficient Deſcription of the Thing granted notwithſtanding any Miſrecital thereof. 661

2. Where a Defect in the Deſcription may be aided by Relation to a Thing certain. Page 663
3. Where by an Election given to the Grantee he may reduce an uncertain Grant to a Certainty. 664

(I) *How Grants are to be expounded:*
And herein,
1. How to be conſtrued where there appears a Repugnancy in the Words. 665
2. Where the Premiſſes differ from the *Habendum*; and therein, how far the *Habendum* may enlarge or abridge the Grant in the Premiſſes. 667
3. How the Words of a Grant are to be conſtrued as to the Things intended to be granted. 667
4. Where a Thing ſhall be ſaid to paſs as appendant, appurtenant or incident. 669
5. What Eſtate or Intereſt ſhall be ſaid to be granted. 670
6. At what Time the Thing granted becomes veſted, and when the Grantee muſt take the ſame. 671

Guardian. Page 672.

(A) *The ſeveral Kinds of Guardians:*
And herein,
1. Of the ſeveral Kinds of Guardians by the Common Law 673
2. Of Guardians by Cuſtom. 675
3. Of Guardians by Statute. 675
(B) *What Perſons may be Guardians, and are intitled thereto.* 678
(C) *By what Authority Guardians are appointed; and herein of the proper Juriſdiction in reſtraining and puniſhing Abuſes by Guardians and others in relation to Infants.* 679
(D) *Of the Manner of appointing and admitting a Guardian.* 680
(E) *At what Time the Authority of a Guardian ceaſes, and what Acts will determine it.* 681
(F) *Of the Guardian's Intereſt in the Body and Lands of the Ward, and his Remedy for the ſame.* 682
(G) *What Things a Guardian may lawfully do, and which will bind the Infant.* 682
(H) *Of the Infant's Remedy againſt his Guardian for Abuſes by him.* 685
(I) *Of obliging a Guardian to account, and what Allowances he ſhall have.* 687

Damages.

Page 1

DAMAGES are a Compenſation given by the Jury for an Injury or a Wrong done the Party (a) before the Action brought.

Co. Lit. 257. 10 Co. 116.

(a) The Expences the Party has been at in obtaining his Right, ſuch as the moderate Fees of Counſel, Attornies, &c. are termed Coſts; and theſe are given by the Court, and taxed by their Officer. For the Difference between Damages and Coſts, *vide* Salk. 209. 6 Mod 157. Gilb. Eq. Rep. 195, 199. Barnes 306. and Title *Coſts*.

(A) In what Actions the Party ſhall recover Damages. 1.
(B) What Perſons are intitled to, or ſhall recover Damages. 2.
(C) Againſt whom Damages ſhall be recovered. 3.
(D) Of aſſeſſing the Damages: And herein, 4.

1. Of the *Quantum* of the Damages the Jury may give. 4.
2. Whether they may give more than the Plaintiff has declared for. 4.
3. Muſt be aſſeſſed purſuant to the Plaintiff's Right, or the Injury he has received: And herein of aſſeſſing intire Damages. 5.
4. Where to be aſſeſſed jointly or ſeverally, where there are ſeveral Defendants. 8.

(E) Where the Court may increaſe or mitigate the Damages. 10.
(F) Of the Manner of aſſeſſing and recovering Damages. 11.

(A) In what Actions the Party ſhall recover Damages.

AT Common Law no Damages were recovered in any real Action, for the Detention of the Poſſeſſion, *&c.* being the Cauſe of Damages, till the Right to the Land was determined, the Party could not be ſaid to ſuffer any Wrong; alſo the Burden of the Feudal Duties lay upon the Tenant in Poſſeſſion, and conſequently he was to receive the meſne Profits until ſome other made out a better Right, who after Recovery might have maintained an Action of Treſpaſs.

10 Co. 116. *a.* 2 Inſt. 284. Co. Lit. 257. 19 H. 6. 27. 2 Rol. Abr. 550. 11 Co. 51.

For recovering the meſne Profits in Ejectment, Replevin and Treſpaſs, *vide* the ſeveral Heads; and where the Courts of Equity will oblige the Tertenant to account for the meſne Profit, Title *Account*.

• Page 2 8 Co. 50. a. 10 Co. 116. a.

• But in an Aſſiſe, which is (a) a mixed and compendious Action, the Diſſeiſee not only recovered his Poſſeſſion, but alſo the meſne Profits in Damages.

(a) But in a Writ of Entry there were no Damages; for ſuch Writ only demanded the Freehold, and was not mixed with the Perſonalty. 2 Inſt. 289. Booth 175. Nor in a Writ of Admeaſurement of Paſture. 2 Inſt. 368.

For the Expoſition of this Statute, *vide* 2 Inſt. 287, 288.

" By the Statute of *Glouceſter* made 6 *E.* 1. whereas before Damages " were not awarded in *Mortdanceſtor*, unleſs upon a Recovery againſt the " chief Lord, they ſhall be awarded in all Caſes where a Man recovers in " *Mortdanceſtor*; ſo in Coſinage, Aiel and Beſaiel; *and by the ſame Statute*, " every one ſhall render Damages where the Land is recovered againſt him, " upon his Intruſion or Act.

By the Statute of *Merton*, *cap.* 1. Damages are given on the Poſſeſſory Action of Dower, *Unde nihil habet*.

But for this *vide* Tit. Dower, Letter (I 146.)

Comp. Incumb. 292, &c.

In a *Quare Impedit*, or *Darrein Preſentment*, he for whom the Judgment is given, ſhall recover as well his Damages as his Preſentment and Advowſon.

In all Actions *ex delicto*, which are either Treſpaſſes founded on Force, or upon Fraud, in not performing of Contracts, Damages ſhall be recovered, and theſe are (b) ſuch Actions as are ſaid to ſound only in Damages.

(b) As all Actions on the Caſe or Covenant, for which *vide* Title *Covenant*, and *Trover*, for which *vide* Title *Trover and Converſion*; —in Account, *vide* Rol. Abr. 575. In Detinue the Thing is to be recovered in Specie, or Damages for it. Rol. Abr. 574. In Debt the ſame is to be reſtored *in Numero*, but there are Damages for the Detainer, *vide* Vaugh. 101. • Damages ſhall be recovered in an *Audita Querela*. 26 *E.* 3. 73. In a Writ of Ward of the Body and Land Damages ſhall be recovered, Rol. Abr. 575. But in Writs of Execution no Damages ſhall be recovered, 50 E. 3. 23. nor in a *Scire Fac.* 2. H. 6. 15.

• In Debt, generally, the Damages are nominal.

But for this *vide* Title *Prohibition*, and *vide* Rol. Abr. 575. Jon. 477. Cro Car. 559. 2 Jon. 128. Raym. 387. Vent. 348, 350. 3 Lev. 360 See Ld. Raym. 342. for an Action on 2 W. and M. ſeſſ. 1. c. 5. of Diſtreſſes. And ſee 10 Mod. 274, 277.

If after a Prohibition to the Spiritual Court the Party proceeds in ſuch Court, the Plaintiff upon his Declaration upon the Prohibition, or upon an Attachment, ſhall recover Damages.

(B) What Perſons are intitled to, or ſhall recover Damages.

15 H. 7. 4. b. 2 Inſt. 285.

IF Leſſee for Years be ouſted, and he in the Reverſion diſſeiſed, and he in the Reverſion recovers in an Aſſiſe, yet he ſhall not recover Damages.

Rol. Abr. 569.

So if after the Ouſter he in the Reverſion enter upon the Diſſeiſor, (as he may by Law to ſave a Diſcent), and after the Diſſeiſor re-enters upon him, and he recovers in an Aſſiſe, yet he ſhall not have any Damages, for the Re-entry of him in Reverſion reduces the Eſtate to the Leſſee, and then the Damages for the Profits belong to him.

Co. Lit. 42. a.

If Tenant for Life, and he in the Reverſion join in a Leaſe for Life, they may join in an Action of Waſte, and Tenant for Life ſhall recover the Place waſted, and he in Reverſion Damages.

In

In Debt by Baron and Feme, upon a Bond made to the Feme *dum ſola*, they ſhall recover Damages (*a*) jointly. Cro. Eliz. 259.

(*a*) In an Aſſiſe by Baron and Feme, if it be found they were diſſeiſed, they ſhall recover Damages of the Iſſues in common, 21 H. 4. 16. b. Rol. Abr. 570.—In Treſpaſs by Baron and Feme, for impriſoning the Feme till Fine* paid, for all the Treſpaſs, but the Fine, they ſhall recover Damages in common. Bro. Damages 51. Rol. Abr. 571.

* *Qu.* As to the Fine, that being to the particular and excluſive Damage of the Huſband, if it is not the proper Subject of an Action at his Suit alone?

* So in Trover by Baron and Feme, Executrix of *A.* for Goods of *A.* they ſhall recover Damages jointly; for the Poſſeſſion of the Wife, as Executrix, was alſo the Poſſeſſion of her Huſband, and the Damages recovered ſhall be to the Eſtate of the Teſtator, and ſo may concern them both. * Page 3—Styl. 48.

If two Jointenants bring an Aſſiſe, and the one is ſevered, if it be found that the other had Goods taken upon the Land, he ſhall recover ſole Damages for them †. 11 H. 4. 17. Rol. Abr. 571.

† The Owner of the Goods may maintain an Action alone, for them.

(C) Againſt whom Damages ſhall be recovered.

" BY the Statute of *Gloucester*, made 6 *E.* 1. *cap.* 1. whereas before " Damages were not awarded in Aſſiſes of *Novel Deſſeiſin*, (*b*) but only " againſt the Diſſeiſors; it is provided that if Diſſeiſors (*c*) alien the " Lands, (*d*) and have not whereof Damages may be levied, (*e*) they, to " (*f*) whoſe Hands ſuch Tenements ſhall come, ſhall be charged with (*g*) " the Damages (*b*), ſo that (*i*) every (*k*) one ſhall (*l*) anſwer (*m*) for his " Time, provided that the Diſſeiſee ſhall recover Damages in a Writ of " Entry, &c.

(*b*) Owen 118. Hob. 98.

(*c*) So if diſſeiſed, for by Equity it extends to all that come under the Diſſeiſor by Right or Wrong. 2 Inſt. 284*.——So if the Lord diſtrains for Rent, and a Stranger reſcues, though the Stranger is only a Diſſeiſor in an Aſſiſe againſt him and the Tenant; if the Stranger is found inſufficient, the Tenant ſhall anſwer in Damages, though he claims not from the Diſſeiſor. 2 Inſt. 284.

(*d*) The Tenant ſhall be charged only where the Diſſeiſor is inſufficient; but if able to pay Part, but not the Whole, both ſhall be charged; therefore the Judgment is always given generally againſt both. 2 Inſt. 284.

(*e*) Lands held *in Capite* were aliened to *J. S.* who died, his Heir within Age; and the King committed his Cuſtody to *B.* who took the Profits, the Heir was no Tenant within the Statute. 2 Inſt. 284. *Secus* if aliened to an Infant, who took the Profits, or if coming in as Heir he had been out of Ward. 2 Inſt. 284.

(*f*) Yet theſe general Words ſhall not charge thoſe with Damages who have an Eſtate caſt upon them by Law, unleſs they conſent thereto, as the Heir of the Alienee, by refuſing to take the Profits, may diſcharge himſelf of the Damages. 2 Inſt. 284. So if Diſſeiſor enfeoffs *A.* and *B.* and makes Livery to *A.* only, and *A.* dies, if *B.* never aſſented, he may waive the Poſſeſſion, &c. Inſt. 360. 2 Inſt. 286.

(*g*) And where by ſubſequent Statutes double or treble Damages are given in an Aſſiſe, they ſhall be anſwered by every mean Tenant accordingly, and for their Inſufficiency the Tenant. 2 Inſt. 285.

(*h*) In an Aſſiſe, but not in a Writ of Entry, for that is to be brought againſt the Tenant only, and this Clauſe refers only to the Aſſiſe. 2 Inſt. 286, 287.

(*i*) If named in the Aſſiſe, otherwiſe if the Diſſeiſor is found inſufficient, the Tenant ſhall be charged with the Whole. 2 Inſt. 285. But if found, that the Diſſeiſor is inſufficient, and that the enfeoffed *A.* who enfeoffed *B.* who enfeoffed the Tenant, and that *A.* had it one Year, and *B.* another, and the Tenant another, the Tenant ſhall be charged for his own Time only, and the Plaintiff ſhall loſe his Damage againſt *A.* and *B.* becauſe not named in the Writ. 2 Inſt. 285. †

(*k*) Tenant for Years, or by Statute, &c. is no mean Occupier within the Act, unleſs the Aſſiſe is brought by Tenant, by Statute, &c. 2 Inſt 284.

(*l*) If they have ſufficient, otherwiſe the Tenant muſt anſwer for the Whole. 2 Inſt 285.

(*m*) Yet ſeveral Judgments ſhall not be given, but one Judgment intirely againſt all, according to the Uſage; but the Sheriff upon the Execution may uſe ſuch Indifferency as Juſtice requires. 2 Inſt. 285. If the Sheriff returns that the Diſſeiſor is inſufficient, Proceſs ſhall iſſue to levy it of the Tenant. 2 Inſt. 285.

* The Perſon having Title may maintain an Ejectment, at any Time within twenty Years, and afterwards recover the annual Value, and Coſts of the Ejectment, &c. in an Action of Treſpaſs for the meſne Profits.

† But perhaps there are few Caſes, where ſeveral Actions would not lie againſt *A.* and *B.* reſpectively, viz. in Treſpaſs, if brought in due Time, in which Actions the Jury would give Damages, in Proportion to the Value, during the reſpective Times the Defendant held the Poſſeſſion.

" By the ſame Act the (m) Diſſeiſee ſhall recover Damages in a Writ of " Entry (n) againſt (o) him that is found (p) Tenant after the Diſſeiſor. his Heirs.

(m) This extends not to

2 Inſt. 286. But by a ſubſequent Clauſe in this Act, where he recovers the Land againſt the Diſſeiſor, he ſhall have Damages. (n) Extends not to him that has an Eſtate by Law caſt upon him, if he waives the Poſſeſſion. Co. Lit. 369. 2 Inſt. 286, 287. (o) If brought againſt two Joint-tenants, and one diſclaims, and the other takes upon him the whole Tenancy, and pleads, &c. he ſhall anſwer the whole Damages. 2 Inſt. 287. (p) The Diſſeiſor enfeoffs *A.* who enfeoffs *B.* and in a Writ of Entry in the *per* and *cui* vouches *A.* who pleads and loſes, judgment ſhall be given againſt the Vouchee, becauſe he is found Tenant in Law. 2 Inſt. 287 ‡.

‡ In moſt Caſes, of this Kind, an Action of Treſpaſs, (if the Party ſues in Time) would be more eligible, as being, in it's Form, more ſimple, and better known, than an Aſſiſe, which is much out of Uſe. I mean againſt Perſons, not in Poſſeſſion, at the Commencement of the Action, but who have wrongfully entered, received the Profits for a Time, and then aliened, aſſigned, or quitted the Poſſeſſion: And where the Party ſuing had originally ſuch a Poſſeſſion, as would, in Law, intitle him to maintain that Kind of Action. Againſt Perſons in Poſſeſſion, Ejectment, and an Action of Treſpaſs, for the meſne Profits, after Recovery in Ejectment, are the proper Remedies.

* Page 4 2 Inſt. 289. Noy 68. *vide* Title *Coparceners.*

* In a Writ of Partition by one Coparcener againſt the other, no Damages ſhall be recovered, though the Defendant hath not been at all Times (q) ready to make Partition.

(q) If a Man will avoid the Damages, becauſe he hath been at all Times ready to render the Thing in Demand, he ought to come at the firſt Day. 17 *E.* 3. 71. In Detinue againſt an Executor, ſuppoſing it to come to his Hands after the Death of the Teſtator, the Defendant may come at the grand Diſtreſs, and ſay, that he hath at all Times been ready to deliver the Writing after the Time that it came to his Hands, and thereby ſave Damages againſt him. 22 Ed. 3. 9. Rol. Abr. 574*.

* Traver will lie in moſt Caſes, for Chattels detained, and if a Demand and Refuſal is proved, the Plaintiff will be intitled to Coſts, ſo in Detinue for Writings, or other Things when the Plaintiff wants to recover the Thing *in Specie.*

(D) Of aſſeſſing the Damages: And herein,

1. Of the *Quantum* of the Damages the Jury may give.

Vide Moor 419. 3 Leon. 150. Owen 34. Vent. 267. Where Money laid out in Repairs ſhall be recovered in Damages. Godb. 53. Where in Treſpaſs for breaking his Cloſe, &c. the Court refuſed to grant a new Writ of Inquiry, becauſe the Damages were too ſmall, the ſuing forth the Writ being the Plaintiff's own Act. 2 Leon. 214. But for this *vide* Title *Trial*, and for what Cauſe a new Trial will be granted, *vide* Mod. 2. In Treſpaſs the Jury gave the Plaintiff half a Farthing Damages, and held good. 2 Rol. Rep. 21, 22. & *vide* 2 Jon. 138.

IN all Actions which ſound in Damages, the Jury ſeem to have a diſcretionary Power of giving what Damages they think proper: for though in Contracts the very Sum ſpecified and agreed on is uſually given, yet if there are any Circumſtances of Hardſhip, Fraud or Deceit, though not ſufficient to invalidate the Contract, the Jury may conſider of them, and proportion and mitigate the Damages accordingly; as in Caſe upon a Policy of Aſſurance, which was a Cheat, for an old Veſſel was painted, and Goods of no Value put in the Veſſel, and about 1500 *l.* inſured upon it, and then the Ship was voluntarily ſunk †. So on an Action brought on a Promiſe of 1000 *l.* if the Plaintiff ſhould find the Defendant's Owl; the Court declared, though the Promiſe was proved, that the Jury might mitigate the Damages; alſo on Demurrer, by which the Promiſe is confeſſed, the Jury may conſider of the Circumſtances, and mitigate Damages accordingly.

† In ſuch Caſe the Perſon guilty of, or privy to the Fraud, is not intitled to recover any Thing, for, it is not againſt ſuch Act, that the Under-writer inſures, nor can Fraud intitle any one to recover Damages.

The Plaintiff declared upon an *Assumpsit* to pay for an Horse a Barley-Corn a Nail, doubling every Nail, and avers, that there were thirty-two Nails in every Shoe, which, doubling every Nail, came to 500 Quarters of Barley; which being tried before *Hyde*, he directed the Jury to give the Value of the Horse in Damage, and accordingly they gave 8 *l.* and held good *. Lev. 111. James and Morgan. Keb. 569. S. C. 6 Mod. 305. S. P.

Vent. 267. Jones 138. 2 Ld. Raym. 1164. 3 Salk. 97. pl. 6.

* Here, evidently, a skilful Person fraudulently took Advantage of an ignorant one: And giving him the real Value of his Horse, was giving him all, he was in Reason and Justice intitled to: And to that he was intitled, as the Defendant could not set up any Title, or Claim to have the Horse for nothing, and he ought to have paid the real Value into Court.

2. Whether they may give more than the Plaintiff has declared for.

In (*a*) Personal Actions, the Plaintiff shall recover Damages only for the *Tort* done before the Action † brought, and therein the Plaintiff counts to his Damage. 10 Co. 117. a. (*a*) But in a Real Action he recovers his Damages pending the Writ, and therefore never counts to his Damage, 10 Co. 117. a: and though Damages be given by Statute, yet the old Form remains. 2 Inst. 286.

† In *Foster* and *Bonner*, B. R. E. 1776, the Court, on Argument, determined, that in an Action, for carrying Persons across the Thames, in Prejudice to the Gravesend Ferry, the Plaintiff might give in Evidence a *Tort*, after suing forth the *Latitat*, and before the Day of exhibiting the Bill, saying, in such Case, the filing the Bill, was the Commencement of the Suit.

Also in Personal Actions the Plaintiff shall recover no more than he hath counted for, although the Jury give him more, for he best knows the Measure of his Wrong, and what he is intitled to ‡. 2 H. 6. 7. 8 H. 6. 5. 10 Co. 116. Owen 45.

S. P. *per Cur'*. Kelw. 81. Yelv. 45. Cro. Eliz. 544. Bulst. 49. Fitz. Damages 16. S. C. Bro. 2. S. C. Cro Jac. 297. S. C.

‡ If the Jury give more, the Plaintiff must relinquish the *extra* Damages, for if he enters up the Judgment for the Whole, which the Jury give, it's Error and cannot be amended or helped, in any Manner. So determined in B. R. H. 1773, *Sandiford* and *Bean*, Esq;

* If the Tenant vouches, the Demandant shall not recover more Damages against the Vouchee than he hath counted of; for the Vouchee comes in Lieu of the Tenant, and the Judgment is given against the Tenant. * Page 5 8 H. 6. 11. Rol. Abr. 578.

But the Plaintiff in *Detinue* may recover more Damages against the Garnishee than he hath counted of, for his Count was not against the Garnishee, but against the Defendant, and Damages against him are for the Delay after the Count. 8 H. 6. 5. 11. Bro. Damages 68. S. C. Rol. Abr. 578. S. C.

In Trespass for rescuing a Distress, to his Damage so much; if the Defendant justifies the Rescous upon Special Matter, upon which it is demurred for the Plaintiff, he shall have Damages as he hath counted of, (*b*) for the Defendant hath acknowledged the Trespass, and hath not denied the Damages. 21 E. 3. 40. b. Rol. Abr. 578. (*b*) In Debt for 200 *l.* upon the 2 E. 6. for not setting forth Tithes, if the Defendant pleads the 31 H. 8. c. 13. f. 21. and that the Lands were discharged in the Hands of the Prior of *B.* at the Time of the Dissolution, &c. and thereupon Issue taken; and at the Trial the Defendant cannot make good his Plea; the Value shall be taken as confessed, because the Issue is joined upon a collateral Point; and the Defendant took not the Value by Protestation. Allen 88. Ruled upon a Trial at Bar, and a Verdict given for 200 *l.* *Vide* Rol. Abr. 572.

Where the Jury finds greater Damages than the Party declares of, the Court may, to prevent Error, give Judgment for so much as the Party declares Yelv. 45.

declares for, *Nulle habita reſpectu* to the Reſt, elſe the Party may releaſe the Overplus, and take Judgment for the Reſt.

For this *vide* 10 Co. 115. b. Cro. Eliz. 568. 2 Rol. Rep. 447. Cro. Jac. 69. Yelv. 70. Rol. Abr. 578. but *vide* 2 Inſt. 288. 21 Jac. 1. c. 16.

Alſo, tho' the Jury cannot regularly give the Plaintiff more Damages than he hath counſed of, yet may they award him Coſts diſtinct and ſeparate from the Damages; and though ſuch Coſts (*e*) exceed the Damages laid in the Declaration, yet ſhall the Plaintiff recover both; for the Damages are given for the Wrong, for which the Action is brought, and the Coſts for the Charge of the Suit; the one before the Suit, and the other in and for the Suit.

(*e*) Where the Jury may give 10*l.* Coſts, though they give but 10*l.* Damages on the Statute 21 Jac. 1. c. 16. Salk. 207. and *vide* Title *Coſts*.

3. Muſt be aſſeſſed purſuant to the Plaintiff's Right, or the Injury he has received; and herein of Aſſeſſing intire Damages.

10 Co. 117. If in a Writ of Entry *Sur Diſſeiſin*, or in Nature of an Aſſiſe, a Writ of Inquiry of Damages is awarded, the Plaintiff ſhall recover his Damages but from the Time of the Diſſeiſin to the Time of the Award of the Enquiry of Damages, and not after, though the Writ of Enquiry be not ſerved till ſeven Years after; and if in ſuch Writ an Iſſue is joined triable by Verdict, he ſhall recover Damages but from the Time of the Diſſeiſin to the Time of the Verdict.

10 Co. 117. (*d*) But in Perſonal Actions the Plaintiff ſhall recover Damages only for the Tort done before the Action brought. 10 Co. 117*.

But in a *Præcipe quod reddat* of a Rent of the Poſſeſſion of the Demandant himſelf, he ſhall recover Arrears as well (*d*) pending the Writ as before *uſque diem Judicii redditi*.

* When the Action ſhall be ſaid to commence, *vide ante*, 4. a.

Co. Lit. 257. The Diſſeiſſee, in an Action of Treſpaſs, may recover Damages for the firſt Entry without any Regreſs.

Co. Lit 257. *vide* 1 Rol. Abr. 550. But after Regreſs he may have Treſpaſs with a *Continuando*, and therein recover for all the mean Occupation as well as for the firſt Entry.

Co. Lit. 257. a. So in an Action upon 5 *R.* 2. *cap.* 7. for entring into Land, *ubi ingreſſus non datur per Legem Terræ*, the Plaintiff ſhall recover Damages for the firſt tortious Entry only.

* Page 6 Co. Lit. 257. *But in an Action upon 8 *H.* 6 *cap.* 9. where one enters by Force, or enters peaceably and detains with Force, or when one enters with Force, or detains with Force, the Plaintiff without any Regreſs ſhall recover treble Damages, as well for the mean Occupation as for the firſt Entry.

Hob. 189. Harbin and Green See 12 Mod. 131. Ld. Raym. 248. Comb. 412 2 Salk. 663. pl. 5. Moor 887. If in Caſe, for not Grinding at the Plaintiff's Mill, the Plaintiff derives his Title under a Leaſe made to him 11 *Jac.* and then ſets forth, that the Defendant at ſeveral Times, from 2 *Jac.* to 12 *Jac.* did grind his Corn elſewhere, he cannot have Judgment, tho' after Verdict, becauſe the Damages are aſſeſſed for all that Time, *viz.* from 2 *Jac.* to 12. whereas the Plaintiff's Leaſe commenced 11 *Jac.* ſo that Damages are given to the Plaintiff before he had any Title.

S. C. Carth. 387. S. C. cited. See Ld. Raym. 329. Comyns 231. pl. 129.

2 Saund. 169. Hambleton and Veere. Lev. 299. S. C. Carth. 261. In Caſe the Plaintiff declared, that *J. S.* 19 *Sept.* 16 *Car.* 2. was retained as an Apprentice to ſerve the Plaintiff for nine Years, and continued in his ſaid Service till the 31 *Octob.* 21 *Car.* 2. when the Defendant procured the ſaid *J. S.* to leave the Plaintiff's Service, (*a*) *per quod* the Plaintiff

totum Proficuum quod ratione Servitii pred' J. S. *per totum residuum Termini reciperi potuisset totaliter perdidit*; and (*b*) after Verdict for the Plaintiff, and general Damages given, though it appeared the Term was not expired; it was intended that Damages were given for all the Term, as well the Time (*c*) to come as past; for the Damages must be intended to be taxed according to the Declaration; and if it should be intended otherwise, it would be uncertain to what Time they were taxed, whether to the Exhibition of the Bill, or Verdict given.

S. C. cited. (*a*) The Plaintiff declared for a Battery of his Servant, 19 *Jan.* &c. *per quod* he loſt his Service for a long Time, *viz.* for the Space of ſix Months then next following, &c. Hob. 284. After a Verdict for the Plaintiff, though the Original bore *Veſte* before the End of the ſix Months; yet the Plaintiff had his Judgment, for the *Viz.* was more than needful, being not of the Subſtance of the Action, but for Aggravation of Damages only. Allen 23. *per Curiam*, but yet *vid.* Cro. Jac. 619. Yelv. 94. 7. (*b*) Whereupon a Demurrer it may be helped, for the Plaintiff may take Damages for the Departure only. Mod. 272. (*c*) For this *vide* 5 Mod. 286. Carth. 389.

† The Space of Time being under a *videlicet*, it was not material. See *infra* the next Caſe but one.

In Treſpaſs, the Plaintiff declared, that upon the ſecond Day of *July* *Anno* 5 *W.* 3. &c. and from thence to the Time of the Action he was poſſeſſed of two Meadows adjoining to a River; and that the Defendant, *Aug.* 2. in the ſame Year, exalted his Mill-banks to that Degree, that thereby the Water overflowed his (the Plaintiff's) Meadows, *per quod* he loſt the Uſe and Profit of his Meadows, *from the ſaid ſecond of July* to the Time of the Action; and after Verdict and intire Damages, Judgment was arreſted; for it was impoſſible that he ſhould loſe the Uſe, &c. before the Fact was done.*

Carth. 386. *Prince* and *Menton*. 2 Salk. 663. pl. 5. S. C. Comb. 442. S. C. Ld. Raym. 148 S. C. And ſee 12 Mod. 131.

* It ſhould have been laid for a long Time, to wit, *from thence* until the Day of exhibiting the Bill, if in B. R. by Bill, or of ſuing forth the Writ, if by Original, or in C. P. See the next Caſe, *infra*.

But where in Treſpaſs for erecting and continuing 300 Perches of Stone Wall on the Soil of the Plaintiff 2 *April An.* 2 *W. & M. tranſgreſſion. prædict. quoad continuation. mur. præd. a* 20 *die Feb. Anno primo W. & M. uſque diem exhibitionis billæ continuando*; it was objected, that the Continuance being laid for one Year before the Commencement of the Treſpaſs, and intire Damages being given, all was void; but adjudged, that the Continuance being for a Time before the Commencement of the Action was ſenſeleſs and void; and it cannot be intended that any Damages were given for a Matter which was void in itſelf.

Carth. 230. *Bridges* and *Harnar*.

In Caſe, for Stopping of Lights by erecting a new Structure, the Declaration concluded, that *occaſione premiſſorum magna tenebritate obſcurat' fuit & Adhuc exiſtit*, &c. after Verdict and intire Damages, it was objected, that by *Adhuc exiſtit*, the Jury had given Damages for a Matter ſubſequent to the Action, and that no Damages can be given for a Matter after the Action commenced; becauſe if another Action ſhould be brought for the ſame Thing, the former Action could not be pleaded in Bar to it; but it was reſolved, that the *Adhuc* ſhould (*d*) refer to the Time of the Plaint levied, and not to the Time of the Declaration.

Carth. 261. *Carter* and *Cowthrop*. 4 Mod. 152. S. C. 3 Lev. 345. S. C. Show. Rep. 366. LdRaym. 122, 124, 392, 576, 713, 905.

(*d*) But in an Action *de uxore abducta*, and keeping her from him *uſque* ſuch a Day, which was ſome Time after the exhibiting of the Bill; Judgment was ſtayed, for the Jury ſhall be intended to have given Damages for the whole Time mentioned in the Declaration. Vent. 103. See 10 Mod. 273, 274. See *ſupra* n.

* If an Action upon the Caſe be brought for ſpeaking of Words all at one Time; and upon Not guilty pleaded, a Verdict is given for the Plaintiff, tho' ſome of the Words will not maintain the Action; yet if any of the Words will, the Damages may be given intirely, for it ſhall be intended that

* Page 7 Rol. Abr. 576. But for this, and for what Things

the Damages ſhall be ſaid to be given,

that the Damages were given for the Words which are actionable, and that the others were inſerted only for Aggravation. *

vide Godb. 343. Moor 141. pl. 283, 708. pl. 987. Cro. Eliz. 329, 788. Bulſt. 37. 3 Bulſt. 283. Cro. Car. 237, 328. March 48. Sid. 38. Winch. 33.

* But, if the Declaration conſiſts of ſeveral Counts, the Words in ſome of which are not actionable, and there is not any ſpecial Damage laid, or if laid, not found, and a general Verdict is taken for the Plaintiff, (except as to the Special Damage, if any laid, and that is found for Defendant,) the Judgment will be erroneous, and may be avoided, by Motion in arreſt of Judgment, or reverſed, on Error brought.

Moor 708. pl. 987. Cro. Eliz. 329. Bulſt. 37. 3 Bulſt. 283. Cro. Car. 237. 328. Hutt. 131. Rol. Abr. 576.

But if the Action be brought for ſeveral Words ſpoke at ſeveral Times, and the Action will not lie for the Words ſpoke at one Time, but will lie for the Words ſpoke at another Time; and upon Not guilty pleaded, a Verdict is found for all the Words, and intire Damages given; this is not good. See *Supra*, n.

10 Co. 130. a. 132. b.

If the Plaintiff declares that he bought of the Defendant *diverſa bona & catalla, viz. unum fulcrum lecti* (*Anglice* a Field Bedſtead) with a Teſter and Curtains of *Say*, *unum Canopium* (*vocat.* a Canopy) *&c.* and that the Defendant aſſumed to deliver *bona præd'*, but had not, *&c.* and there is a Verdict for the Plaintiff, and general Damages given, it ſhall not be preſumed that any Damages were given for the Teſter and Curtains, which (*a*) were not alledged *poſitivè*, but only *expoſitivè*; and this Expoſition is too extenſive, for *fulcrum* ſignifies the Bedſtead only.

(*a*) Trover *de uno riſco*, (*Anglice* a Trunk full of Linen, *&c.*) and Damages intended to be given for the Trunk only. Cro. Jac. 665.

2 Rol. Rep. 178. *Steel* and *Spight*.

If in an Action upon a Covenant divided into two (*b*) Branches, the Breach is aſſigned in one Part only, *&c.* and the Jury aſſeſs Damages generally *pro fractione conventionis præd.* this ſhall have Relation to that Part only in which the Breach was aſſigned.

(*b*) *A.* brought an Action in an inferior Court for ſlandering of him in his Trade, by which he loſt his Cuſtom, within the Juriſdiction of that Court *& alibi*; and it was held maintainable, notwithſtanding the *Alibi*. Vent. 104. cited by *Twiſden* to have been adjudged.

Styl. 161 *Creſſit* and *Burgis*.

If in Debt upon 2 *E.* 6. for not ſetting forth Tithes growing upon ſeventy Acres of Land, *&c.* the Jury as to ſixty-ſix Acres give Damages, *&c.* and as to the five Acres Reſidue, give Damage, *&c.* whereas it ought to have been, as to the four Acres Reſidue; yet this being only (*c*) a Miſcounting of the Jury, and no Damage to any thereby, the Plaintiff ſhall have his Judgment.

(*c*) An Action upon the Sale of ſeveral Things for divers Sums of Money, *quæ quidem pecuniarum Summæ attingunt ad* 10 *l.* whereas rightly computed they came but to 9 *l.* the Jury gave Damages leſs than 9 *l.* and it was held good; but if the Verdict had been for 10 *l.* it had been naught Vent. 104. cited by *Twiſden* to have been adjudged ‡.

‡ The proper Method of declaring for Goods ſold and delivered is, generally, that the Defendant is indebted to the Plaintiff in ſuch a Sum, for Goods ſold and delivered by the Plaintiff to the Defendant, at his Requeſt, which he promiſed to pay, *&c.* Laying the Sum to the full Amount of, or more than, the Demand, and the Form of the Action being to recover Damages for the Breach of the Promiſe, and not a *Specific* Sum, the Jury give the real Value, in Damages.

Sid 96.

If in Treſpaſs for an Aſſault, Battery and Wounding, the Defendant, *quoad* the Force, pleads Not guilty; and *quoad* the Aſſault and Battery, that he was removing a Market-Croſs to a more convenient Place, and the Plaintiff interrupted him, *per quod molliter manus impoſuit*, *&c.* and thereupon they are at Iſſue, and the Jury find the Defendant guilty *de injuria ſua propria*; and ſo (*d*) recite the intire Declaration of the Aſſault, Battery and Wounding, (though the Wounding was not in Iſſue,) and aſſeſs Damages *occaſione*

(*d*) But without ſuch Recital, it would

occaſione tranſgreſſionis illius to 20 *l.* it muſt be intended, that the Damages were given for all in the Declaration, *viz.* the Wounding, tho' not in Iſſue, and the Jury cannot find (*a*) more than the Plaintiff has declared for, and aſſeſs Damages for it.

not have been preſumed that Damages were given for what was not in Iſſue. Hob. 187. Cro. Jac 353. (*a*) Nor can they give Damages for what they have not found. Bulſt. 64. See Salk. 11. pl. 5. Ld. Raym. 339, 692. 12 Mod. 542.

* If in Trover, *inter alia de una Salſura (Anglice a Salting-Trough)*, there is a Verdict for the Plaintiff and intire Damages; the Declaration as to the Trough being merely in *Engliſh*, the Damages ſhall be intended given for the other Particulars; but if the Defendant had been acquitted of the other Things, and expreſly found guilty of this, it would have been otherwiſe.

* Page 8 Sid. 98. Lev. 99. For this ſee 10 Co. 133. Raym. 15. 3 Lev. 336. Ld. Raym. 317.

If in an Avowry for Rent due in Money, and alſo for ſo many *Hens*, it appears on the Face of the Avowry that the *Hens* were not due at the Time of the Diſtreſs taken, and altho' there are intire Damages and Coſts, yet the Plaintiff may releaſe the Damages and Rent for the *Hens*, and take Judgment only for the Rent in Money, (*b*) but need not releaſe the Coſts.

Carth. 437. *Morrite* and *Golder* adjudged, and a *Remittitur* entred accordingly. (*b*) *Byars* and *Newton*, Trin. 28. Car. Rot. 728. S. P. ſaid to be adjudged

If an Action upon the Caſe be brought (*c*) upon two Promiſes (*d*) and both are found for the Plaintiff, the Jury may give intire Damages for both, for this is at the Peril of the Plaintiff; but if the Action does not lie for one of them, the Plaintiff, (*e*) ſhall not have Judgment for the other.

Rol. Abr. 570. Rol. Rep. 423. 3 Bulſ. 258. S. C. the Judgment being given on Demurrer and intire Damages aſſeſſed upon a Writ of Inquiry. (*c*) So in other Actions upon the Caſe. Moor 707. pl. 987 Cro. Eliz. 560. Hob. 189. 10 Co. 130. Moore 281.—So in Debt Brownl. 70.—So in Treſpaſs. Styl. 174, 182, 399. 3 Leon. 213. Cro. Car. 21. Godb. 57.—So in Covenant. Cro. Eliz. 685. Cro. Jac. 439. Sand. 155.—And for this *vid.* 5 Co. 108. *a.* 10 Co. 130. 3 Bulſ. 231. Hetl. 51, 53. Lit. Rep. 61. Styl. 198. Cro. Eliz. 59. Cro. Jac. 239. Sid. 38. Moor 281. (*d*) So where the Plaintiff alledges two Breaches of an Award, one of which is inſufficient, and intire Damages are given. Leon. 170. 5 Co. 108. 10 Co. 131. but *vid.* Yelv. 35. and Title *Arbitrament*. (*e*) Where intire Damages ſhall hinder the Plaintiff's Judgment, *vid.* 2 Roll. Abr. 99.

So where an Action againſt an Adminiſtrator was laid as follows, *ſſ. In Conſideration that the Plaintiff had ſold a Mare to the Inteſtate, he promiſed to pay the Plaintiff tantam Denariorum Summam quantam Equa prædict. rationabiliter habere meruit*, and then avers in Fact, *quod Equa prædict. rationabiliter habere meruit* 8 *l.* which laſt Promiſe being void, it being abſurd to ſay that the Mare deſerved to have ſo much Money, makes the whole void.

Carth. 254. *Blackman* and *Cobbet*, adjudged, and the Judgment of the Court of *C. B.* in which there were intire Damages, reverſed accordingly.

4. Where to be aſſeſſed jointly or ſeverally, where there are ſeveral Defendants.

The Jury cannot regularly aſſeſs (*f*) ſeveral Damages for one Treſpaſs, with which the Defendants are jointly charged by the Plaintiff's Writ or Declaration, for though in Fact one was more malicious, and did greater Wrong than the other, yet all coming to do an unlawful Act, the Act of one is the Act of all the Parties preſent.

11 Co. 6. b. Cro. Eliz. 860. Cro. Jac. 118, 384. Rol. Rep. 31. Hob. 66. *vide* Bulſ. 157. (*f*) For by finding them guilty *de Præmiſſis*, they find them equally guilty, and it is a Rule in Law, that what the Plaintiff had laid joint in his Declaration the Jury cannot ſever in their Verdict. Carth. 20. *arguendo*.

But in Treſpaſs if one Defendant is found Guilty at one Time, and the other at another Time, ſeveral Damages may be (*g*) taxed.

11 Co. 6. b. Brownl. 233. S. C. 3 Mod. 102. (*g*) And the Plaintiff hath Election to take Execution *de melioribus Damnis*.

Cro.Car.239. *Walſh* and *Biſhop*. 3 Mod. 102. S. C. cited.

So where they plead ſeveral Pleas, as in an Action of Battery, if one pleads Not Guilty, and the other juſtifies, and both Iſſues are found for the Plaintiff; in ſuch Caſe he may enter a *Nolle Proſ.* againſt one, and take Judgment againſt the other, becauſe their Pleas are ſeveral.

* Page 9 11 Co. 6. b. Rol. Rep. 31. S. C. 10 Co. 119. 11 Co. 5. b. Sir *John Heyden*'s Caſe. Cro.Car.192. Like Point in an Appeal of Mayhem.

* If in Treſpaſs againſt two, one appears againſt whom the Plaintiff counts *ſimul cum*, &c. who pleads, and is found Guilty and Damages aſſeſſed, and after the other appears and pleads, and is found Guilty, he ſhall be charged with the Damages taxed by the firſt Jury.

If in Treſpaſs againſt *A. B.* and *C.* for a Battery and Wounding, *A.* appears, and the Plaintiff declares againſt him, *ſimul cum*, &c. and *A.* pleads Not guilty, and a *Venire* iſſues, &c. and after *B.* appears, and the Plaintiff declares againſt him *ſimul cum*, and *B.* pleads Not guilty, and a *Venire* iſſues, and both theſe Iſſues are tried at the ſame Aſſiſes, *viz.* that againſt *A.* is firſt tried, and 200 *l.* Damages given; and after that againſt *B.* is tried, and 50 *l.* Damages given; and after *C.* appears and confeſſes the Action, and a Writ of Inquiry is awarded upon the Roll, but none iſſues, the (*a*) Plaintiff at his Election may have Judgment for the Damages given by the Jury, and this ſhall bind all, for in Judgment of Law the ſeveral Juries gave their Verdict at the ſame Time.

(*a*) In Treſpaſs againſt *A. B.* and *C. A.* and *B.* juſtify; upon which there is a Demurrer, and *C.* pleads, thereupon Iſſue is joined, and the Demurrer is adjudged againſt *A.* and *B.* and upon Writ of Enquiry Damages are given; and after the Iſſue is found for the Plaintiff, and Damages given, the Plaintiff may have his Election, which Damages he will take. Rol. Rep. 395. per Cur. Cro. Jac. 350. S. C. adjudged upon a Writ of Error; and the firſt Judgment affirmed accordingly, becauſe the Writ is intire, and the Defendants are all charged with one Battery, tho' the Declarations are ſeveral. Rol. Rep. 30, 31. S. C. ‖

‖ In ſuch Caſe, 'tis more eligible to argue the Demurrer firſt, and after Judgment for Plaintiff, then to try the Iſſue, when the Jury will aſſeſs the Damages regularly againſt all the Defendants.

Cro Jac.251. And if the Damages ſhould be found ſeverally, it would be double.

In Treſpaſs for an Aſſault, Battery and Wounding, the Defendant *quoad* the Battery and Wounding pleads Not guilty, and *quoad* the Aſſault juſtifies, and both Iſſues are found againſt the Defendant, ſeveral Damages ſhall not be found, for the Aſſault is included in the Battery and Wounding.

Cro. Car. 54. *Player* and *Warn.*

If in Trover and Converſion of 2000 Loads of Coals, upon Not guilty pleaded, the Defendants are (*b*) found ſeverally Guilty for ſeveral Loads of Coals, and ſeverally Not guilty for the Reſidue; the Jury muſt aſſeſs ſeveral Damages; (*c*) adjudged upon a Writ of Error in the *Exchequer-Chamber*, and Judgment againſt them ſeverally for Damages, according to the Verdict, and intire Coſts.

(*b*) So in Treſpaſs, if one Defendant is found Guilty in Part only, and the other in all, the Damages ſhall be ſeveral. Cro. Eliz. 860. Brownl. 233. Bulſ. 50. (*c*) But *vid.* Carth. 20. where it is ſaid that the contrary had been lately reſolved in *C. B.* between *Whorewood* and *Jackſon*. See 10 Mod. 196. ¶

¶ And the Doctrine in *Curthew* is, we believe, now the ſettled Law.

Carth. 19. Rodney v. *Strode* & *Al.* adjudged in *B. R.* Paſch. 2 Ja. 2. and affirmed in the Exchequer Chamber, as alſo in the Houſe of Lords, 1 *W.* & *M.* and a

In Treſpaſs and falſe Impriſonment, and impoſing the Crime of Treaſon on the Plaintiff, againſt *A. B.* and *C. B.* confeſſed the Action, *A.* and *C.* pleaded jointly Not guilty, and were found guilty; the Jury aſſeſſed Damages, *viz.* 1000 *l.* againſt *A.* and 50 *l.* againſt *B.* and *C.* each; and the Plaintiff entred a *Nolle Proſequi* as to *B.* and *C.* and took Judgment againſt *A.* only for the 1000 *l.* and it was held that the Defect of the Verdict was (*d*) cured by the *Nolle Proſequi*; for as the Plaintiff might have brought his Action againſt them jointly or ſeverally, ſo it is but reaſonable that he ſhould have the ſame Election as to the Damages; altho' it was objected that the Plaintiff hath Election *de melioribus Damnis* only where the Trials are at ſeveral Times, and this was a Fact of which they are all equally Guilty, and

that it was a Contradiction to say that the Plaintiff is injured by one to the Value of 50 *l.* only, and by the other to the Value of 1000 *l.*

like Judgment said to be lately given in *B. R.* between *Treburiffot* and *Grotbway*. 3 Mod. 101. S. C. Cro. Car. 243. Like Case; where it is said, tho' Damages ought not to have been taxed severally, yet the Plaintiff relinquishing his Suit against the other, it is not material, no Advantage being taken thereof. *(d)* For this *vid.* Raft. Ent. 127, 583, 654. Rol. Abr. 784, Cro. Car. 54.

* (E) Where the Court may increase or mitigate the Damages.

* Page 10

IN (*a*) all Actions at *Nisi prius*, where Damages are the Principal, as the Court can have no certain Conusance of the Cause, either by Record or other Matter apparent, they can neither mitigate nor increase the Damages.

Rol. Abr. (*a*) In Trespass for cutting his Trees, upon Not guilty pleaded, the Court cannot increase the Damages given by the Jury, because it lies not in their Conusance. 3 H. 4. 4. Bro. Costs 7.—Nor can they diminish them, because the Trespass is local, and it cannot appear to them what the Damages were. Brownl. 204.—So in Case for Words, though the Court thought the Damages excessive, yet they would not mitigate them. Palm. 314. And though at first they inclined to do it, yet upon great Consideration they resolved to leave such Matters of Fact to the Trial of the Jury, who best know the Quality and Estate of the Person, and the Damages he hath sustained.

But in (*b*) Battery *pro Amputatione manus dextræ*, the Court may increase the Damages, for it is apparent to the Court by the Record and (*c*) View of the Person.

22 E. 3. 11. b. 3 H. 4. 4. Rol. Abr. 572.

Leon. 139. so done (*b*) So in an Appeal of Mayhem, upon View of the Mayhem. 8 *H.* 4. 22. 3 Ass. 30.——In an Appeal of Mayhem the Jury gave 20 Marks Damages, and upon View in Court, and Information of the Surgeons there present, the Court increased the Damages to 100 *l.* because he lost the Use of his Hand. Rol. Abr. 572. *Freeman* and *Trebers*. Freem. Rep. 173. (*c*) It is not sufficient that the Justices of *Nisi prius* upon View thereof certify that he had sustained Damages to such greater Sum; for the Justices of the Court, out of which it issues, cannot increase the Damages without their View. 8 H. 4. 23. Rol. Abr. 572. 3 Salk. 115. pl. 6. Ld. Raym. 176.——But upon a View *in Pais* by any of the Justices of the Court into which the *Nisi prius* is returned, they may increase Damages. 8 H. 4. 23. Bro. *Damages* 74.

So in Trespass, if Judgment be given upon *Nihil dicit*, and a Writ of Inquiry of Damages executed, the Court may increase or (*d*) diminish the Damages found by the Inquest; for that they might have awarded Damages, according to their Discretion, without such Writ, adjudged in an Action of Assault, Battery and Wounding; (*e*) the Manner of doing thereof being specially laid in the Declaration, tho' the Inquest gave 200 *l.* Damages, yet upon Examination of Surgeons, and upon View of the Wound in Court, and for the Heinousness of the Fact, being done in the high Street in the Day-time with a *Stilletto*, with an Intent to kill him; and the Surgeon by Agreement being to have 150 *l.* for the Cure; the Plaintiff being in great Danger of Death, and having lost a Pottle of Blood, as the Surgeons said, the Court increased the Damages to 400 *l. in toto*; and Judgment given accordingly.

19 H. 6. 10. adjudged. Rol. Abr. 573. Styl. 310. S. C. adjudged.

(*d*) Judgment in Battery by *Nonsum informatus*, and upon a Writ of Inquiry of Damages found, &c. And upon a Motion to mitigate the

In Damages, the Court said that in such Cases they never alter the Damages. Lit. Rep. 150. Hetl. 93. Ld. Raym. 176. (*e*) Otherwise if the Wounding be not particularly expressed in the Declaration, that the Court may judge thereof by the Record; for it ought to appear that the Wounding was by this Battery, and the Party is not to be viewed in Court by a bare Averment at the Bar. Styl. 345. ‡—So in an Appeal of Mayhem, when the Particulars of the Mayhem are not expressed in the Declaration, the Court upon View of the Mayhem cannot increase the Damages, unless the Judges of *Nisi prius*, before whom tried, certify the Particulars of the Mayhem to the Court; or where tried before a Judge of the same Court, who affirms that these are the

Lit. Rep. 51, 52. See Salk. 11. pl. 5. Ld Raym. 339. In Treſpaſs for an Aſſault and Battery againſt *A.* and *B.* *A.* appeared, *&c.* and a Verdict was given againſt him, and Damages taxed to 30 *l.* and the Court upon View of the Mayhem increaſed the Damages to 40 *l.* and after a Verdict was given againſt *B.* and Damages taxed; and then it was moved that the Court upon another View of the Wound would increaſe Damages againſt *B.* for that *A.* had murdered the Officer that came to ſerve the Execution upon him for the 40 *l.* ſo that poſſibly * Page 11. * the Plaintiff might recover nothing againſt *A.* But it was denied by the Court, for that they could have the View but once in the ſame Action; tho' if he had brought ſeveral Actions, it would have been otherwiſe; but the Court directed the Plaintiff to ſtay till *A.* was hanged, and then they might have the View and increaſe the Damages.

Sid. 433. *Burford* and his Wife *v.* Dodwell. Mod. 24. 2 Danv. Abr. 431. Ld Raym. 38. 2 Salk. 637. pl. 5. 4 Mod. 404. In Treſpaſs *Quare inſultum fecit et maletractavit* the Wife of the Plaintiff, *et equam*, upon which the Wife rode, *percuſſit*; ſo that the Wife was thrown, and another Horſe trod upon her, *per quod* ſhe loſt the Uſe of three Fingers, *&c.* there was a Verdict for the Plaintiff, and 8 *l.* Damages; and the Court refuſed to increaſe the Damages upon View of the Mayhem and hearing Surgeons, becauſe there was no Mayhem or Wounding directly done by the Party, but rather by Accident, *viz.* by the coming, *&c.* of another Horſe, which, whether he came, *&c.* or the Wife might have avoided him, is Matter of Evidence.

Rol. Rep. 30. Cro. Jac. 350. Cro. Car. 192. 11 Co. 5. 2 Stra. 872.

Rol. Abr. 573. (*a*) 27 H. 8. 2 pl. 8. The Courts have a general diſcretionary Power, except in ſpecial Caſes, as (*a*) local Treſpaſſes, *&c.* either to increaſe or abridge the Damages found by an (*b*) Inqueſt of Office.

19 H. 6. 10. pl. 28. Brownl. 204. *(b)* In Action for taking his Goods, if the Defendant avows, upon which it is demurred, and adjudged for the Plaintiff, or upon Default, and Damages found upon the Writ of Inquiry of Damages, the Court may increaſe them; for the Court (this being upon Demurrer) might ‖ have awarded Damages without Inquiry; and therefore the Inqueſt is but for their Information. 14 H. 4. 9. 3 H. 6. 29. b. Yelv. 152. Brownl. 214.—But where on a Writ of Inquiry the Court refuſed to mitigate Damages, *vid.* 3 Leon. 150. Godb. 135. Lit. Rep. 150. Hetley 93.

‖ *Qu. de hoc?* The conſtant Practice is, to award a Writ of Inquiry to the Sheriff who ſummonſes a Jury, to aſſeſs the Damages, which done, the Inqueſt is returned to the Court.

13 Hen. 4. 7. b. *vide* Rol. Abr. 578. All. 88. In Treſpaſs for taking his Goods to the Damage of 20 *l.* if the Defendant pleads an Arbitrament made in another County, and this is tried againſt the Defendant, and Damages aſſeſſed for the Treſpaſs; yet in as much as this Foreign Jury could not have full Conuzance of the Treſpaſs, and the Defendant hath not denied the Damage to be according to the Count, the Court with the Aſſent of the Plaintiff may increaſe the Damages, and to ſo much as the Plaintiff hath counted.†

† *Qu.* if this is Law? The Plaintiff might have produced his Evidence before this as well as before another Jury; and whether ſetting aſide the Verdict would not be more proper?

On the Mayhems that were proved upon Evidence; otherwiſe *non poteſt conſtare curiæ*, that theſe are the ſame Mayhems for which the Plaintiff has declared. Latch 223. Sid. 108. *et vid.* Hard. 408. 3 Salk. 115. pl. 6. Ld Raym. 177. by an Inferior Court, 2 Sid. 183.

‡ *Sed Qu.* If the Court does now ever alter Damages found by a Jury unleſs in an Appeal of Mayhem, or where fatal Conſequences have reſulted from the Injury, after the Trial, and for which a Jury could not in the Nature of the Thing give Damages? The Caſe in the Text cited from Rol. 573. and Styles 310. was upon View by the Court and Examination of Witneſſes.——In that Caſe *Wild* was at firſt of Opinion the Court could not encreaſe Damages, on View, if he was not *maimed*.—But according to *Coak* and *Peal* 8 & 9 W. 3. 1. L. Ray. 176. The Court may encreaſe the Damages, if the *Wound* be *apparent*, tho' it be not a *maim*.—In *Woodford* v. *Eades et al.* it is laid down as Law, that where the Jury miſtake in Point of Law, the Verdict may be ſet *aſide* for the Smallneſs of the Damages.—This Action was in *Caſe*, on a Contract.

Damages.

On the Statute of *Weſt.* 2. *cap.* 12. which gives Damages to an Appellee on a falſe and malicious Appeal; if the Jury give too great Damages, the Court may abridge them; or if they give too ſmall Damages, the Court may increaſe them; for after the Acquittal of the Appellee, their Inquiry as to Damages is to be conſidered only as an Inqueſt of Office; alſo the (*a*) Words of the Statute are, *Damages ſhall be given according to the Diſcretion of the Juſtices*, &c.* 2 Hawk. P. C. 201.

(*a*) Where by the Statute 3 E. 1. c. 20. It is enacted, That if a Treſpaſſer in Parks and Ponds is attainted at the Suit of the Party, great and large Amends ſhall be awarded, according to the Treſpaſs; in the Explanation of that Statute, it is ſaid that if the Damages are too ſmall, the Court hath Power to increaſe them, for that the Word *Award* properly belonged to the Court. 2 Inſt. 200.

* This Caſe differs from the preceding, becauſe Power is given by a Statute, to the Juſtices.—The general Doctrine, as to the Courts aſſeſſing Damages, without the iſſuing of a Writ of Inquiry ſeems to be this;—If there is a Judgment by Default or Confeſſion, and the *Certainty of the Demand* appears *upon Record*, the Court may aſſeſs Damages, without awarding a Writ of Inquiry, if they will. 2 Sand. 107.—So if there be Judgment for the Plaintiff on Demurrer.—So in Debt—(where generally, if not always, the Damages are nominal)——But where the Demand is *not certain upon the Record*, or where the Damages are not merely nominal, and Judgment is for Plaintiff on Demurrer, by Default, or Confeſſion, and the Damages are not confeſſed, a Writ of Inquiry ſhould iſſue. See Yelv. 152. 3 Leo. 213. Lut. 211, 213 11 H. 7. 5. b. Cro. El. 536. For Damages are to be proved, by a *viva voce* Examination of Witneſſes, which is not the proper Province of the Court.

(F) Of the Manner of aſſeſſing and recovering Damages.

IF Treſpaſs is brought againſt Overſeers of the Poor, *&c.* for any Act done by Authority of 43 *Eliz. cap.* 2. and there is a Verdict for the Defendant, the Jury ſhall aſſeſs the Damages which ſhall be (*b*) trebled by the Court. Yelv. 176.

(*b*) So on the Statute of Weſtm. 2. c. 26. The Court ſhall double the Damages. 2 Inſt. 416.—So on the Statute 23 H. 6. c. 10. Cro Car. 438.

* (*c*) No Damages can be given to the Party grieved upon an Indictment, or any (*d*) other criminal Proſecution; alſo where by Statute Damages are given to the Party grieved by the Offence intended to be redreſſed, they cannot be recovered on an Indictment, grounded on ſuch Statute, unleſs ſuch Method of recovering them be expreſly given by the Statute (*e*); but they ought to be ſued for in an Action on the Statute, in the Name of the Party grieved; yet the Court may, by (*f*) Virtue of a Privy Seal, give to the Party injured Part of the Fine ſet on the Offender, or (*g*) may induce a Defendant to make Satisfaction to the Proſecutors, by giving an Intimation, that on that Account the Fine to the King ſhall be mitigated.

* Page 12.

(*c*) Rol. Abr. 220. 2 Rol. Abr. 83. Cro. Car. 531.

(*d*) Notwithſtanding the King, by his Commiſſion erecting a new Court, expreſly directs, that the Party ſhall recover his Damages by ſuch a Proſecution. Cro. Car. 558. 2 Hawk. P. C. 210. (*e*) Jon. 380. Cro. Car. 438, 448. (*f*) 1 Keb. 487.—may give the third Part of the Fine aſſeſſed. 2 Hawk. P. C. 210. (*g*) Said to be every Day's Practice. 2 Hawk. P. C. 210*.

* It certainly is in Caſes that are proper.

In all Actions in which the Plaintiff is to be recompenſed in Damages, the Jury muſt aſcertain the Damages by their Verdict, nor can ſuch Omiſſion or Defect be ſupplied by Writ of Inquiry; for, if this were permitted, the Party would be deprived of his Remedy by Attaint againſt the Jury for exceſſive Damages; for no Attaint lies againſt them on a Writ of Inquiry, it being an Inqueſt of Office. † 10 Co. 119. Latch 113. Rol. Abr. 272. 2 Rol. Abr. 112. Skin. 595. pl. 8. Salk. 205. pl 3.

† This means, where an Iſſue is joined between the Parties, to be tried by the Country.

So in a Writ *de valore Maritagii*, where Iſſue was joined on the Tenure, and the Jury aſſeſſed 40*s.* Damages, and 10*s.* Coſts, but did not inquire of the Value of the Marriage; and it was held that this Defect (*f*) could not be ſupplied by Writ of Inquiry.

10Co. 118.b. *Cheney's* Caſe.

(*f*) So in Detinue, where the Jury gave a Verdict, but omitted to inquire of the Value of the Goods, 10 Co. 119. b. But in Skin. 595. pl. 8. and Salk. 205. pl. 3. this Point is ſaid by *Holt* Ch. Juſt. to have been otherwiſe determined, but, as he thought, contrary to Law, being againſt *Cheney's* Caſe.

Cro.Car. 143. Styl. 22.

If there be (*g*) a Demurrer upon Evidence, tho' the Jury are thereby diſcharged of the Iſſue, yet they may tax Damages conditionally, *viz.* if Judgment ſhall be given for the Plaintiff, or when the Demurrer is determined, it (*b*) may be done by (*i*) Writ of Inquiry, and ſaid to be the moſt uſual Courſe where there is a Demurrer to Evidence to diſcharge the Jury without further Inquiry.

(*g*) Where there is a Demurrer to Part, and Iſſue to Part. 2 Rol. Abr. 722.

(*b*) Where an Omiſſion of taxing Damages by the Jury cannot be ſupplied by Writ of Inquiry, but a *Venire facias de novo* ſhall go. 2 Rol. Abr. 321.—Where the Court will refuſe a Writ of Inquiry, but will award a new *Venire*. 22 E. 3. 5. Rol. Abr. 571. (*i*) Where upon a Writ of Inquiry the Plaintiff is not bound to prove his Property. Cro. Jac. 220. Yel. 151. Brownl. 214 *.

* For it is admitted by letting Judgment go by Default, and the only Subject of the Inquiry is, the *Value*, or *Quantum*, of the Damages.

2 Saund. 106, 107. *Holdip* and *Otway*. Sid. 442. S. P. Fitz. Bar. 283.

If in Debt upon a Bill obligatory, the Plaintiff hath Judgment (*k*) by Default, the Court, by the Aſſent of the Plaintiff, which is always entred upon Record, may tax the Damages *occaſione detentionis debit'*, (*l*) but if he will not aſſent thereto, he may have a Writ of Inquiry; but this Election is in the Plaintiff, not in the Defendant; alſo it is ſaid to be the Courſe and Practice of both Courts upon a Judgment in Debt, (*m*) by Default or Confeſſion, to tax Damages ‡ as well as Coſts.

(*k*) So if a Verdict is found for the Plaintiff, and the Jury do not aſſeſs Damages, &c. for the Debt is certain, and the Loſs of the Plaintiff apparent. Dyer 105. *in Margine*.—In Replevin, the Plaintiff is nonſuit; the Court, without a Writ of Inquiry, may aſſeſs Damages, becauſe they accrue not in reſpect of any local Matter, but it is the Delay in Non-payment of the Rent ‖; *ſecus* where Judgment is given for the Plaintiff, for he ought to recover for Taking his Cattle, and the Damages may be greater or leſs, according to the Value of the Cattle and Circumſtances of Taking. 3 Leon. 213. (*l*) Cro. Jac. 415. (*m*) So upon Demurrer. Latch 113.

‡ But, as ſaid in the Notes before, theſe Damages are in general, if not always, nominal.—If actual Damage is ſuſtained which the Plaintiff ought to recover, and can by Law recover, it ſhould ſeem a Writ of Inquiry ought to iſſue, as the only proper Means of informing the Court of the *Quantum*, unleſs it's in a Caſe where that *Quantum* is apparent on the Record. See *ante* 11 n.

‖ This muſt mean, where the *Rent* appears on the *Record*, and is the certain Meaſure of the Damages. The Caſe in 3 Leon. 213. was upon an Avowry for *Rent*, that was in the 30th of Eliz. when the Avowant could not avow double, as he may now by 4 Ann. c. 16. therefore we may ſuppoſe the Defendant avowed for the *ſpecific Sum* due. By Stat. 17. Car. 2. c. 7. On Diſtreſs for Rent on the Lands chargeable, if the Plaintiff in Replevin, by Plaint or Writ depending in any Court at *Weſtminſter*, be nonſuited before Iſſue, the Defendant may make Suggeſtion in Nature of an Avowery, or Conuſance to ſhew Cauſe of Diſtreſs, and the Court ſhall award a Writ to inquire, &c. what Arrear, and the Value of the Diſtreſs, of the Execution of which fifteen Days Notice ſhall be given to the Plaintiff or his Attorney.— *By the ſame Statute*, on Return of the Inquiſition, the Defendant ſhall have Judgment to recover the Rent Arrear, if the Goods diſtrained amount to it, otherwiſe, to the Value of the Diſtreſs with full Coſts, for which he may have Execution by *Fieri Facias*, *Elegit*, &c. 1 Sand. 195.——*By the ſame Stat.* if the Plaintiff be nonſuited after Avowry, or Conuſance, and Iſſue joined, or a Verdict be for the Defendant, the Jury who were to try the Iſſue ſhall inquire what Arrear, and the Value of the Diſtreſs, and the Defendant ſhall have Judgment and Execution, *ut ſupra*. So, *by the ſame Stat.* if Judgment be for the Defendant upon Demurrer, the Court ſhall award a Writ to inquire the Value of the Diſtreſs, and on Return the Defendant ſhall have Judgment for the Arrears mentioned in the Avowry or Conuſance if the Diſtreſs amount to that Value, otherwiſe, to the Value of the Diſtreſs, and his full Coſts, and Execution *ut ſupra*. See further 5 Com. Dig. 304. and *vid. tit. Replevin*.

If in Replevin, the Defendant avows as Overſeer of the Poor for a Diſtreſs for a Rate, upon the 43 *Eliz. cap.* 2. and on the Trial the Plaintiff is nonſuit, if the Jury omit to find Damages, this Omiſſion will • be ſupplied by Writ of Inquiry; for if the Jury had inquired, they had inquired only as an Inqueſt of Office, on which no Attaint lies. Salk. 205. pl. 3. • Page 13 *Herbert* and *Waters.* Skin. 595. pl. 8. S. C. adjudged. 5 Mod. 76, 77, 118. Carth. 362. 12 Mod. 85.

Alſo the Omiſſion of the Inquiry of the Value of the Church in a *Quare Impedit*, may be ſupplied by a Writ of Inquiry. 10 Co. 119. Skin. 596. S. P. agreed.

But in an Avowry for a Rent-Charge, according to the 17 *Car.* 2. *cap.* 7. the Omiſſion of the Jury cannot be ſupplied by Writ of Inquiry; for that Statute expreſly requires, that the ſame Jury ſhall inquire of the Rent Arrear, Value of the Cattle, *&c.* Sid. 380. Salk. 205. pl. 3, 206. Skin. 595. pl. 8. S. C. cited, and agreed to be Law. See 10 Mod. 319.

See farther in Sayer's Law of Damages, a very uſeful Collection of Caſes, in a ſmall Compaſs.

Debt.

(A) In what Caſes an Action of Debt will lie.
(B) At what Time it ſhall be ſaid to have accrued. 15.
(C) Who may bring Debt, and herein of the Privity of Contract and Eſtate. 16.
(D) Againſt whom it may be brought. 18.
(E) Where Debt is the proper Action, and not Covenant, Caſe, &c. 20.
(F) Of the Manner of bringing the Action, and where it muſt be brought in the Debet & Detinet, or Detinet only. 21.
(G) Of the Extinguiſhment of the Debt, and Pleading in Bar thereof. 24.

(A) In What Caſes an Action of Debt will lie. Vide (E) 20.

AN Action of Debt is ſaid to be founded upon Contract, either expreſs, or implied; in which the (*a*) Certainty of the Sum or Duty appears, and therefore the Plaintiff is to recover the ſame *in Numero*, and not to be repaired in Damages by the Jury, as in thoſe Actions which ſound only in Damages; as *Aſſumpſit*, Trover, *&c.* 4 Co. 90. *Slade's* Caſe. Vaugh. 101. (*a*) Hence Debt due by Specialty can only be recovered by Action of Debt.——If upon a Submiſſion to Arbitration, the Arbitrators award the Payment of a certain Sum of Money, Debt lies; but if they award the doing of ſomething advantageous to the Party only, an Action on the Caſe. *Vide* Title *Arbitrament and Award.* If one makes a Bill to another in theſe Words, *Memorandum, I owe to* A. B. 20l. *to be paid in Watches*; an Action of Debt, *&c.* muſt be brought for the Money, and not an Action for the Watches, for the Number of Watches is not certain. And. 117.

* Page 14 (a) As in Waſte, 43 E. 3, 2. and *vide* Rol. Abr. 600, 601. ſeveral Caſes to this Purpoſe.

* But if in an (a) Action, in which the Plaintiff can only recover Damages, there be Judgment for him, he can afterwards bring an Action of Debt for thoſe Damages. *

* That is, an Action of Debt, on his final Judgment; for by the Judgment it is reduced to Certainty, and is a *Debt*, on Record.——The Reaſon of bringing an Action is to puniſh the Defendant for not paying the Money recovered by the Judgment, without putting the Plaintiff to the Expence and Trouble of levying the Money, by an Execution, and to compel, if poſſible, Payment, without an Execution, as in a Judgment for Damages the Plaintiff pays the Coſts of levying.

Sid. 236. Lev. 153. Raym. 100. S. C. (b) So after Writ of Error brought in Parliament.

Alſo if after Judgment for the Plaintiff in *B. R.* the Defendant brings a Writ of Error *in* (b) *Cam. Scacc.* an Action of Debt may be brought in *B. R.* upon the Judgment, pending the Writ of Error; and the Defendant cannot plead *Nul tiel Record*; for by the Writ of Error the Tranſcript of the Record only is removed‡.

Sid. 236. But for this *vide* Style 124. Mod. 121. 3 Lev. 397. 2 Vent. 261. 3Keb. 330. and Title *Error*.

‡ But, the Court on Motion will ſtay the Suit, the Defendant giving Judgment, and make a Rule to ſtay Execution 'till the Writ of Error on the principal Judgment is determined.

Salk. 209. pl. 3 *per Cur'*.

Debt lies in the *Marſhalſea*, or any other Court, upon Judgments in *C. B.* or *B. R.* and upon *Nul tiel Record*, the Iſſue ſhall be tried by *Certiorari*, and *Mittimus* out of Chancery.

For this *vide* Head of *Obligations*.

Every Contract muſt be legally (c) entered into, and the (d) Conſideration thereof muſt be lawful, otherwiſe an Action of Debt will not lie.

(c) If a Man by Deed acknowledges, that he hath ſo much Money of *J. S.*'s due to him, in his Hands, though here is no Contract of Borrowing between them, yet *J. S.* may have an Action of Debt againſt him. 11 H. 6. 39. (d) As Marriage, Work, Soliciting a Cauſe, *&c. vide* Rol. Abr. 593. ſeveral ſuch Inſtances;——but not for Money won at Play, though an Action on the Caſe will lie; but for this *vide* Title *Gaming*, and 5 Mod. 13.

Hob. 206. Moor 886. Brownl. 5. And where it will lie

If a Sheriff levies a certain Sum of Money on a *Levari facias*, at the Suit of *J. S.* and returns the Writ (e) ſerved, *J. S.* may have an Action of Debt againſt the Sheriff, without any actual Contract; for the Levying the Money to the Uſe of *J. S.* is a Contract in Law, that he ſhould pay it over.

againſt the Executor of the Sheriff, *vide* Title *Sheriff* and Title *Executors and Adminiſtrators*. (e) Otherwiſe where he returns, that he hath taken Goods into his Hands to ſuch a Value, which remain *pro defectu emptorum*. Cro. Jac. 514. 2 Rol. Rep. 57. Godb. 276. And *vide March* 13.——But if he returns, they were reſcued from him, he ſhall be charged; for he might have taken the *Poſſe Comitatus*, *&c.* 2 Saund. 343. Cro. Jac. 514. Godb. 276.

Rol. Abr. 598. (f) As 14 H. 8. c. 5.

If (f) a Statute prohibits the Doing a Thing under a certain Penalty, and preſcribes no particular Method for the Recovery thereof, the Party intitled to the Penalty may recover the ſame by Action of Debt.

againſt practiſing Phyſick without Licence.——2 and 3 Ed. 6. c. 13. which gives the treble Value for not ſetting forth Tithes, *vide* Head of *Tithes*. Rol. Abr. 598, and which is now the common Practice.

Rol. Abr. 598. Latch 17, 51. Noy 75. (g) The Sheriff brought Debt for his Fees of executing an *Elegit*; and held by *Holt*, that it lay; for it is all the Execution the Plaintiff in the original Action can have on this Judgment; and he may enter on the Land extended, if he can, without Force. Salk. 209. pl. 2. *vide* Cro. Car. 286.

An Action of Debt lies by a Sheriff upon the Statute of 28 *Eliz. cap.* 4. for his Fees given by the Statute, for an Execution ſerved by him; though the Statute does not ſay that he ſhall have his Fees, or any Action for them, but only ſays, that he ſhall not take, for (g) any Execution ſerved, any Conſideration or Recompence beſides that thereafter in the ſaid Act mentioned, *&c.*

The

The Action of Debt is a proper Remedy which the Law gives for the Recovery of Rents reſerved upon Leaſes for (*a*) Years; but this extended not to (*b*) Freehold Rents; the Reaſon whereof, and how it is now remedied by 8 *Ann c.* 14. *vide* Title Rents. Co. Lit. 162. a.

(*a*) Alſo the Grantee for Years of an Annuity may have an Action of Debt for the Arrears. Cro. Eliz 268. 895. (*b*) But if there had been Tenant for Life of a Rent, and he died, the Rent being in arrear, his Executor, by the Common Law, might have an Action of Debt for the Arrears, becauſe there was no other Remedy. 4 C. 49. a.

* If a Leſſee for Years aſſigns over his whole Term by Indenture, reſerving Rent, the Leſſee, by the Name of Rent, may recover in an Action of Debt upon the (*c*) Contract; although it was objected, that the Leſſee having no (*d*) Reverſion, it was to be conſidered as a Sum in (*e*) groſs, and therefore not recoverable until the Term was expired. * Page 15 Carth. 161. *Newcomb* and *Harvey*, adjudged.

(*c*) Alſo Debt would lie againſt a ſecond Aſſignee. Carth. 162. *per Curiam*. (*d*) Huſband poſſeſſed of a Term in Right of his Wife, makes a Leaſe for half the Term, and dies, his Executors ſhall have Debt for the Rent, and yet the Feme ſhall have the Reverſion. Dyer 227. (*e*) If a Termor ſurrenders to the Leſſor without Deed, rendring Rent; this is recoverable as a Rent, and is not as a Sum in groſs. Vent. 272. 2 Lev. 80. adjudged.

If a Man lends Goods as a Security for Money, and the Borrower tender the Money, and recover the Goods in an Action of Trover, yet the Pawnbroker may have an Action of Debt for his Money; (*f*) becauſe, though the Security ceaſes, yet the Duty remains, inaſmuch as the Money lent is not paid back to the Party from whence it came. The ſame Law as to Land. Cro. Jac. 243. Yelv. 179. Bulſt. 29. 31.

(*f*) So if a Man lend periſhable Goods as a Pledge, and they decay, yet the Perſon to whom they are pledged may have an Action of Debt for his Money, becauſe the Duty continues. Yelv. 179. Co. Lit. 209.

The Conuzee of a Statute-Merchant, as alſo the Conuzee on the 23 *H.* 8. *c.* 6. the Statute and Recognizance having the Seal of the Conuzors, as well as the Seal of the King, may bring an Action of Debt, and waive the Execution given by the Statute; *ſecus* of a Statute-Staple; becauſe the King's Seal only, without that of the Party, is affixed to it. Bro. Statute Merchant 16. Moor pl. 1097. Cro. Eliz. 494.

Debt will not lie *for a Wager*. Ld Raym. 69. Salk. 23. pl. 3.

5 Mod. 13. Comb. 303. 12 Mod. 69. 6 Mod. 129. Skin. 196. pl. 11.

(B) At what Time it ſhall be ſaid to have accrued.

IF a Man enters into a Bill obligatory for the Payment of (*g*) ſeveral Sums of Money at ſeveral Days, an Action of Debt will not lie till the laſt Day is paſt. Co. Lit. 47. b. 292. S. P. ‡ 3 Co. 22. a. 128. b.

Cro Jac. 505. Cro Car. 241. (*g*) If to pay 20*l.* in Manner following, *viz.* 10*l* at one Day, and 10*l.* at another Day, Debt lies not till after the laſt Day, becauſe one intire Duty; but if a Man binds himſelf to pay *J. S.* 10*l.* at one Day; and 10*l.* at another Day; after the firſt Day, Debt lies for 10*l.* becauſe it is in itſelf a ſeveral Duty. Owen 42.——So if *A.* makes a Bill to *B.* for the Payment of 20*l. viz.* 10*l. &c.* and thereby covenants and grants with *B.* that if he makes Default in either of the ſaid Payments, that he will then pay what of the Whole ſhall be unpaid, after Default at the firſt Day, Debt lies for the Whole. Leon. 208. adjudged.

‡ In 292. b. it is more fully explained, *viz.* there it is ſaid, "If a Man be bound in a Bond or by Contract to another to pay 100*l* at five ſeveral Days, he ſhall not have an Action of Debt before the laſt Day be paſt.—But if a Man be bound in a Recogniſance to pay 100*l.* at five ſeveral Days, preſently after the firſt Day of Payment, he ſhall have Execution upon the Recogniſance for that Sum, and ſhall not tarry, till the laſt be paſt, for that it is in the Nature of ſeveral Judgments."

So upon a Contract, Debt lies not till all the Days of Payment are paſt, for where there is but (a) one Contract, there can be but one Debt, and conſequently but one Action of Debt for the Recovery of it.

Co Lit. 292. 3 Co. 22. 4 Co. 94. 5 Co. 51. S. P.

(a) But the Law is otherwiſe of a Covenant or Promiſe to pay Money, &c. at ſeveral Days, for as often as the Money is not paid, according to the Covenant or Promiſe, ſo often is there a Breach of the Covenant or Promiſe, and conſequently ſo often an Action lies. Co. Lit. 292. b.

If a Man leaſes Lands for Years, reſerving yearly 20 *l.* at four (*b*) Quarters, Debt lies for one Quarter before the others are paſt; for it is reſerved for the Leſſor's Maintenance in lieu of the Profits, and ſhall be conſidered as ſeveral Contracts.

Co Lit. 47. b. 292. b. S. P. 2 Lev. 80.

(*b*) So if reſerving Weekly, during the Term, nine Quarters of Wheat. Rol. Abr. 601, but for this *vide* Plowd. 172. Allen. 57. Raym. 222. Vent. 242, 272. Carth. 161. and Title *Rent*.

* Page 16

* If one enters into an Obligation or Contract to pay Money, &c. on two ſeveral Contingencies, the Obligee may have an (*c*) Action of Debt on the Happening of either of them; for the putting in, that he ſhall pay at the one or the other, muſt be taken to have been inſerted for the Benefit of the Obligee; and the rather, becauſe every Contract is to be conſtrued moſt ſtrongly againſt the Obligor.

Vide Title *Election*.

(*c*) As in Debt on an Obligation, that if a Ship put to Sea, and either the Goods or the Obligor came ſafe, he ſhould pay ſuch a Sum over and above the Uſe allowed by the Statute; although the Obligor dies, yet an Action of Debt lies againſt his Executor on the Happening of the other Contingency; for the Law ſupplies the Words, *which ſhould firſt happen*. Lev. 54. *Sayer* and *Gloane*.

(C) Who may bring Debt; and herein, of the Privity of Contract and Eſtate.

AT Common Law, if the Leſſor, who had reſerved Rent-Service, had died, and there had been Rent arrear, neither his Heir nor (*d*) Executor could maintain an Action of Debt for them; not the Heir, becauſe he had nothing to do with the Perſonal Contracts of his Anceſtor; nor the Executor, becauſe he could not repreſent his Teſtator as to any Contracts relating to the Freehold and Inheritance.

Vide Head of Rent. 11 H. 6. 15. 19 H. 6. 41. b. Co. Lit. 162. a.

(*d*) But if a Woman had been endowed of a Rent, or a Rent had been granted for Life, and the Tenant had attorned; and after Rent had been arrear, and then the particular Eſtate in the Rent had determined by Death, the Executors of the Tenant in Dower, or of the Grantee for Life, ſhould have had Debt by the Common Law; becauſe by Poſſibility the Teſtator might have had Debt; as, if he had ſurrendered his Eſtate to the Reverſioner, he ſhould have had Debt for the Arrears incurred before; and theſe particular Eſtates, with the Attornment of the Tenant, or when the Law ſupplies an Attornment, amount to a real Contract in Law; which Realty, when the Freehold is determined, reſolves itſelf to the Perſonalty. 4 Co. 49. a. b. Keilw. 47. Executor may bring Debt for the Arrears of Annuity due to his Teſtator upon the Deed.

But the Executor might have maintained an Action of Debt for (*e*) Relief fallen in the Life-time of the Teſtator.

11 H. 6. 15. Roll Abr. 596.

4 Co. 49. S. P. Not 43. S. P. adjudged; and ſaid, that in ſuch Action, Seiſin of the Services need not be alledged; otherwiſe where the Party himſelf avows. Dalt. 17. Becauſe it is now become as a Flower fallen from the Stock, and they have no other Remedy. Co. Lit 162. b. S. P. For it is no Rent, but a caſual Improvement.

(*e*) Debt will lie for an Adminiſtratrix for a Fine of a Copyholder; and *per Holt*, Ch. Juſt. It is the proper Action; but three Judges held that an *Aſſumpſit* likewiſe will lie. Carth. 90, 91. 3 Mod. 233. Show. 35, 3 Lev. 262. Ld. Raym. 502. 2 Lev. 261. Comb. 151. 5 Mod. 439, 440, 444.

And now by 32 *H.* 8. *cap.* 37. reciting, "For as much as by the Com-
" mon Law, Executors or Adminiſtrators of Tenants in Fee-ſimple,
" Tail, or for (*a*) Life, of Rents (*b*) Service, Charge and Seck, and
" Fee-farms, had no Remedy to recover ſuch Arrears as were due to
" their Teſtators in their Life; it is enacted, That the Executors and
" Adminiſtrators of ſuch Perſon to whom (*c*) ſuch Rent or Fee-farm
" ſhall be due, and not paid at his Death, may have Debt for ſuch (*d*)
" Arrearages againſt the (*e*) Tenant or Tenants that ought to have paid
" the ſaid Rents or Fee-farms, ſo being behind in the Life of their Te-
" ſtator, or againſt the Executors or Adminiſtrators of the ſaid Tenants;
" and further, that it ſhall be lawful for ſuch Executor or Adminiſtrator
" of ſuch Perſon, to whom (*f*) ſuch Rent or Fee-farm ſhall be due, and
" not paid at his Death, to diſtrain for the (*g*) Arrears, and all ſuch Rents
" and Fee-farms upon the Lands, *&c.* charged with the Payment of ſuch
" Rent or Fee-farms, and chargeable to the Diſtreſs of the Teſtator, ſo
" long as the ſaid Lands, *&c.* continue in the Seiſin or Poſſeſſion of the
" Tenant in Demeſne, who ought to have paid the ſaid Rent or Fee-farm
" ſo behind to the Teſtator in his Life, or in the Seiſin or Poſſeſſion of any
" other claiming (*h*) only (*i*) by (*k*) and (*l*) from the ſame Tenant (*m*) by
" Purchaſe, Gift or Deſcent, (*n*) in like Manner as their Teſtator might or
" ought in his Life, and ſhall make Avowry upon the Matter afore-
" ſaid."

(*a*) Intended of Tenants *pur auter vie*, ſo long as *Ceſtui que vie* lived. Co. Lit 162. a.

(*b*) Reſerved upon a Leaſe for Life, or Gift in Tail within the Act. Co. Lit. 162.

* Page 17

(*c*) Extends not to a Quit-rent iſſuing out of a Copyhold. Yelv. 135. But *vide* Earth. 91. where by *Eyre* Juſt. this is doubted.

(*d*) Whether Money, Corn, Cattle, *&c.* or other Profit to be delivered or yielded, whether annual, or ſecond, third, *&c.* Year, but Work Days, or other corporal Service, is not within the Act. Co. Lit. 162. (*e*) Whether the Leſſor, Leſſee, or Occupier. Lit. Rep. 93. The Tenant is not charged, but he is under a Neceſſity to pay it to ſave the Diſtreſs. Allen 62. (*f*) This extends not to the Grantee of a Rent-charge for Years, if he lives ſo long. Cro. Car. 471. adjudged; for the Statute hath provided only where the Teſtator dies ſeiſed of a Rent in Fee, or for Life, and the Executors have no Remedy; *vide* 2 Sid. 62.—An Action of Debt is given for Arrears upon a Leaſe for Life, by 8 Ann. c. 14. ſ. 4.—At the Death of Tenant for Life, a proportionable Part of the Rent ſhall be paid to the Executors. 11 Geo. 2. c. 19. ſ. 15. (*g*) But it extends not to the Arrears of a *Nomine pœnæ*, Relief, Aid *pur fait fitz Chivaler* or *File Marrier*. Co. Lit. 162. b. (*h*) Of *Ceſtui que Uſe* of a Feoffment, though he claims not only by the Feoffor, but by the Statute alſo. 4 Co. 50. b.——So if the Tenant makes a Gift in Tail, and the Donee dies, a Diſtreſs may be taken upon the Poſſeſſion of the Iſſue in Tail, though he claims *per formam Doni*, as well as by Deſcent. 4 Co. 50. b. 2 Leon. 153. 3 Leon. 59, 60. (*i*) The Tenant leaſes for Life, the Remainder in Fee, and the Tenant for Life pays not his Rent to the Lord, and the Lord dies, and the Tenant for Life dies, the Executors of the Lord cannot diſtrain upon him in Remainder, for he claims not by or from the Tenant for Life. Co. Lit. 162. b. 5 Co. 118. a.——So in Caſe of a Reverſion. Co. Lit. 162. (*k*) And not paramount, as the Lord by Eſcheat. Co. Lit. 162. Leon. 303. Or one that is remitted to an antient Title. 4 Co. 50. b. (*l*) The Feoffee and Leſſee of the Feoffee, *&c. in infinitum*, are within the Act. 4 Co. 50. a. b. Leon. 303. 3 Leon. 158. (*m*) But Tenant in Dower, or by the Curteſy, ſhall not be charged, for they claim not by the Party only, but by Law alſo; Leon. 303. *per Curiam.* 3 Leon. 263. *per Curiam.* (*n*) So that if after Rent is Arrear, the Lord grants away his Seigniory, his Executors ſhall have no Remedy, for the Act gives none, where the Teſtator had none at his Death.

And by the ſame Act, "If one, in Right of his Wife, hath any Eſtate
" in Fee-ſimple, Tail, or for Life, in Rents or Fee-farms, which ſhall be
" unpaid in the Wife's Life, after the Death of his Wife, his Executors
" and Adminiſtrators ſhall have Debt for the (*o*) Arrears againſt the Te-
" nant of the Demeſne that ought to have paid the ſame, his Executors
" or Adminiſtrators, and he may diſtrain for the Arrears in like Manner
" as he might have done if his Wife had been then living, and avow upon
" the Matter aforeſaid."

(*o*) Extends to ſuch as incurred before Marriage, ſo as to thoſe incurred during Marriage, he might have had Debt by the Common Law. 4 Co. 51. a. b. Co. Lit. 162. b. Co. Ent. 119. Bendl. 262. Kelw. 214.

And by the ſame Act, "If one hath Rents or Fee-farms for the Life of
" another, which ſhall be unpaid, and *Ceſtui que vie* dies after his Death,
" ſuch Perſon, his Executors or Adminiſtrators, may have Debt againſt
" the

" the Tenant in Demeſne that ought to have paid it when firſt due, his " Executors or Adminiſtrators; and alſo (*a*) diſtrain for the ſame Arrears " upon ſuch Lands, *&c.* (*b*) out of which payable, in ſuch Manner as he " ought or might if *Ceſtui que vie* had been living."

(*a*) But if upon a Judgment againſt Tenant for Life of a Rent-charge, a Moiety thereof is extended upon an *Elegit*, and after Rent being Arrear, the Tenant for Life dies, the Tenant by *Elegit* cannot diſtrain for the Arrears by this Act; for coming in by an Act of Parliament, he is in the *Poſt*. *Pool* and *Neal*, 2 Sid. 28, 62. adjudged. (*b*) If a Rent be granted to *A.* for the Life of *B.* and after the Land out of which, *&c.* is let to *C.* for Life, the Remainder to *D.* in Fee; and Rent being Arrear, *B.* dies, and after *C.* dies, *A.* may diſtrain upon *D.* in Remainder for all the Arrears. Co. Lit. 162. b. *Edrich*'s Caſe 5 Co. 118. adjudged, & *vide* Moor 625. pl. 858. Cro. Eliz. 805. S. C. Debt is given in lieu of the Diſtreſs.

Rol.Abr.598. If a Man leaſes for Years, rendring Rent, and after deviſes the Rent to another, and dies, the Deviſee may have an Action of Debt for the Rent, though it is become a Rent-ſeck, becauſe by the original Creation thereof Debt lay.

Leon. 315. 2 Leon. 1. *vide* Dyer 140. Cro.Eliz.895. So if the Leſſor grants over the Rent, and the Leſſee attorns, for the Attornment creates a Privity; and there is no Caſe where a Thing may be tranferred or aſſigned over, but the Remedy ſhall go along with it; and the Law (*c*) favours Remedies for Rents.

(*c*) Huſband poſſeſſed of a Term in Right of his Wife, makes a Leaſe for half the Term, and dies, his Executors ſhall have Debt for the Rent, and yet the Feme ſhall have the Reverſion. Co. Lit. 46.—Rent granted for Life, Tenant dies, Debt will lie, becauſe there is no other Remedy. Dyer 227.

* Page 18 Cro.Eliz.268. adjudged. Bulſt. 151. ſaid to be adjudged. * If a Man grants an Annuity for Years, an Action of Debt may be brought for the Arrears during the Years, for being a Grant for Years, it is by the Deed as a Contract.

Yelv. 208. and Bulſt. 151. *Lucas* and *Fulwood* S. P. ſeems to be admitted; but the Plaintiff could not recover, becauſe his Plaint was of Debt, and his Count of Annuity; but *vide* Dyer 140. Cro. Eliz. 3. 9 H. 7. 17. cited in 7 Co. Lillington's Caſe, 45 E. 3. 8.

4 Co. 49. a. If the Father grants a Rent-charge to the Son in Fee, and the Rent being Arrear, the Father dies, and the Land deſcends to the Son, by which the Rent is extinct, the Son may charge the Executors of the Father in an Action of Debt for the Arrearages incurred in the Life of the Father; for though no Action lies for them, as for the Arrearages of an Annuity; for though both the Annuity and Rent are determined, yet the original Election remains as to the Arrears.

(D) Againſt whom it may be brought.

10 H. 6. 11. 26 E. 3. 64. Rol.Abr.592. IF a Feme, Leſſee for Life, takes Huſband, and dies, Debt lies againſt the Huſband for (*d*) Rent iſſuing out of the Land, incurred during Coverture; for he took the Profits out of which the Rent iſſued.

(*d*) Alſo it lies againſt him or his Executors, for the Arrears of a Rent-charge incurred during ſuch Time as he took the Profits. 4 Co. 49. *b*.

3 Co. 22. *Walker*'s Caſe. If Leſſee for Years aſſigns all his Intereſt to another, yet the Leſſor may have Debt againſt the (*e*) Leſſee for the Arrears incurred after the Aſſignment,

ment, for the Privity of Contract remains, and the Leſſee by his own Act ſhall not prevent the Remedy of the Leſſor againſt him upon his Contract. Moor 351. pl. 472. S. C. adjudged. Cro. Eliz. 556.

S. C. cited, 715. S. C. cited, and denied by three Judges to be Law. Sid. 266. S. C. cited, and agreed to be Law, though ſeveral of the Caſes there put, as there reported, were denied to be Law. Latch 260. S. C. cited, and ſaid it was not adjudged, as appears by the Book of Entries. *Vide* Cook 122. Poph. 120. ſeems to be the S. C. cited, *& vide* Dalſ. 16. (*a*) Or Aſſignee, at his Election. 4 Leon. 17. 3 Co. 24. ——But if he once accepts the Rent from the Aſſignee, he ſhall not after charge the Leſſee for Rent due after the Aſſignment. 3 Co. 24. b. *Marrow* and *Turpin*. Moor 600. pl. 829. 2 And. 133. *& vide* Sid. 402.——For in the Acceptance of the Rent from the Aſſignee, Notice of the Aſſignment is implied. *March* and *Brace*, Cro. Jac. 334. adjudged. 2 Bulſt. 152. adjudged, *& vide* Rol. Rep. 366.——But though he refuſes to accept the Aſſignee as his Tenant, yet he may after charge him in an Action for the Rent, if he pleaſes. *Dewereux* and *Barlow*, 2 Saund. 181.——Where *Covenant*, againſt the Leſſee, after Aſſignment of his Term, brought upon an expreſs Covenant for Non-payment of Rent, and held good, and that the Accepting the Aſſignee as Tenant did not hurt. *Edwards* and *Morgan*. 3 Lev. 233. Carth. 178.

But if after ſuch Aſſignment of the Leſſee the Leſſor grants over his Reverſion to another, the Grantee ſhall not have Debt againſt the Leſſee, for the Privity of Contract holds only between the Leſſor and Leſſee. 3 Co. 22. b. *per Cur'*. Poph. 55. S. P. adjudged. 3 Lev. 233.

Brownl. S. C. Cro. Eliz. 556. cited. Moor 351. cited; but *vide* Cro. Eliz. 636. and

If *A.* leaſes three Acres to *B.* rendring Rent, and *B.* aſſigns all his Eſtate in one Acre, and after *A.* grants the Reverſion of three Acres to C. he may have Debt againſt (*b*) *B.* for the whole Rent, for the intire Eſtate remaining in Part, the intire Privity and Action for the Whole remains againſt the firſt Leſſee. Cro. Eliz. 633. 3 Co. 24. a. S. C. cited, and *vide* Lit. Rep. 53. (*b*) Cro. Jac. 411. ſaid the Leſſor in ſuch Caſe may have a joint Action againſt the Leſſee and Aſſignee.—For Arrears of a Rent-charge for Life, after Determination thereof, Debt lies not againſt him alone that received the Profits of Part of the Land charged, but againſt all that received the Profits of any Part thereof. Sand. 284.

* If Leſſee for Years aſſigns his whole Term in the Moiety of the Land, the Leſſor may have an Action againſt the Aſſignee for the Moiety of the Rent; for the Aſſignee having the intire Eſtate in the Moiety of the Land, he hath a ſufficient Privity of Eſtate to be charged by the Leſſor, if he pleaſes, with the Moiety of the Rent. * Page 19 2 Lev. 231. *Gamon* and *Vernon*, adjudged.

If a Prebend leaſes for Years rendring Rent, and this is confirmed by Dean and Chapter, and the Leſſee dies, and his (*c*) Executor (*d*) aſſigns over the Term, and after the Prebend reſigns, and a new Prebend is made, he ſhall not have Debt againſt the Executor of the firſt Leſſee for Rent due after the Aſſignment; for the Succeſſor was no Party to the Contract, but privy in Law only, (*e*) and by the Aſſignment of the Term, the Cauſe of the Charge is removed. Adjudged between (*f*) *Overton* and *Syddal*, *Cro. Eliz.* 555. (*c*) So where the Adminiſtrator of the Leſſee aſſigns, *Marrow* and *Turpin*, Cro. Eliz. 715. adjudged. Moor 600. pl. 829. adjudged *per totam Curiam*. 2 And. 133. adjudged. Latch 260. cited, and ſaid no Judgment was ever given, as appears by the Roll; but 2. *Vent.* 210. cited, and ſaid that Acceptance of Rent from the Aſſignee was pleaded, *&c.* 3 Mod. 326. cited, and ſaid the late Reſolutions had been contrary. 4 Mod. 76. cited and denied to be Law; for the Executor ſhall be ſtill liable to the Contracts of his Teſtator, ſo long as he hath any Aſſets to ſatisfy them. (*d*) By the Report of the Caſe in *Popham* the Leſſee aſſigned. (*e*) That the Executor is liable notwithſtanding *Ironmonger* and *Naſam*, Noy 97. Latch 261. 2 Vent. 209. cited to have been ſo reſolved. *Helyar* and *Caſhord*, Sid. 240, 266. adjudged. Lev. 127. adjudged. But by this Report the Action was brought againſt an Adminiſtrator. (*f*) Poph. 120. S. C. and the Court divided. Goulſ. 120. adjudged by three Judges *cont' Popham*, who held the contrary, and that the Succeſſor was privy to the Contract of the Predeceſſor. 3 Co. 24. a. S. C. cited to have been adjudged by *Popham* C. J. and all the Court, whether the Aſſignment were by the Leſſee himſelf or his Executor; yet *vide* the Report of the Caſe in the Books before. Sid. 266. S. C. cited from 3 Co. 24. and denied to be Law, as there cited. Lev. 127. S. C. cited to have been adjudged, becauſe the Privity of Contract did not go to the Succeſſor more than to the Heir, and the Heir of the Leſſor ſhall not have Debt againſt the Leſſee after Aſſignment, becauſe the Privity of Eſtate only deſcended to him. Latch 262. S. C. cited, and ſaid that the Leſſor being a ſole Corporation, the Privity of Contract was determined.

Lev. 215. *Keighly* and *Bulkley*, adjudged by *Keeling* and *Windham*, *cont' Twiſden*. Sid. 338. S. C. Raym. 162. 2 Keb. 260. S. C. Salk. 81. pl. 2. Ld. Raym. 368. S. C. cited, and denied to be Law.

If the Aſſignee of a Term aſſigns to another, yet he may be charged in Debt for Rent growing due after, before Notice given to the Reverſioner; but 2.

Carth. 177. *Towey* and *Pitcher*, held by *Pollexfen* and *Rokeby* in *C. B. cont'*. *Powel* and *Ventris*, that the Defendant ought in his Plea to have ſet forth Notice given to the Plaintiff of the Aſſignment; and *Ventris* dying the Judgment was accordingly; but upon a Writ of Error in *B. R.* the Judgment was reverſed by three Judges. 3 Lev. 295. S. C. Show. 340. S. C. 4 Mod. 71. S. C. 2 Vent. 228, 234. S. C. Salk. 81. pl. 2. 12 Mod. 23. S. C. Ld. Raym. 99, 320, 322, 368, 554. 2 Ld. Raym. 1551. 2 Vern. 241. Prec. Chan. 156. Stra. 405. 2 Stra. 1221. Danv. 485. pl. 9. Holt 73. Swinb. 390.

For where Covenant was brought for Rent againſt the Aſſignee of the Executrix of the Leſſee, who pleaded that before any Rent Arrear he aſſigned over to *J. S.* and on Demurrer it was held that the Privity was deſtroyed, and the Aſſignment compleat without Notice, and the Defendant diſcharged of all the Rent accrued after the Aſſignment.

* Page 20. * (E) **Where Debt is the proper Action, and not Covenant, Caſe,** &c. Vide (A.) 13, &c.

4 Co. 92. b. *Slade's* Caſe. Vaugh. 101.

ACTIONS of Debt are founded on Contract, in which the Plaintiff ſets forth his Demand in Certainty, and inſiſts on being reſtored to it *in Numero*.

The Inconveniency of the Defendant's being allowed to wage his Law in this Action occaſioned the Subſtituting of other Actions in the Room of it; ſuch as all Actions on the Caſe, which are properly founded on Injuries and Fraud, for in theſe the Defendant could not wage his Law, becauſe he could not make Oath of paying that which by Reaſon of it's Uncertainty he could not know; and which could never be before it was aſcertained by the Jury.

4 Co. 92. b. *Slade's* Caſe. Moor 433. S. C. Yelv. 20. S. C. *Vide* the *Regiſter* 95, 139.

Hence if *A.* declares that he ſold Corn, *&c.* to *B.* and that *B.* at or before ſuch a Day promiſed to pay ſo much Money, *A.* may at his (*a*) Election bring Debt or *Aſſumpſit* for the Injury done him by the Violation of the Contract.

(*a*) If I deliver 20*l.* to *A.* to deliver to *B.* and he does not deliver it, I may have an Action of Account, Debt, or perhaps Caſe, againſt him. Keilw. 69. a. 77. b. Cro. Jac. 687. Dyer 21. Hut. 12.*.———*A.* delivers Oxen to *B.* to ſell for as much as he can get, and he ſells them for ſo much, *A.* may have Debt againſt *B.* for the Money. Rol. Rep. adjudged.———*A.* delivers Money to *B.* to re-deliver, Debt lies for it. Palmer 364†.———The Defendant by Bill ſealed acknowledged that he had received 7*l.* of the Plaintiff *ad emendendum* a Pair of Bellows. Cro. Eliz. 644. adjudged, that Account, or Debt lay. *Vide* 3 Leon. 38. Rol. Abr. 597. Dan. 26. 2 Ld. Raym. 814. 2 Salk. 658 pl. 3. 7 Mod. 87.

* It ſhould ſeem that Caſe would lie, on his Promiſe to deliver. † Caſe would be better becauſe the Defendant could not wage his Law.—Tho', indeed, now the Law Wager ſeems to be obſolete.

Palm. 364.

A. pays Money to *B.* as a Fine, upon *B.*'s Promiſe to make a Leaſe of Land, and before the Leaſe is made *B.* is evicted, Debt lies not for the Money, for it was not paid to be received back; but Caſe lies for Non-performance of the Bargain, in which he ſhall recover in Damages not only the Money given for the Fine, but the Damage by Breach of the Contract.

Styl. 31, 133. S. P. (*b*) 2 Jon. 184. Like Point adjudged, though the Certainty of the Debt did not appear by the Deed.

If *A.* covenants with *B.* to pay him (*b*) ſo much Money as he ſhall expend in the Repairing and Victualling a Ship for him, and *B.* expends 300*l.* accordingly, an Action of Debt or Covenant lies for the Money expended.

If it be recited by Deed, that there is a Suit depending between the Vicar of *S.* and *A.* concerning a *Modus decimandi*, which concerns all the Pariſhioners of *S.* and *B.* a Pariſhioner, by the ſaid Deed agrees and promiſes *A.* to pay his proportionable Part of the Charges of the Suit; an Action of Debt or Covenant lies upon this Deed; for by an Averment of what was expended in the Suit, that which was at firſt uncertain may be reduced to a Certainty. 3 Lev. 429. *Sanders* and *Mark* adjudged, after a long Debate.

If *A.* retains *B.* to embroider a Sattin Gown of a Maid Servant of the Daughter of *A.* taking for the ſame 40 *s.* *B.* may have Debt againſt *A.* for the Money; for the Embroidering the Gown of another at the Requeſt of *A.* is a ſufficient Conſideration to charge *A.* and it is at the Election of *B.* to bring Debt, or an *Aſſumpſit*. * Cro. Eliz. 880.

* There may be one Advantage in bringing *Debt*, (where it will lie,) inſtead of *Aſſumpſit*, which is, if Judgment goes by Default, it is final, in the firſt Inſtance, and the Delay and Expence of a Writ of Inquiry is thereby ſaved.

*(F) Of the Manner of bringing the Action, and where it muſt be brought in the Debet and Detinet. * Page 21

IF the Action be brought for (*a*) Money, it muſt be in the *Debet* and *Detinet*; but if (*b*) Goods or Chattels, it muſt be in the *Detinet* only. (*a*) 50 E. 3. 16. b. Rol. Abr. 604.

S. P. (*b*) 3 Leon. 260. 4 Leon. 46. S. P.——Winch. 75. It was brought for Money in the *Debet* and *Detinet*, and for two Shirts in the *Detinet* only †.

† *Sed qu.* If the Declaration was good, as it ſeems to be two diſtinct Species of Action, and requires two different Pleas?

So if brought for Foreign Money (*c*) not made current, for then it is as Bullion. Palm. 407. Latch 77, 84. Jon. 69.

S. C. adjudged, where by *Dod.* the Action might be brought in the *Debet* and *Detinet*, or in the *Detinet* only; but this muſt be intended where ſo much *Engliſh* Money, being the Value of the Foreign, is demanded. *Raſtal* and *Draper*, Cro. Jac. 88. Yelv. 80. Brownl. 90. Noy 13. *& vide* Leon. 41. Yelv. 135. Brownl. 102.

(*c*) But if made current by Proclamation, the Action for it may be brought in the *Debet* and *Detinet*. Noy. 13. Latch 77, 84. Palm. 407.—Debt in the *Debet* and *Detinet* for 107 *l.* 10 *s.* where the Declaration was upon a ſpecial Wager for 100 Guineas, which the Plaintiff averred were worth 107 *l.* 10 *s.* and it was objected that it ſhould have been in the *Detinet* only, for 100 Guineas in Specie, but held well enough as to this Point, tho' reverſed for another Fault. *St. Leger* and *Pope*, Carth. 322. 2 Mod. 4. 4 Mod. 406. Lutw. 484. Salk. 344. S. C. pl. 1. 10 Mod. 336. 12 Mod. 81. S. C.——

If a Man ſells certain Cloths for 66 *l.* *Flemiſh* Money current at *Middleburgh*, to be paid upon Requeſt, he may bring an Action of Debt for 39 *l.* 12 *s.* ſetting forth the ſpecial Matter, and averring that the 66 *l.* *Flemiſh* *tempore venditionis*, *&c.* amounted to 39 *l.* 12 *s.* *monetæ Angliæ*, and that the Defendant has not paid, *&c.* and if he values the Foreign Money otherwiſe than in Truth it is, the Defendant may plead in Abatement, and ſo help himſelf. Adjudged after a Verdict for the Plaintiff, and ſaid that it being found that he owed what is demanded, there ought to be no (*d*) farther Inquiry of the Value. Cro. Jac. 88. *Raſtal* and *Draper*, adjudged. Yelv. 80. Brownl. 90. Moor 775. S. C. Leon. 41.

If Cro. Eliz. 536 S. P. adjudged

& vide Yelv. 135. Brownl. 102. (*d*) But in Debt againſt an Executor for 47 *l.* 8 *s.* 8 *d.* *monetæ Flandriæ attingent. ad valentiam* 40 *l.* *Engliſh*, the Defendant pleaded *Plene adminiſtravit*, and it was found againſt him, and Judgment given *quod recuperet Debitum*; but upon a Writ of Error between *Bagſhaw* and *Plain*, Cro. Eliz.

Moor 506. Rol. Abr. 602, 603. 20 H. 6, 5. 5 Co. 32. b. S. P. laid down as a Rule.

If an Executor brings Debt for any Thing in Right of his Teſtator, it muſt be in the *Detinet* only.

Rol. Abr. 602. Lane 79. S. C. adjudged.

As if *A.* be in Execution upon a Judgment for *B.* and after *B.* dies, and after *A.* brings an *Audita Querela* againſt *C.* the Executor of *B.* and has a *Scire Facias*, and thereupon puts in Bail by Recognizance in Chancery, according to the Statute of 11 *H.* 6. c. 10. and after upon this *Audita Querela* Judgment is given againſt *A.* and afterwards a *Scire Facias* iſſues againſt the Bail, and after Judgment the Bail is taken in Execution upon the Recognizance, and the Sheriff ſuffers him to eſcape; upon which Eſcape the Executor brings an Action of Debt, (*a*) this Action ought to be brought in the *Detinet* only, and not in the *Debet* and *Detinet*, for this * Recognizance is in the Nature of the firſt Debt, this being in a legal Courſe.

* Page 32.

(*a*) So if one as Executor obtains Judgment in Debt, and takes the Defendant in Execution, and the Sheriff ſuffers him to eſcape, &c. for the firſt Action being in the *Detinet*, and that for the Eſcape being founded upon the ſame Record, it ought to purſue it. Cro. Eliz. 326. Cro. Jac. 545, 685. Hob. 264. 2 Rol. Rep. 132. Styl. 232. Hut. 79. Carth. 49. S. P. adjudged, in which laſt Book it was endeavoured to diſtinguiſh it from the other Caſes, being the Plaintiff declared generally, and not as Executor.

Rol. Abr. 603. Lane 80. S. P.

So if an Executor recovers in an Action of Debt upon a Contract, and afterwards brings Debt upon the Judgment, it muſt be in the *Detinet*.

20 H. 6. 5. b. Rol. Abr. 602. S. C.

If an Executor brings Debt upon an Obligation made to the Teſtator, where the Day of Payment incurred after the Death of the Teſtator, yet the Writ ſhall be in the *Detinet* only, for he brings the Action as Executor.

20 H. 6. 6. b. Rol. Abr. 602.

So if a Man binds himſelf to the Teſtator to pay him 100 *l.* when ſuch a Thing ſhall happen; if it happens after the Death of the Teſtator, yet the Writ of Debt by the Executor ſhall be in the *Detinet* only.

11 H. 6. 36. Rol. Abr. 602. S. C.

If a Rent be granted to another for Years, the Executor of the Grantee ſhall have Debt for the Arrearages of this Rent incurred after the Death of the Teſtator in the *Detinet* only, for he had it as Executor.

Rol. Abr. 603. *Spark* and *Spark*. Cro. Eliz. and Noy 32. S. C. adjudged. Cro. Car. 225. Lev. 250. 2 Keb. 407. Sid. 379. S. P. adjudged.

So if Leſſee for 20 Years leaſes for 10 Years rendring Rent, and dies, his Executor or Adminiſtrator ſhall have Debt for the Rent incurred after the Death of the Teſtator (*b*) in the *Detinet* only.

(*b*) But in the Caſe of *Treble* and *King*, 2 Jon. 169. it is adjudged it lay in the *Debet* and *Detinet*, and a Diverſity taken between Things in Action and Chattels in Poſſeſſion; for as to Things in Action the Writ muſt always be in the *Detinet*; as for the Arrears of an Account, &c. and it ſhall not be Aſſets till recovered; but in this Caſe, the Reverſion of the Term being in the Executor immediately by the Death of the Teſtator, it is Aſſets, for the whole Value, and the ſhewing he is Executor, is only to intitle him to the Term to which the Rent is incident.——And where being brought in the *Debet* and *Detinet* it is aided after Verdict, by 16 & 17 Car. 2. c. 8. *vid.* Lev. 250.

Cro. Eliz. 326. Cro. Jac. 545. 5 Co. 31. a. But for this *vide* Hob. 88, 184, 272.

If in an Account an Executor recovers a Debt due to his Teſtator, in Debt for the Arrearages thereupon, the Writ ſhall be in the *Detinet* only; for tho' the Action is converted into a Debt by the Account, yet it is the ſame Thing which was received in the Life of the Teſtator.

Noy 19. 2 Lev. 111. 2 Jon. 47.

But

Eliz. 536. it was reverſed, becauſe it ſhould have been *quod recuperet* the 47 *l.* 8 *s.* 8 *d. Flemiſh*, and a Writ to have been awarded to inquire the Value. *Moor* 704. pl. 980. reverſed, becauſe the Jury had not inquired of the Value of the *Flemiſh* Money, and the Affirmation of the Plaintiff that it amounted to 40 *l.* was not a ſufficient Warrant for the Court to give Judgment upon.

But if an Executor takes an Obligation for a Debt due to his Teſtator by Contract, in Debt upon this Obligation the Writ ſhall be in the *Debet* and *Detinet*. 20 H. 6. 4: b 5. b. Rol. Abr. 602. S. C.

So if an Executor recovers in Treſpaſs for Goods taken out of his Poſſeſſion, in Debt for the Damages recovered, the Writ ſhall be in the *Debet* and *Detinet*, for he need not name himſelf Executor. 20 H. 6. 5. b. Rol. Abr. 602. S. C. Lane 80. S. C. cited.

So if the Executor ſells the Goods of the Teſtator for a certain Sum, he ſhall have Debt for this in the *Debet* and *Detinet*. Rol. Abr. 602. Lane 80.

If an Executor, having Lands by an Extent upon a Statute made to the Teſtator, and naming himſelf Executor, by Deed leaſes them for three Years, rendering Rent, &c. If an Action of Debt is after brought by him for this Rent, it muſt be in the *Debet* and *Detinet*, becauſe it is founded upon his own Contract. Cro. Jac. 685. Winch 86. S. C. Brownl. 205. Mod. 185. S. P.

So an Executor, being Leſſee for Years of a Rectory in the Right of the Teſtator, may have Debt upon 2 & 3 *E.* 6. *c.* 13. for not ſetting out Tithes in the *Debet* and *Detinet*, becauſe founded upon a Wrong in his own Time, and by the Statute it is given to the Party grieved. Cro. Jac. 545. cited to have been adjudged.

Alſo Debt againſt an Executor ſhall be in the *Detinet* only, for he is chargeable no farther than he has Aſſets. 11 H. 4. 16. Rol. Abr. 603.

* But after (*a*) Judgment againſt an Executor, one may in a new Action of Debt in the *Debet* and *Detinet* ſuggeſt a *Devaſtavit* by the Executor, and (*b*) thereby charge him *de bonis propriis*. * Page 23 Sid. 397. *vid.* Tit. *Executors.*

(*a*) But not without a Judgment, Cart. 2.—And therefore it lies not upon a Bond ſuggeſting ſuch a *Devaſtavit*, for it is hard upon ſuch a Surmiſe to charge an Executor in his own Right. Vent, 321. adjudged, and the Court ſaid they would not extend theſe Actions farther than they had been. 2 Lev. 209. adjudged. Lev. 147. and for this *vid.* Rol. Abr. 603. 5 Co. 32. Sand. 216. (*b*) Where the Defendant has been held to ſpecial Bail in ſuch Action. Vent, 355. Sid. 63.

So if the Executor obliges himſelf to pay a Debt due by Contract by the Teſtator, in Debt upon this Obligation the Writ may be in the *Debet* and *Detinet*, becauſe the Obligation made it his own Debt. 11 H. 6. 8. 17. b. Rol. Abr. 603 S. C.

In an Action of Debt againſt an Executor for Rent, incurred in the Life of the Teſtator, the Writ ſhall be in the (*c*) *Detinet* only. 11 H. 6. 36. Rol. Abr. 603.

(*c*) If Debt be brought againſt an Adminiſtrator in the *Debet* and *Detinet* for Rent due before his Time, where it ſhould only be in the *Detinet*, this is aided after Verdict, by 16 & 17 Car. 2. c. 8. *vide* Sid. 379. *Potter*'s Caſe, and Tit. *Error**.

* Therefore if the Defendant would take Advantage of it, he ſhould demur ſpecially.——In ſuch Caſe Plaintiff may amend, on Payment of Coſts, and that by a Judge's Order.

But if an Action of Debt be brought againſt an Executor for the Arrearages of a Rent, reſerved upon a Leaſe for Years, and (*d*) incurred after the Death of the Teſtator, the Writ (*e*) ſhall be in the *Debet* and *Detinet*, (*f*) becauſe the Executor is charged of his own Poſſeſſion. Rol. Abr. 603. Cro. Eliz. 711 Moor 566.

If Brownl. 56. Cro. Jac. 411, 546. Bulſt. 23. 2 Brownl. 206. Cro. Car. 225. All. 34. Mod. 185. 2 Brownl. 202. Palm. 116. S. P. (*d*) Where Part incurred in the Time of the Teſtator, and Part after his Death, his Executor may be charged in the *Detinet* for the whole. All. 76 Styl. 118. (*e*) He may be charged in the *Detinet* only, but then he ſhall anſwer only out of the Teſtator's Eſtate. *Royſton* and *Cordary*. All. 42. adjudged, and ſaid that it was never doubted. Styl. 79. adjudged, & *vide* Styl. 52. Lev. 127 †. (*f*) For tho' they have the Land as Executors, yet nothing ſhall be employed to the Execution of the Will but ſuch Profits only which are above that which is to make the Rent; and therefore ſo much of the Profits as is to make or anſwer the Rent they ſhall take to their own Uſe, and they ſhall be charged for it in the *Debet* and *Detinet*. Poph. 120. *per Popham*. 5 Co. 31. Cro. Eliz. 712.——And if the Land be not worth more than the Rent, it is a good Plea to ſuch Action in the *Debet* and *Detinet*; for in ſuch Caſe he is to be charged in the *Detinet* only. Vent.

5 Co. 36. a. *Lloyd* and *Walcot*. 3 Leon. 206. S. C adjudged. Allen 73. S.P.

If an Action of Debt is brought againſt Baron and Feme, upon an Obligation entred into by the Feme before Marriage, it ſhall be in the *Debet* and *Detinet*; for by the Marriage all the perſonal Goods and Power of diſpoſing of the Real are by Law given the Huſband, which he has to his own Uſe, and not as Executors, who have them only to the Uſe of another.

5 Co. 36. a. (*a*) And for another Reaſon, becauſe

So if an Action is brought upon a Bond againſt the Heir of the Obligor, it ſhall be in the *Debet* and *Detinet*, (*a*) becauſe he hath the Aſſets in his own Right.

he is bound by ſpecial Words in the Obligation. Cro. Eliz. 712. & *vide* Cro. Eliz. 350. 2 Leon. 11. 2 Brownl. 204, 205.——But if in the *Detinet* only, it is good after Verdict, by 16 & 17 Car. 2. c. 8. *Comber* and *Watton*, Lev. 224. adjudged. Sid. 342, 375, 379.

* Page 24 * (G) Of the Extinguiſhment of the Debt, and pleading in Bar thereof.

Vide Head of *Pleas* and *Pleadings*. 13 H. 4. 1. Rol. Abr. 604. Bur. Rep. 9.

IF a Man accepts an (*b*) Obligation for a Debt due by ſimple Contract, this extinguiſhes the Contract, but the Acceptance of an Obligation for a Debt due by another Obligation is (*c*) no Bar of the firſt Obligation.

(*b*) This muſt be intended from the Debtor; for if a Stranger gives Bond for ſuch Debt, it is otherwiſe. 2 Leon. 110. adjudged *.——So if upon the making the Contract a Stranger gives Bond for it, or being preſent promiſes to give Bond for it, and after does ſo, the Debt by Contract is extinguiſhed, the Obligation being made upon or purſuant to the Contract. 2 Leon. 110. *per Cur'*;——So if a Man accepts a Bond for a Legacy, he cannot after ſue for his Legacy in the Spiritual Court, for by the Deed the Legacy is extinct, and it is become a mere Debt at Common Law. Yelv. 38. (*c*) For one Deed cannot determine the Duty upon another. Cro. Eliz. 304, 727. for this *vide* 2 Dan. 116.—So if a Statute is accepted for it. Rol. Abr. 470.——Otherwiſe if a Judgment is given or obtained upon the Obligation. 6 Co. 44, 45.

* So a negotiable Note, or Bill of Exchange, has been held in *B. R.* an Extinguiſhment of a ſimple Contract Debt, the Defendant being liable to pay the Money to a third Perſon.—*Richardſon* and *Rickman* M. 1775.

Vide Hard. 332. of Pleas in Bar, Head of *Pleas* and *Pleadings*. Hob. 218. 2 Inſt. 651.

In Debt upon an Obligation the Defendant cannot plead *Nil debet*, but muſt deny the Deed by pleading *Non eſt Factum*, for the Seal of the Party continuing, it muſt be diſſolved *eo Ligamine quo Ligatur*.

But if the Debt be due by ſimple Contract, then he may plead *Nil debet*, for it does not appear that there is any Debt continuing.

In

Vent. 171. *per cur'*; and for this *vid.* Palm. 118. Sid. 266. Mod. 185. 8 Mod. 288, 356. 10 Mod. 12. 12 Mod. 7.‡———But where they are to be charged upon a Leaſe made to the Teſtator, and have not the Profits of the Leaſe to anſwer it, they ought to be charged in the *Detinet* only; as where Debt is brought againſt an Executor of a Leſſee for Rent incurred after Aſſignment of the Term. Poph. 120. Sid. 266. Lev. 127. 2 Vent. 209. 3 Mod. 327 ‖. So if brought againſt him after Waiver of the Term. Lev. 127. & *vide* Allen 43.

† But where Part incurs in the Life of Teſtator, and Part after, the Plaintiff may bring two Actions, for the firſt Part in the *Detinet* only, the other in the *Debet* and *Detinet*, and need not charge him as Executor, in the laſt Caſe, by which Means he may obtain a Judgment *de bonis Propriis* ‡ Yet ſee the preceding Note. ‖ But ſee *ante* 19. n.

In Debt for Rent, if it be by Deed, the proper Plea is *Non eſt factum*; but if it be without Deed, the Defendant may plead *Non dimiſit*, Nothing in Arrear, or That he never (*c*) entred; alſo by the better Opinion of the Books, if the Rent be due by Indenture, the Defendant may plead *Nil debet*; for an Indenture does not acknowledge a Debt like an Obligation, ſince the Debt accrued by ſubſequent Enjoyment.

Hard. 332.
(*c*) But if the Leaſe be by Indenture, Debt lies, tho' he never entered.

2 H. 8. 14. Rol. Abr. 605. 2 Ld. Raym. 1477. 2 Stra. 763.—And therefore in a Declaration in Debt for Rent againſt ſuch Leſſee, it need not be ſhewn that he entred, for the Contract is the Ground of the Action. 4 Leon. 18. Hetl. 54. Vent. 41.——And the Occupation not material; otherwiſe of a Leaſe at Will. Dyer 14. a. Hetl. 54. Vent. 41, 108. Salk. 209. pl. 1. S. P. for it muſt appear to the Court when he entred, and how long he occupied; *ſecus* of a Leſſee for Years. Ld. Raym. 170.——Where upon a Leaſe from Year to Year *quamdiu Partibus placuerit*, no Entry or Continuance of the Poſſeſſion was ſhewn as to the ſecond Year, and yet after Verdict it was intended he was in Poſſeſſion for all the Time for which the Rent is found due. 3 Salk. 136. pl. 3. Mod. 3. Sid. 423. & *vide* Plow. 423. Palm. 117. 2 Rol. Rep. 131. Keilw. 65. 2 Danv. Abr. 508. pl. 6. 10 Mod. 69, 70. 12 Mod. 7. Ld. Raym. 746. 2 Stra. 776.

In Debt for the Arrears of an (*d*) Annuity granted for Life, *Nil debet* is no good Plea, for the Action is meerly founded upon the Deed, for without it no Action can be maintained, and tho' by the Death of the Grantee the Nature of the Action is changed, the Annuity being determined; yet this proves not but that the Action is founded upon the Deed.

Keilw. 147.
(*d*) But in Debt upon the Grant of a Rent, *Nil detinet* is a good Plea,

becauſe the Plaintiff hath other Remedy to levy it, *viz.* by Diſtreſs; otherwiſe upon the Grant of a bare Annuity, for there being no Remedy by Diſtreſs, the Grant muſt be avoided by Matter of as high a Nature, *viz.* by Acquittance. Hard. 333.

But in Debt for the Arrears of a Rent-Charge, by Will deviſed to the Plaintiff's Wife for Life, againſt the (*e*) Adminiſtrator of the Occupier of the Land, *Nil detinet* is a good Plea, for a Will is no Deed, nor wants any Delivery; adjudged, and ſaid the Action was not ſo much grounded upon the Will itſelf as upon the Statute, by which Men are enabled by Will to diſpoſe of their Lands and Rents iſſuing out thereof.

Hard. 322. *Wilſon*'s Caſe.
(*e*) That where the Teſtator could not plead *Nil debet*, his Executor ſhall not plead *Non detinet*.
2 Mod. 266.

* In Debt upon 2 & 3 *E.* 6. *c.* 13. for not ſetting forth Tithes, (*f*) Not guilty, or (*g*) *Nil debet* are good Iſſues.

* Page 25
2 Inſt. 651. Cro. Eliz. 621. S. P. adjudged.
(*f*) Where the Action is founded upon a Penal Statute, Not guilty is a good Plea. Cro. Eliz. 257. Goulſ. 39. Noy 56. 2 Inſt. 651. Moor 914. pl. 1293.
(*g*) Hob. 218. S. P. adjudged*.

* For by being guilty of a Breach of the Law, he is guilty of a Tort; and if he is not guilty of the Tort, he does not owe the Money; and conſequently the Plaintiff has not any Right to his Action.

In Debt upon a Contract, the Defendant cannot plead the Contract was for a leſs Sum, or otherways, than the Plaintiff has declared, and traverſe the Contract in the Declaration laid, but may (*b*) wage his Law.

Moor 49.
(*b*) Or plead *Nil debet* †.
Keilw. 39.

Cro. Eliz. 880. Palm. 223. The Contract being but the Conveyance to the Action is not traverſable. Co. Lit. 295. But for this *vide* Head of *Pleas* and *Pleadings*, and 11 Mod. 144. pl. 1. 258. pl. 13. 2 Ld. Raym. 1056, 1057.

† The Plea of *Nil debet*, in ſuch Caſe, puts the whole Matter in Iſſue.

Deodand.

3 Inſt. 57, 58. 5 Co. 110. *H. P. C.* 34. Pult. 125. Crom. 31. a. (*a*) And was poſſibly taken from the Law of *Moſes*, which requires that the Beaſt that murders ſhould be ſlain. 2 Exod. 28.

A Deodand is that Inſtrument which occaſions the Death of a Man, and is forfeited to the King in order to be diſpoſed of in pious Uſes by the King's Almoner; this Forfeiture of whatever procures the Death of a Man without the Default of another was (*a*) introduced to increaſe the Terror and Abhorrence of Murder, ſo that nothing that occaſioned it ſhould ſeem to go unpuniſhed; alſo that Weapon or Inſtrument, whereby one Man kills another, is called a Deodand.

Hawk. P. C. 66, 67.

To underſtand what Things are forfeited as Deodands, we muſt obſerve that it is laid down as a Rule, that *Omnia quæ movent ad Mortem ſunt Deodanda*, and therefore that wherever the Thing which is the Occaſion of a Man's Death is in Motion at the Time, not only that Part thereof which immediately wounds him, but all Things which move together with it, and help to make the Wound more dangerous, are forfeited alſo.

Salk 220. The Lord of the Manor of *Hamſtead's* Caſe, by *Pollexfen* and *Gregory* on the HomeCircuit.

As where a Cart meeting a Waggon loaded upon the Road, and the Cart endeavouring to paſs by the Waggon, was driven upon a high Bank and overturned, and threw the Perſon that was in the Cart juſt before the Wheels of the Waggon, and the Waggon run over the Man and killed him, it was held that the Cart, Waggon, Loading, and all the Horſes were Deodands, becauſe they all moved *ad Mortem*.

3 Inſt. 58. S. P. C. 20. Hawk. P. C. 66.

But if a Man, riding on the Shafts of a Waggon, fall to the Ground and break his Neck, the Horſes and Waggon only are forfeited, but not the Loading, becauſe it no Way contributed to his Death.

Hawk. P. C. 66.

So where a Thing not in Motion cauſes a Man's Death, that Part thereof only which is the immediate Cauſe is forfeited; as where one climbing upon the Wheel of a Cart while it ſtands ſtill, falls from it and

* Page 26

* dies of the Fall, the Wheel only is forfeited, but if he had been killed by a Bruiſe from one of the Wheels being in Motion, the Loading alſo would have been forfeited, becauſe the Weight thereof made the Hurt the greater.

Cro. Jac. 483. 2 Rol. Rep. 23. Poph. 136. (*b*) *Secus* if the Horſe had thrown him. Salk 220.

Alſo if a Man riding on a Horſe over a River is drowned (*b*) through the Violence of the Stream, the Horſe is not forfeited, becauſe not that, but the Waters cauſed his Death.

(*c*) S. P. C. 20. b. Pult 124 b. (*d*) As Sid. 204. Lev. 136. *Raym.* 97. Keb. 723, 744. S. C. where a Man that was ringing a Bell, and the Rope caught him up and daſhed him againſt the Roof of the Belfry, whereby he died. 6 Mod. 187. S. C. cited by *Holt*, and that it was no Deodand——So of the Wheel of a Forge. 6 Mod. 187. See Salk. 220. Hawk. P. C. cap. 26 ſect. 5, 6, 8, &c. Stra. 61.

By the Opinion of our (*c*) antient Authors Things fixed to a Freehold, as the Wheel of a Mill, a Bell hanging in a Steeple, &c. may be Deodands; but by the (*c*) latter Reſolutions they cannot, unleſs they were ſevered before the Accident happened.

Alſo it was (*d*) formerly held, that this Forfeiture did not extend to caſual Deaths ariſing from the Indiſcretion of Children or Infants, within the Age of Diſcretion. for that ſuch Puniſhment of innocent Owners by taking their Goods would anſwer no good End of Juſtice; beſides the Misfortune in this Caſe might ſeem rather owing to the Indiſcretion of the Infant than any Default in the Thing; but this Diſtinction has not been allowed of (*e*) late; for the Law does not ground the Forfeiture on any Default in the Things forfeited, ſince it extends it to Things without Life, to which it is plain, that no Manner of Fault can be imputed.

(*d*) S. P. C. 21. a. 3 Inſt. 58. H. P C. 33. Pult. 125. Dalt. c. 97.

(*e*) 2 Kdb. 719, 806. Hawk. P. C. 66.

This Forfeiture takes Place at Land only, and doth not extend to the Seas that are continually liable to Storms and Tempeſts, and therefore a Ship in Salt Water, whether in the open Sea, or within the Body of a County, from which a Man falls and is drowned, is not forfeited.

3 Inſt. 58. H. P. C. 33. S.P.C. 20. *b.* Hawk. P. C. 66.

But a Ship, by a Fall from which a Man is drowned in the freſh Water, ſhall be forfeited, but not the Merchandize therein, becauſe they no way contribute to his Death.

H. P. C. 33. 3 Inſt. 58. Hawk. P. C. 66.

In all theſe Caſes, if the Party wounded die not of his Wound within a Year and a Day after he received it, there ſhall be nothing forfeited; for the Law does not look on ſuch a Wound as the Cauſe of a Man's Death, after which he lives ſo long; but if the Party die within that Time, the Forfeiture ſhall have relation to the Wound given, and cannot be ſaved by any Alienation or other Act whatſoever in the mean Time.

S.P.C. 21. *b.* H. P. C. 55. Hawk. P. C. 67. Dalt. c. 97. Plow. 260. Keilw. 68.

However nothing can be forfeited as a Deodand, nor ſeized as ſuch, till it be found by the Coroner's Inqueſt to have cauſed a Man's Death; but after ſuch Inquiſition the Sheriff is anſwerable for the Value of it, and may levy the ſame on the Town where it fell; and therefore the Inqueſt ought to find the Value.

5 Co. 110. *b.* Co. Lit. 115. Dalt. c. 97. S P.C. 21. a. Pult. 125. Hawk. P. C. 67.

As this Forfeiture ſeemeth to have been originally founded rather in the Superſtition of an Age of extreme Ignorance, than in the Principles of ſound Reaſon and true Policy; it hath not of late Years met with great Countenance in *Weſtminſter-Hall.* *

Foſt. Cr. Law 266.

* Upon Inquiſitions, the Jury find the Value as ſmall as poſſible.—And in ſome Caſes only the Value of the Identical Thing moving to, or cauſing the Death, as for Example, of the Wheel of a loaded Waggon, *&c.*

* Page 27

Deſcent.

(A) Of Lineal Deſcent, and herein of the Excluſion of the aſcending Line. 27.
(B) Of Collateral Deſcent. 29.
(C) Of the Half-Blood, and the Poſſeſſio Fratris. 30.
(D) Of Deſcents according to Cuſtom. 32.
(E) Where a Perſon ſhall be ſaid to take by Purchaſe, and not by Deſcent. 33.
(F) Of a Deſcent, its Operation to take away an Entry. 36.
(G) In what Caſes the Entry of the Diſſeiſſee may be lawful notwithſtanding a Deſcent. 38.
(H) Whoſe Entry is preſerved notwithſtanding a Deſcent. 41.
(I) How the Entry may be preſerved by continual Claim: And herein, 42.

1. Of the Nature of continual Claim, and the Effects of it. 42.
2. What is neceſſary to a continual Claim to make it effectual. 43.
3. The Time in which it is to be made. 44.

(A) Of Lineal Deſcent, and herein of the Excluſion of the aſcending Line.

ANciently the Lords gave Lands to ſuch Perſons as had behaved themſelves well in the Wars, for their Lives only, and ſometimes they alſo married their Daughters to them, and then they limited the Lands to go not only to the Tenant himſelf, but alſo to the Iſſue of that Marriage; and this firſt brought in the Notion of Succeſſion among the Northern Nations where the Feudal Tenures prevailed.

Gilb. Treat. of Ten. 9.

The Lands therefore in the Elder Times went to the immediate Deſcendants of ſuch Marriage, and originally to none elſe; and in the firſt Place it went to the (*a*) Males as the moſt worthy of Blood, and moſt capable of doing the Service annexed to ſuch Donations; and the Feud was united in the (*b*) Male, becauſe he was obliged to do the Duty in the Wars, and for every Knight's Fee was to go out forty Days with his Lord, ſo that the Feud did not divide among the Males, becauſe the Duty could not be commodiouſly divided; beſides the Males were to keep up the Name and Grandeur of the Family; and therefore the Inheritance was not ſhared nor broken. From hence it came to paſs, that among the Males the Eldeſt was preferred as the moſt worthy,

(*a*) *Vide* Title *Coparceners.*

(*b*) *Vide* Titles *Gavel-Kind* and *Borough Engliſh.*

ſince

* ſince he was ſooneſt able to go to the Wars, and to do the (*a*) Duties of the Tenure. * Page 28

(*a*) Alſo the eldeſt Son was anciently married with the Conſent and Approbation of the Lord, for the Lord always approved the firſt Marriage of his Feuditary, and of his Heir apparent; and if the Feuditary died, his Heir within Age, the Lord had the total Marriage of him; and if he was of full Age, the Lord gave Licence to ſuch Marriage. From hence the Deſcent always ſettled in the eldeſt Line, and the Daughter of the eldeſt Son was preferred before the ſecond or third Brother, and their Male Deſcendants, in order to encourage the beſt Marriages with ſuch eldeſt Son. Spelm. Ram. 29.

When a Feud eſcheated to the Lords for Felony, or want of Heirs, the Lords uſed to reſtore it to the old Family, or grant it out again to another Family *ut Feudum antiquum*, and then the Deſcent was formed in ſuch new Feud, as if it had been *Feudum antiquum*. Hence the lineal Succeſſion or Succeſſion of the Father was totally excluded, becauſe no Caſe could happen where the aſcending Line could be admitted *in Feudis antiquis*; for the Father took before the Son under the firſt Feuditary in every ancient Feudal Donation; and all above ſuch Donation were excluded, ſo that in ſuch Donations the Father could not claim as Heir to his Son; and this Order of Deſcent which excluded the Father was the rather continued, becauſe the Father was Guardian to his Son; and in thoſe barbarous Times they would not truſt the Father with any Profit from the Death of his own Iſſue, and ſo the Father was totally excluded. Co. Lit. 11.b.

But though the Father cannot inherit his Son, yet if a Leaſe for Life be made to the Son, the Remainder to his next of Blood, the Father ſhall take the Remainder by (*b*) Purchaſe under the Words of Deſignation. Co. Lit. 10.b.

(*b*) So if a Man hath Iſſue two Sons, and the Eldeſt dies, leaving a Son, and a Remainder is limited to the next of Blood to the Father, the younger Son ſhall take it, yet the other is the Father's Heir. Co. Lit. 10 b.

Alſo if the Son purchaſes Lands, and dies without Iſſue, and without Brothers and Siſters of the whole Blood, and the Lands deſcend to his Uncle, the Father may be Heir to the Uncle, if the Uncle was in (*c*) actual Poſſeſſion, but he claims it as Heir to his Brother who was laſt (*d*) ſeiſed, according to the Rule *quod ſeiſina facit Stirpem*. Lit. Sect. 3. Co. Lit. 11.b

(*c*) Therefore in Caſe of a Reverſion upon a Leaſe for Life, made of the Lands by the Son, the Father cannot be Heir, becauſe the Son was laſt actually ſeiſed; otherwiſe of a Reverſion upon a Leaſe for Years; for the Poſſeſſion of the Tenant is the Poſſeſſion of the Uncle. Co. Lit. 11. b.—If a Son be enfeoffed with Warranty, and the Uncle enters into the Lands after the Death of the Son, and dies; My Lord *Coke* ſays that the Father cannot take Benefit of ſuch Warranty, becauſe it was never actually poſſeſſed by Voucher, or *Warrantia Chartæ*. Co. Lit. 11. b.—If an Advowſon be granted to the Son and his Heirs, and the Son die without Iſſue, and the Advowſon deſcend to his Uncle, and he dies before he can or does preſent to the Church, the Father ſhall not inherit, for before a Preſentation there is no actual Seiſin of the Advowſon. The ſame Law of a Rent. Co. Lit. 21. b. (*d*) The Evidence of Seiſin, or Defect thereof, ſhews when it will or will not deſcend to the Father from the Uncle,

But here we muſt take Notice, That if after ſuch Deſcent to the Uncle the Father has Iſſue a Son or a Daughter, that Iſſue ſhall enter upon the Uncle, for the Land deſcended originally upon the Uncle, becauſe he was then the next Heir; therefore if an Heir nearer than him ſprings up, by the ſame Rule that he ſucceeded to the Land at firſt, that Heir muſt now take Place and exclude him; and by the ſame Rule, if a Man hath Iſſue a Son and a Daughter, and the Son purchaſes Lands in Fee, and dies without Iſſue, the Daughter ſhall inherit; but if the Father hath afterwards Iſſue a Son, this Son ſhall enter into the Land as Heir to the Brother; and if he hath Iſſue a Daughter and no Son, ſhe ſhall be Coparcener with her Siſter. Co. Lit. 11.b.

* Page 29 * (B) **Of collateral Deſcent.**

Plow. 444 to 449. *Clere* and *Brook.* Co. Lit. 12.

IF a Man purchaſed the *Feudum Novum ut Feudum Antiquum*, and died without Iſſue, it went firſt to the Father's Side, becauſe the Lords in ſuch feudal Donations were preſumed to reſpect the Father's Side, who had been the antient Tenants of the Manor; for where it was given *ut Feudum Antiquum*, it muſt be preſumed to be meant, as if it had been an antient Feud of that Manor, and therefore it went to the Father's Side *in infinitum*, before it could go to any of the Female Blood; if the Father's Male Line failed, it went to the Female Blood of the Father; for the Lords were preſumed rather to reſpect the Female Blood of their former Tenants, than the Blood of the Mother who was newly introduced into the Family of their Feuditary, becauſe the Feud was given as an antient one, and by Conſequence the Blood of the precedent Tenant was preferred to any other; but the Blood of his Mother's Side was preferred to the Blood of his Grandmother; becauſe, being both Female Bloods, and both coming under the Conſideration of antient Tenants, the (*a*) nearer Tenant's Blood was preferred to the more remote; but if the Father's Side wholly failed, then the Blood of the Mother was admitted, *to wit*, firſt the Male Line, and then the Female of ſuch Blood, ſince the Lord muſt be preſumed to introduce the Blood of the Mother, when he had given an indefinite Right of Repreſentation.

(*a*) Co. Lit. 10 b. *Hæres in linea Recta præfertur hæredi in linea tranſverſali, & propinquior excludit propinquum, propinquus remotum, remotus remotiorem.*

Lit. Sect. 4. *Vide infra* Letter (E) 36.

Agreeable to this Scheme of Deſcent upon the Purchaſe of the *Feudum Novum ut Feudum Antiquum*, if a Son purchaſes Lands in Fee-ſimple, and die without Iſſue, they of the Blood of his Father's Side ſhall inherit as Heirs to him before any of the Blood of his Mother's Side, for the old Rules, formerly ſettled for the directing of the Deſcents of ſuch Feuds as were purchaſed, ſtill prevail; and all new Purchaſes made now of Lands in Fee ſhall be conſidered as the Purchaſes formerly made of the *Feudum Novum ut Antiquum*.

If the Son purchaſes Land, and dies without Iſſue, and it deſcends to any Heir of the Part of the Father, and then the Line of the Father (after Entry and Poſſeſſion) fail, it ſhall never reſort to the Line of the Mother, though in the firſt Inſtance, or firſt Deſcent from the Son, it might have deſcended to the Heir of the Part of the Mother; for now by this Deſcent and Seiſin, it is lodged in the Father's Line, to whom the Heir of the Part of the Mother can never derive a Title as Heir, becauſe he can never ſhew that he was Heir to him that was laſt actually ſeiſed; which being a Rule to be ſtrictly obſerved, he muſt intitle himſelf by it, otherwiſe be excluded.

* (C) Of the Half-Blood, and the Poſſeſſio Fratris.

* Page 30.

NONE ſhall be Heir of Land in Fee-ſimple, or to a Warranty, or ſue an Appeal of Death as Heir, unleſs he be of the (*a*) whole Blood, *viz.* both of the Father and the Mother. Co. Lit. 14 a.

(*a*) In a long Courſe of Time the feudal Donations were worn out, and then it became impoſſible to compute up to the firſt Marriage, where ſuch Donations were originally ſettled, and therefore they changed the Computation, and computed from the laſt Poſſeſſor, provided the Heir that claimed was of the Blood of the firſt Purchaſer, and then the Rule was taken *quod Seiſina facit ſtirpem*; for ſince the feudal Donation was loſt, they could not regularly compute the Deſcendants from the firſt feudal Marriage; and therefore they computed from the laſt Feuditary; and ſince both Bloods of the firſt Marriage were neceſſary to any Perſon that would claim under the firſt Donation, they required that a Man ſhould be of the whole Blood of the laſt Feuditary, that would claim as Heir to him; for if any Perſon was of the whole Blood of ſuch Feuditary, then he muſt of Neceſſity be of both Bloods of that remote feudal Marriage, where the Feud was originally placed; and thus the Half-blood became to be excluded; *vide Diſtribution*, under Title *Executors and Adminiſtrators*.

Therefore if an elder Brother purchaſes Lands in Fee, and dies without Iſſue, his Siſter of the Whole, not his younger Brother of the Half-blood, ſhall be his Heir. Co. Lit. 14 a.

So if a Man ſeiſed in (*b*) Fee hath Iſſue a Son and a Daughter by one Venter, and a Son by a ſecond Venter, and dies, and the eldeſt Son (*c*) enters and dies, his Siſter ſhall inherit according to the Rule *quod Poſſeſſio fratris de Feodo Simplici facit ſororem eſſe hæredem.* Co. Lit. 15.

(*b*) But this Rule does not extend to Lands in Tail, for as to them a Man muſt claim as Heir *per formam Doni*. Co. Lit. 15.——So of a Remainder after an Eſtate for Life that never fell in Poſſeſſion, for a Man muſt claim by virtue of the Contract, as Heir to him to whom the Remainder was limited. 3 Co. 41. *b.* So of a Reverſion, whether any Rent were reſerved, or not. 3 Co. 41. b. 42. b. (*c*) But without an actual Seiſin the Younger ſhall have the Lands as Heir to his Father. Co. Lit. 15. a.

If a Father makes a Leaſe for Years, and the Leſſee enters, and dies, the eldeſt Son dies during the Term, before Entry or Receipt of Rent, the younger Son of the Half-Blood ſhall not inherit, but the Siſter; becauſe the Poſſeſſion of the Leſſee for Years, who was formerly conſidered only as a Bailiff to the Leſſor, is the (*d*) Poſſeſſion of the eldeſt Son, Co. Lit. 15 a. 243. a. And. 47. Keilw. 110.

(*d*) So if a Guardian by Knights Service, or Socage, enters, for the Poſſeſſion of the Guardian is the Poſſeſſion of the Infant. Co. Lit. 15. a.

But if a Man makes a Leaſe for Life, and dies, leaving a Son and a Daughter by one *Venter*, and a Son by a ſecond Wife, and the eldeſt Son dies before the Leaſe for Life is determined, the youngeſt Son ſhall inherit, becauſe the eldeſt was never ſeiſed. Co. Lit. 15. Cro. Car. 411. Rol. Abr. 628. Jon. 361.

So if a Father makes a Leaſe for Life, and after recovers againſt his Leſſee by Default, and dies, and the eldeſt Son enters, againſt whom the Leſſee recovers by a *Quod ei deforceat*, and then the eldeſt Son dies, the Brother of the Half-blood, and not the Siſter, ſhall have the Reverſion; for when the Tenant for Life has recovered his Eſtate, he hath intirely defeated all Poſſeſſion in his Leſſor, which he acquired by the Judgment on Default, and all Poſſeſſion in the eldeſt Son likewiſe by virtue of that Judgment, and is intirely in of his old Eſtate; ſo that there is no actual Seiſin left in the elder Brother whereon to found a *Poſſeſſio fratris*. N. Bendl. 143. 8 Aſſ. 6.

There is *Poſſeſſio fratris* of an Advowſon or (*e*) Rent, after actual Receipt of the Rent, or Preſentation of the Clerk; ſo of (*f*) a Uſe, becauſe Equity follows the Rule of the Common Law, as likewiſe of a Copyhold, where the eldeſt Son receives the Profits, and dies, though before Admittance. Co. Lit. 14. b. And ſo of other Hereditaments, as a Seignory, &c. 3 Co. 41. b.

42. a.—Of Offices, Courts, Liberties, Franchiſes, and Commons of Inheritance. Co. Lit. 15 b. 3 Co. 42. a. (*e*) Co. Lit. 15. b. S. P. 3 Co. 42. a. S. P. (*f*) Dyer 10. pl. 40. 274. pl. 43. Rol. Abr. 502. pl. 3.

* Page 31. Co. Lit. 15. a. * But tho' the eldeſt Son enters, and gets an actual Poſſeſſion of the Land yet if the Father's Relict be endowed of the third Part, and the eldeſt Son dies, the Brother of the Half-blood, and not the Siſter, ſhall have the Reverſion of the third Part, becauſe the actual Seiſin which the Brother obtained, was defeated as to the third Part, by the Widow's Entry into it, who is eſteemed in Law to be in, in Continuance of her Huſband's Eſtate, without any Interruption.

Co. Lit. 15. a. But if the eldeſt Son had made a Leaſe for Life, and the Leſſee had endowed the Wife of the Father, who afterwards died, the Daughter ſhall have the Reverſion, and not the Half-brother; for the Widow's Acceptance of Dower from the Tenant for Life, and the Exiſtence of his Eſtate in the Land after her Deceaſe, ſhew that the Tenant for Life had an Intereſt in the Land; but ſuch an Intereſt always preſuppoſes an actual Seiſin in the Leſſor; otherwiſe he could not make that Livery which is neceſſary on the Paſſing of a Freehold; therefore, notwithſtanding the Dower, this actual Seiſin in the Brother ſhall eſtabliſh a *Poſſeſſio fratris*.

Co. Lit. 14. b. Rol. Abr. 628. Lands are given to a Man and his Wife in Special Tail, the Remainder to the Heirs of the Huſband, and they have Iſſue a Son, and the Wife dies, the Huſband marries again, and hath Iſſue a Son, and dies, the eldeſt Son enters, and dies without Iſſue; the ſecond Brother of the Half-blood ſhall inherit the Remainder, becauſe the eldeſt Brother was not ſeiſed of a Fee-ſimple, as the Margin is, but only of the Special Tail, and ſo no Ground for a *Poſſeſſio fratris* of the Fee expectant on the Tail.

Co. Lit. 15. If a Man dies ſeiſed of ſeveral Parcels of Land in one County, and after his Death his eldeſt Son enters into one Parcel generally, and, before any actual Entry into the Reſt, dies, this General Entry into Part ſhall veſt in him an actual Seiſin in the Whole, ſufficient to eſtabliſh a *Poſſeſſio fratris* upon; for ſince the Freehold in Law is caſt upon him by the Death of his Father, and ſince the Poſſeſſion is in no Body, and ſo no particular Eſtate to be defeated, a General Entry into Parcel, in the Name of all, may well ſerve to reduce the Whole into an actual Poſſeſſion; but if his Entry into Parcel be ſpecial, it ſhall only reduce that Parcel into Poſſeſſion; for it is reaſonable to bound the Operation of his Act by the Intention which he appears to have had in doing it.

Co. Lit. 15. a. The Advantages of this Rule of *Poſſeſſio fratris* do not only extend to the Siſter, but to her Iſſue, who ſhall be preferred to the Half-brother, becauſe they repreſent the Anceſtor, and therefore ſhall ſucceed to thoſe Advantages, which their Anceſtor would have enjoyed if ſhe had lived.

Co. Lit. 15. a. 3 Co. 42. b. Cro. Car. 601. There can be no *Poſſeſſio fratris* of Dignities, as Duke, Marquis, and the other Honours annexed to the Peerage, but the Brother of the Half-blood ſhall (*a*) inherit them; and this Difference ſeems to be founded on a ſtrict Regard to the publick Good, which is the better conſulted when ſuch Perſons are promoted to thoſe Dignities as are capable of diſcharging the great Duties annexed to them.

(*a*) The Lord *Gray* being a Baron by Writ, was created Earl of *Kent*, to him and the Heirs Male of his Body, and had Iſſue two Sons by ſeveral Venters, the eldeſt of whom had Iſſue a Daughter, the Barony ſhall go to the Daughter *Jure repræſentationis*, but the Earldom to the ſecond Son, according to its original Limitation. Cro. Car. 601.

Co. Lit. 15. a. Alſo the Policy of the Kingdom hath eſtabliſhed Laws and Rules for the Government of the Poſſeſſions and Deſcent of the Crown, different from thoſe which guide and direct the Deſcents of private Property; therefore if the King hath Iſſue a Son and a Daughter by one Venter, and a Son by another Venter, and purchaſes Lands, and dies, and the eldeſt Son enters and dies without Iſſue, the Daughter ſhall not inherit thoſe Lands, nor any other Fee-ſimple Lands of the Crown, but the younger Brother ſhall have them together with the Crown.

* (D) Of Deſcents according to Cuſtom.

* Page 32.

THERE are ſeveral Cuſtoms as to Deſcents, which having been allowed Time out of Mind, muſt be preſumed to be coeval with the Common Law, and therefore cannot be altered without an Act of Parliament, as that of *Gavelkind* in *Kent*, by which the Deſcent is firſt to all the Male Children, then to the Females, then to collateral Relations; but in this, according to the Civil Law, Regard is to be had to the *Stirpes*, and therefore if the eldeſt Son had Iſſue a Daughter, ſhe ſhould inherit her Father's Share with the younger Sons.

Lit Sect. 210. Co. Lit. 140. a. Lamb. 608. *vide* Head of *Gavelkind*, and Lamb. 628. that it is probable that moſt Lands in *England* were thus partable.

But if a Remainder of Lands of the Nature of Gavelkind be limited to the right Heirs of *J. S.* the Heir at Common Law ſhall take it, and not the Heirs in Gavelkind; for this Remainder being (*a*) newly created, cannot be reckoned (*b*) within the Cuſtom.

Co. Lit. 10. Lamb. 607. Heb. 31.

(*a*) Alſo for a Condition broken the Heir at Common Law ſhall enter, becauſe the Condition is a Thing of a new Creation, and altogether collateral to the Land. Lamb. 608. Co. Lit. 11, 12. † (*b*) This Cuſtom, like all other Cuſtoms that are derogatory from the Common Law, is to be conſtrued ſtrictly, becauſe as far as the particular Cuſtom hath not derogated from the Common Law, the general Cuſtom of the whole Kingdom ought to prevail. Rol. Abr. 568.*

† But after ſuch Entry, *Qu.* if the Heirs in Gavelkind ſhall not enter?

* All Lands in *Kent* are now ſuppoſed to be Gavelkind, notwithſtanding 31 *H.* 8. *c.* 3. which diſgavelled certain Lands, for in that Statute the Lands diſgavelled are not particularized, and therefore not now known, and if any one inſiſts Lands in *Kent* are diſgavelled, he muſt prove it, which at this Day is morally impoſſible.

If a Rent be granted out of Gavelkind Lands, it is of the Nature thereof, and ſhall (*c*) deſcend to all equally; for the Rent is Part of the Profits of the Land, and iſſues thereout.

2 Lev. 87. adjudged, Mod. 96. S. C. adjudged, 8 Mod. 208. 10 Mod. 417. 11 Mod. 160. 2 Ld. Raym. 1024. 1292. Salk. 243. pl. 4. 6 Mod. 120. Will. Rep. 64, 65, 475. 3 Will. Rep. 63. *vide* Noy 15. and Bro. Tit. *Cuſtom* 58. *contr.* but *vide* 14 *H.* 8. 9. 26 *H.* 8. 4. Noy 15. (*c*) That a Truſt ſhall deſcend accordingly. 2 Rol. Abr. 780.

The General Cuſtom of Gavelkind Lands extends to Sons only; but a Special Cuſtom, that if one Brother dies without Iſſue, all his Brothers may inherit, is good.

Co. Lit. 140. a.

By the (*d*) Cuſtom of Borough Engliſh, the youngeſt Sons only ſhall inherit.

For this and the Reaſons thereof, *vide* Title *Borough Engliſh*.

(*d*) Where the Cuſtom was laid, that if a Copyholder dies ſeiſed, that his youngeſt Son ſhould inherit, and the Copyhold was granted to a Man and his Wife, and the Heirs of the Man, and he died, whether within the Cuſtom, 2 Leon. 208. *dubitatur*.

If Borough Engliſh Lands be let to a Man and his Heirs, during the Life of *J. S.* and the Leſſee dies, the youngeſt Son ſhall enjoy it.

Co. Lit. 110. b. 2 Lev. 138. S. P. adjudged upon a Special Verdict.

If the Cuſtom be, that the youngeſt Son ſhall inherit, the youngeſt (*e*) Brother ſhall not inherit by Force of this Cuſtom.

Rol. Abr. 623. 4 Leon. 242. Cro. Jac. 198. Cro. Car. 411. (*e*) If the Cuſtom of a Copyhold be, that the eldeſt Daughter ſhall have the Land, the eldeſt Daughter ſhall not have it by the Cuſtom, Godb. 166. Rol. Abr. 623. 4 Leon. 242.—But by ſome Cuſtoms the youngeſt Brother ſhall inherit, but *conſuetudo loci obſervanda*. Co. Lit. 110. b.——Special Cuſtom, that Lands in Fee ſhould deſcend to the younger Son, but Lands in Tail to the Elder is good. *March* 54.——So that it ſhall deſcend to the youngeſt Son, if not of the Half-blood; and if he be, then to the eldeſt. Co. Lit. 140. b.

If

Rol. Abr. 623. *Godfrey* and *Bullock.*

If a Cuſtom be, that if a Man dies without Heir Male, that his eldeſt Daughter ſhall have the Land; and if he hath no Daughter, that the eldeſt Siſter ſhall have the Land; and if he hath not a Siſter, the eldeſt Couſin; but if he hath an Heir Male, that he ſhall have it before any of them; and the Tenant of the Land hath ſeveral Daughters, but no Heir Male, and the eldeſt Daughter dies in the Life of the Tenant of the Land, having Iſſue a Daughter; this Grandchild is within the Cuſtom, and ſhall have the Land by Deſcent upon the Death of the Grandfather.

Rol. Abr. 624. reſolved *per Cur.*

But if the Cuſtom be, that the youngeſt Son ſhall inherit, and a Man has Iſſue two Sons, and the eldeſt has Iſſue two Sons, and dies, and the * Lands deſcend to the youngeſt Son, who dies without Iſſue, the eldeſt Son of the eldeſt Brother ſhall have the Land, becauſe the Cuſtom holds not in the (*a*) tranſverſal Line, but only in the lineal Deſcent.

* Page 33

(*a*) If a Copyholder of the Nature of Borough Engliſh, ſurrenders to the Uſe of himſelf and his Wife, and his Heirs, and dies leaving Iſſue three Sons, and the youngeſt dies in the Life-time of the Wife; the eldeſt Brother ſhall inherit, as Heir to the younger Brother; for the Cuſtom cannot extend to the Collateral Deſcent. Rol. Abr. 624. Cro. Car. 411. Jon. 360. S. C. by two Judges againſt two.

Lev. 172. between *Newton* and *Shaftoe*, adjudged, and that the Cuſtom was good, according to Co. Lit. 140. *b.* Keb. 925. 2 Keb. 111. S. C. Sid. 267. S. C. adjudged,

If there be a Cuſtom within the Manor of *T.* that if the Father dies, leaving no Son, but two or more Daughters, that the eldeſt Daughter ſhall have his Land for her Life only, and after her Death it ſhall deſcend to the next Heir Male that can derive by Males; and for want of ſuch, that it ſhall eſcheat to the Lord; and there is another Cuſtom, that if the Tenant dies, and leaves a Wife, that ſhe ſhall have it for her Life; and a Copyholder of the Manor dies, leaving a Wife and two Daughters, and no Son, and his Wife enters, and the eldeſt Daughter dies, and after the Wife dies, the ſecond Daughter ſhall have the Lands for Life, within the Cuſtom; for though ſhe was not the eldeſt at the Death of her Father, yet ſhe was ſo at the Death of her Mother, whoſe Eſtate was a Continuance of the Father's Eſtate, as in Caſe of Free Bench.

and that the Cuſtom was good; though ſaid in the Report thereof, that it ſeemed to be admitted by all, that ſuch Cuſtom, as to Fee-ſimple Lands would be void; it being wholly againſt the Nature of a Fee to eſcheat as long as there are Heirs; and 268, another Caſe was ſaid to have been adjudged accordingly, upon Debate in *B. R.* in 20 Car. 2. between *Sampſon* and *Quinſey*; but *vide* that Caſe. Lev. 293, adjudged without Argument, becauſe the Court ſaid, the Point had before been adjudged in the Caſe of *Newton* and *Shaftoe*.

Salk. 243. between *Clements* and *Scudamore*, adjudged. 6 Mod. 120. S. C. adjudged

If *A.* hath Iſſue five Sons, and the youngeſt dies in the Life-time of the Father, leaving Iſſue a Daughter; after which the Father purchaſes Copyhold Lands of the Nature of Borough Engliſh; thoſe Lands ſhall, at the Death of the Father, go to the Daughter of the youngeſt Son *jure repræſentationis*, and not to the fourth Son, although he was the youngeſt Son at the Time of the Purchaſe, and Death of the Father.

Will. Rep. 63, 64. 2 Ld. Raym. 1024. See 3 Will. Rep. 62, 63. 2 Ld. Raym. 1028.

(E) Where a Perſon ſhall be ſaid to take by Purchaſe, and not by Deſcent.

Lit. ſ. 4. Co. Lit. 13.

IT is an eſtabliſhed Rule in Deſcents, that none can inherit as Heirs, but thoſe who are of the Blood of the Purchaſer; and therefore if Lands deſcend to the Son of the Part of the Father, and he enters, and after dies without Iſſue, the Lands ſhall deſcend to the Heirs on the Part of the Father,

ther, and not to the Heirs on the Part of the Mother; and if there be no Heirs on the Part of the Father, then they ſhall go to the Lord by Eſcheat.

In the ſame Manner, if a Man marries an (a) Inheritrix of Lands in Fee, who has Iſſue a Son, and dies, and the Son enters into the Tenement as Son and Heir to his Mother, and after dies without Iſſue; the Heirs on the Part of the Mother are to inherit; and for want of ſuch Heir the Lands ſhall eſcheat. Lit. ſ. 4.

(a) But if a Man gives Lands to another and his Heirs of the Part of the Mother, yet the Heirs of the Father's Part ſhall inherit; for no Man can inſtitute a new Kind of Inheritance, not allowed by the Law. Co. Lit. 13. But *vide* Lit. ſ. 354. that Lands may be given to a Man and his Heirs, on the Part of the Father; in which Caſe, none of the Heirs of the Part of the Mother ſhall ever inherit; but in ſuch Caſe, the Inheritance, as long as it continues, deſcends according to the Rules of Law, though it be determinable for want of Heirs on the Part of the Father.

* So if a Grandfather had purchaſed Lands in Fee, and the Lands had deſcended from him to the Father, and from him to the Son; if the Son had entred, and died without Iſſue, his Father's Brothers or Siſters, or their Deſcendants; or for want of them, his Grandfather's Brothers or Siſters, or their Deſcendants; or for want of them, his Great-Grandfather's Brothers Siſters, or their Deſcendants; or for want of them, his Great-Grandmother's Brothers or Siſters, or their Deſcendants, might have inherited; but none of the Line of the Mother or Grandmother, *viz.* the Grandfather's Wife, ſhould have inherited, becauſe not of the Blood, either by Father or Mother, of the firſt Purchaſer, *viz.* the Grandfather. * Page 34 Plow. 446, 447.

A Man ſeiſed of Lands as Heir of the Part of his Mother, makes a Feoffment in Fee, and takes back an Eſtate to him and his (b) Heirs, this is a (c) new Purchaſe of the Lands, and conſequently, if the Purchaſer dies without Iſſue, the Heirs of the Part of the Father, and not the Heirs of the Part of the Mother, ſhall ſucceed him in it; for he is the original Purchaſer of that Eſtate, which he takes back to him and his Heirs; and therefore it ſhall deſcend as a new Purchaſe. Co. Lit. 12 *b*.

(b) Where the Anceſtor takes but a particular Eſtate, and the Limitations after operate by way of Purchaſe, and not by Deſcent; *vide* Head of *Remainders*, and Co. Lit. 22. Styl. 148. Co. 93. Moor 136. And. 69. Hob. 30. Vent. 372. 2 Lev. 75. Raym. 228. Mod. 121, 226. 2 Mod. 207. 4 Mod 380. Carth. 272. (c) So if he levies a Fine *ſur cognizance de droit, &c.* to *A.* and *B.* and by the ſame Fine they grant and render the Lands to him and his Wife in Tail, Remainder to his right Heirs; this makes it a new Purchaſe, and the Heirs of the Part of the Father ſhall inherit, Carth. 140. adjudged.

But if a Man ſeiſed as Heir of the Part of his Mother, makes a Feoffment in Fee to the Uſe of him and his Heirs, the Uſe ſhall go to the Heirs of the Part of the Mother; for the Uſe being a Creature of Equity, muſt be governed by the Rules of Equity, which conſiders in this Caſe, that the Uſe ſprings and ariſes out of an Inheritance which belongs to the Heirs of the Mother, and will therefore aſſign it to them, as a Truſt which ariſes out of their Property. Co. Lit. 13.

A Man is ſeiſed of Land on the Part of his Mother, and makes a Feoffment in (d) Fee, reſerving Rent to him and his Heirs; this Rent, ſince the Statute *Quia Emptores terrarum, &c.* if it has a Diſtreſs annexed to it, muſt be conſidered as a Rent-charge; and if it wants a Diſtreſs, as a Rent-ſeck; and ſo either Way it is the Grant of the Feoffee, and conſequently a (e) new Purchaſe; and therefore it ſhall go to the Heir of the Part of the Father, and not to the Heir of the Part of the Mother. Co. Lit 12. b.

(d) But if he had made a Gift in Tail, or a Leaſe for Life of ſuch Lands, reſerving a Rent, the Heir on the Mother's Side ſhould have had this Rent, becauſe the Reverſion belongs to ſuch Heir, and conſequently the Rent too, as incident to that Reverſion. Co. Lit. 12. b. (e) If a Man, ſeiſed of a Manor on the Part of his Mother, had, before the Statute *Quia Emptores, &c.* made a Feoffment in Fee of Parcel, to hold of him by Rent and Service; though this Rent and Service were newly created, yet continuing Parcel of the Manor, they ſhall, with the Reſt of the Manor, deſcend to the Heir on the Mother's Side. Co. Lit. 12. b.

Co. Lit. 12. b. If a Man hath a Rent-ſeck of the Part his Mother, and the Tenant of the Land grants a Diſtreſs to him and his Heirs, and ſo improves the Rent into a Rent-charge; this Diſtreſs ſhall go along with the Rent to the Heir on the Part of the Mother, as incident and appurtenant to it.

Co. Lit. 13. a. If the Heir of the Part of the Mother, of Lands whereunto a Warranty is annexed, is impleaded for thoſe Lands, and vouches, and Judgment is given againſt him, and likewiſe for him to recover in Value, and he dies before Execution, the Heir on the Mother's Side ſhall ſue Execution to recover in Value againſt the Vouchee; for the Lands to be recovered in Value are deſigned as a Recompence for thoſe Lands which were recovered by the Demandant from the Vouchee, and ſo muſt go to that Perſon who has ſuſtained the Loſs.

* Page 35 Co Lit. 13 a. * A Man hath Iſſue a Son, and dies, and his Wife dies alſo, and Lands are let for Life, the Remainder to the Heirs of the Wife; the Son dies without Iſſue; the Heirs of the Part of the Father ſhall inherit, and not the Heirs of the Part of the Mother; for the Lands veſted in the Son as a Purchaſer, and therefore the Deſcent is to be governed by the Rules of Law.

Co. Lit. 12. b. If a Man be ſeiſed of Lands on the Part of his Mother, and makes a Feoffment in Fee of them upon Condition, and dies; this Condition ſhall deſcend to the Heir of the Part of the Father; becauſe he is Heir at Common Law; but if he enters for the Condition broken, then he reſtores the Eſtate to its former Nature, and then the Heir of the Part of the Mother ſhall enter upon him, and enjoy the Land.

Cro. Eliz. 431. Owen 65. S. C. 3 Lev. 127. S. P. admitted *per Cur.*† If a Man, having only two Daughters, his Heirs, deviſes his Lands to them and their Heirs, they take as (*a*) Jointenants, and not as Coparceners; for the Deviſe giveth it to them in another Degree than the Common Law would have given it them; and for the (*b*) Benefit of the Survivorſhip between them.

(*a*) If to them and their Heirs, equally to be divided between them, Share and Share alike, they are Tenants in Common. 2 Sid. 53, 78. *Vide* Godb. 362. 3 Leon. 25. Goulſ. 18. and Title *Jointenants and Tenants in Common.*
(*b*) If a Man deviſes Lands to his Son and Heir apparent, and a Stranger, they are Jointenants for the Benefit of the Stranger. Godb. 94. Owen 65.

† May they not elect to take as Heirs by Deſcent, and be Coparceners?

Salk. 242. between *Reading* and *Royſton* and judged. If *A.* hath Iſſue two Daughters, one of which dies in his Life-time, leaving Iſſue *J. S.* a Son, and *A.* deviſes his Lands to *J. S.* and his Heirs, *J. S.* ſhall take the (*c*) Whole by Purchaſe, and not one Moiety by Purchaſe, and the other by Deſcent.

(*c*) Palm. 373. 2 Rol. Rep. 352. 2 Sid. 79. S. P.

Moor 644. adjudged, Cro. Eliz. 833 919, 920. S. C. adjudged, that the firſt If a Man deviſes Lands to his eldeſt Son, and his Heirs, paying 20 *l.* apiece to his younger Children, at their Ages of twelve Years; and upon Non-payment of the Legacies deviſes the Lands to his younger Children, and their Heirs, the eldeſt Son is in by Deſcent.

Deviſe to the eldeſt Son, and his Heirs in Fee, being no more than the Law gave him, was void; but the Deviſe to the Younger, upon his Non-payment, was good, by way of future or executory Deviſe. *Vide* Title *Deviſes*; and Vaugh. 271. S. C. cited. 3 Mod. 207. S. C. cited. 1 Rol. Abr. 411. S. C. cited. Leon. 101. 3 Leon. 216. 2 Sid. 79. 2 Mod. 7, 286. Dyer 371. Hard. 204.

Salk. 241. *Clerk* and *Smith* adjudged, and *Gilpin*'s Caſe, So if a Man deviſes Lands to his Daughter's Son in Fee, who is his Heir at Law, upon Condition that he ſhould pay 200 *l.* to ſuch Perſons as the Deviſor's Wife ſhould appoint by Deed; the Wife makes no Appointment, and the Grandſon enters, and dies without Iſſue, the Lands ſhall go to the Heirs

Heirs *a parte Materna*; for the Grandſon took by Deſcent, and not by Purchaſe; for the Deviſe gave him the ſame Eſtate the Law would have given him under a Poſſibility of being charged. Cro. Car. 161. where it is adjudged, that a Deviſe to the Heir at Law, upon Condition to pay Debts, and if he fails, that the Executors ſhall ſell, makes it a Purchaſe in the Heir at Law, being tied with a Condition, denied to be Law by *Treby* Ch. Juſt. and *Powell* Juſt'. Lutw. 793. S. C.

If a Man, being ſeiſed of Lands on the Part of his Mother, deviſes them to his Executors for ſixteen Years, and after to one who is his Heir *a parte Materna*, he ſhall take by Deſcent; for the Deſcent to the Heir *a parte Paterna* or *Materna* is but a Conſequent dependant upon the Nature of the Eſtate; though it was objected, it was better for him to take by Purchaſe, for then the Heirs of the Part of the Father might inherit before the Heirs of the Part of the Mother, and ſo both Heirs would be inheritable. 3 Lev. 127. *Hedger* and *Row*, adjudged.

*(F) Of a Deſcent, its Operation to take away an Entry.

* Page 36.

DEſcents which take away an Entry are of two Sorts; 1ſt, Where the Deſcent is in Fee, as where a Man ſeiſed of certain Lands or Tenements is diſſeiſed, and the Diſſeiſor having Iſſue dies ſeiſed, and the Lands gained by the Diſſeiſin deſcend to his Heirs; this Deſcent ſhall toll the Entry of the Diſſeiſſee, and oblige him to ſue a Writ of Entry *ſur Diſſeiſin* againſt the Heir of the Diſſeiſor, in order to recover the Right of Poſſeſſion which he hath loſt by the Deſcent; and the (*a*) Reaſon is, becauſe the Freehold is caſt upon the Heir, the Notions of the Law do make this Title to him, that there may be a Perſon in Being to do the feudal Duties, and to fill the Poſſeſſion, and anſwer the Actions of all Perſons; and ſince it is the Law that gives him this Right, and obliges him to theſe Duties, antecedent to any Act of his own, it muſt defend ſuch Poſſeſſion from the Act of any other Perſon till it be evicted by Judgment, which being the Act of Law, may deſtroy the Heir's Title. Lit. ſ. 385.

(*a*) There are alſo other Reaſons for this; as 1ſt, Becauſe the Diſſeiſee not having claimed during the Life of the Diſſeiſor, the Right of Poſſeſſion muſt be preſumed to be derelict. 2. Becauſe the Relief was in the Nature of a new Purchaſe upon every Deſcent, for the Payment of which a Diſtreſs was immediately taken upon the Deſcent's being caſt. 3. The Right of Poſſeſſion is gotten by Deſcent, that it may be an Encouragement to the Tenant to be bold in War; for that none can diſpoſſeſs his Children of the Eſtate he died ſeiſed of. Spelm. Feud. 31.

2dly, Deſcents in Fee-tail toll Entries; as if a Man be diſſeiſed, and the Diſſeiſor grants the Land in Tail, and the Tenant in Tail having Iſſue, die ſeiſed, and the Iſſue enters, the Poſſeſſion being thrown upon the Heir in Tail, the Law conſtrues the Right of Poſſeſſion to be in him, for the Reaſons above given, and therefore bars the Entry of the Diſſeiſor. Lit. ſ. 386.

If a Diſſeiſor make a Gift in Tail, and the Donee diſcontinues in Fee, and diſſeiſes the Diſcontinuee, and dies ſeiſed; this Deſcent ſhall not take away the Entry of the Diſſeiſee; for the Deſcent of the Fee-ſimple to the Heir is defeated by his Remitter to the Eſtate-tail; and though by Virtue of ſuch Remitter the Heir is ſeiſed in Tail; yet there is no Deſcent of it, becauſe the Tail was diſcontinued; and the ſubſequent Diſſeiſin doth not regain it to the Anceſtor; and though the Heir be remitted into his elder Title, yet ſuch Remitter places him in only above the ſecond Diſſeiſin, and doth not tend to make a Deſcent of the Eſtate-tail of which his Anceſtor never died ſeiſed; and where a new Right ſprings to the Heir by Operation and Co. Lit. 238.

and Conſtruction of Law, he ought to take, ſubject to the ſame Claim, as ran upon ſuch Eſtate before the Remitter, or elſe the Act of Law would work an Injury to the firſt Diſſeiſee, who poſſibly was prevented from bringing his Aſſize or Ejectment, by the frequent ſhifting of the Poſſeſſion; and the Law of Deſcents being in Prejudice of an ancient Right, is to be taken ſtrictly, and therefore to take Place only where the ſame Eſtate deſcends from Anceſtor to Heir; and the rather, for that after Diſcontinuance the Diſſeiſee might not watch the Death of the Tenant in Tail, whoſe Intereſt was transferred, and therefore no preſumptive Dereliction of the Diſſeiſee could be formed in this Caſe.

Co. Lit. 238. A Diſſeiſor makes a Gift in Tail, the Donee has Iſſue, and dies ſeiſed, the Entry of the Diſſeiſſee is taken away; but if the Iſſue die without Iſſue, ſo that the Eſtate-tail is ſpent, then the Entry of the Diſſeiſee is revived, and he may enter upon him in Reverſion or Remainder; for in * this Caſe there is no Relief to be demanded from him in Reverſion or Remainder; ſo that he labours under no Hardſhip in that Point, for which he might expect Favour from the Law: Likewiſe the Poſſeſſion is not caſt on him till Entry; which being a voluntary Act, the Law annexes no Privileges to it, as in caſe where a Poſſeſſion is caſt on an Heir by Deſcent.

* Page 37

Co. Lit. 238. b. Grandfather, Father and Son, the Son diſſeiſes one, and enfeoffs the Grandfather, who dies ſeiſed, and the Land deſcends to the Father, the Diſſeiſſee cannot enter, for the Right of Poſſeſſion is devolved on the Father, (who had no Hand in the Diſſeiſin,) by a fair and legal Deſcent; but if the Father dies ſeiſed, and the Land deſcends to the Son, the Diſſeiſee may enter on the Son, for the Feoffment made by the Diſſeiſor to the Grandfather is a Stratagem to derive the Lands gained by Diſſeiſin to the Son by Deſcent, in order to enjoy the Benefit annexed to ſuch Conveyance, which the Law will never cheriſh; but on the contrary blaſt ſuch Deſigns, to diſcountenance all Wrong and Oppreſſion.

Lit. Sect. 387, 388, 389, 394. In Deſcents which toll Entries, it is required, that the Anceſtor die ſeiſed of a Freehold and Fee, or a Freehold and Fee-tail; for if the Diſſeiſor, at the Time of his Death, hath not the Freehold in him, it cannot be caſt on his Heir, for then there is no Danger that the Freehold ſhould want a Poſſeſſor; and therefore the Law creates no Title to ſuch Poſſeſſion in the Heir at Law; for it were incongruous that the Law ſhould ſuppoſe the Right of Poſſeſſion in the Heir, when the Poſſeſſion is in another at the Death of the Anceſtor; and if the Right of Poſſeſſion be not tranſmitted at the Death of the Anceſtor, the Law will not afterwards create him a new Title in Prejudice of the Perſon that has the Right of Propriety; if a Diſſeiſor therefore makes a Leaſe for Life, he parts with the Poſſeſſion, and cannot tranſmit it to the Heir, having parted with it before; and a Deſcent of a Reverſion will not make a Right of Poſſeſſion; for nothing deſcends to the Heir in Reverſion but a Right of Reverſion, and that is a Right againſt all Perſons but the Diſſeiſſee; for ſince only a Right deſcends, the Heir can be in no better Caſe than the Diſſeiſor was at the Time of his Death; and therefore when the Tenant for Life dies, he has only the naked Poſſeſſion, as the Diſſeiſor had it; but if the Diſſeiſor had died in Poſſeſſion, the Law, for the Reaſons aforeſaid, caſting the Poſſeſſion on the Heir, makes it a Right; for that is properly a Right which a Man comes to by Act of Law; and ſince the Heir in ſuch Caſe comes to the Poſſeſſion by Act of Law, it muſt be called a Right of Poſſeſſion, and it could not be a Right of Poſſeſſion, if he could not defend it againſt all Aggreſſors; and therefore in ſuch Caſe the Right of Entry is taken away from every one; and hence aroſe the Diſtinction of *Jus Proprietatis* and *Jus Poſſeſſionis*.

If he in Reverſion diſſeiſe his Tenant for Life, and dies ſeiſed, this Deſcent ſhall take away the Entry of the Tenant for Life; for the Right of Poſſeſſion is by Law caſt upon the Heir. Co. Lit. 239. a. Hob. 323.

So if there be Tenant for Life, Remainder in Tail, Remainder in Fee, and Tenant in Tail diſſeiſes the Tenant for Life, and dies ſeiſed, this Deſcent ſhall take away the Entry of the Tenant for Life; but if the King's Tenant for Life be diſſeiſed, and the Diſſeiſor die ſeiſed, this Deſcent ſhall not take away the Entry of the Tenant for Life; for ſince the King cannot be diſſeiſed, the Diſſeiſor gains but a bare Eſtate of Freehold during the Life of the Leſſee; and therefore the Law does not caſt the Poſſeſſion on the Heir; for if the Heir comes into the Poſſeſſion, he muſt come in as an Occupant, which being a voluntary Acquiſition, the Law does not favour it, as it does a Right of Poſſeſſion devolved by Deſcent. Co. Lit. 239. a.

If a Diſſeiſor make a Leaſe to a Man and his Heirs during the Life of *J. S.* and the Leſſee dies, living *J. S.* this ſhall not take away the Entry of the Diſſeiſee, becauſe the Heir is only in as a ſpecial Occupant of an Eſtate of Freehold, and not of a Fee or Fee-tail. Co. Lit. 239. a. * Page 38

If a Diſſeiſor makes a Leaſe for Years, or has the Land extended upon a Statute-Merchant, Staple, Judgment or Recognizance, and dies ſeiſed; this Deſcent ſhall take away the Entry of the Diſſeiſee, becauſe the Freehold or Fee are caſt on him by Act of Law. Co. Lit. 239. a.

The Deſcent of Incorporeal Inheritances, as Advowſons, Rents, &c. do not take away the Entry of him who hath Right, becauſe no Diſſeiſin can be committed of them, but at the Election of the Owner thereof. Co. Lit. 237. b.

If a Diſſeiſor make a Leaſe for his own Life, and dies, this Deſcent ſhall not take away the Entry of the Diſſeiſee; for though the Freehold and Fee deſcend to the Heir of the Diſſeiſor, yet the Diſſeiſor died not ſeiſed of both, becauſe his Death was to precede the Determination of the Leaſe, which carried the Freehold to his Heir. Co. Lit. 239.

Deſcents to a Brother, Siſter, Uncle, or other collateral Heir of the Diſſeiſor, take away the Entry of the Diſſeiſee, as well as if the Diſſeiſor had had Iſſue, and the Deſcent had been to them.

(G) In what Caſes the Entry of the Diſſeiſee may be lawful, notwithſtanding a Deſcent.

LORD and Tenant; the Tenant is diſſeiſed, and the Diſſeiſor aliens to another in Fee, and the Alienee dies without Iſſue, whereupon the Lord enters, as upon his Eſcheat; this does not take away the Entry of the Diſſeiſee, becauſe the Lord does not come to the Land by Deſcent, but by Eſcheat, for want of a Tenant, which can warrant his Title no longer than ſuch Tenant is wanting, nor hinder the Diſſeiſee from Entry, who is that Tenant; but if the Lord by Eſcheat die ſeiſed, and the Land deſcend to his Heir; here is a perfect Deſcent, which ſhall take away the Entry of the Diſſeiſee; alſo his Heir upon ſuch Deſcent muſt pay Relief, which the Lord upon the Eſcheat only was not obliged to do. Lit. Sect. 390. 2 Inſt. 286. Co. Lit. 240.

If a Diſſeiſor die ſeiſed, and his Heir die without Heir, the Diſſeiſee cannot enter upon the Lord by Eſcheat, becauſe his Entry was taken away by the Deſcent caſt before, and then whoever comes to the Lands ſhall take the Benefit of it. Co. Lit. 240. a.

A Man ſeiſed of Lands in Fee, or in Tail, upon Condition, dies ſeiſed, if the Condition be broken in his Life-time, or after the Lands deſcended Lit. Sect. 391.

to his Heir, yet the Entry of the Feoffor, or Donor, or their Heirs, is not taken away.

Lit. Sect. 392. Co. Lit. 240. a. So if ſuch Tenant on Condition be diſſeiſed, and the Diſſeiſor die ſeiſed, and the Lands deſcend to his Heir, the Entry of the Tenant on Condition is thereby taken away; but if the Condition be after broken, the Feoffor or Donor, or their Heirs, may enter; becauſe the Condition went along with, and was annexed and incorporated in the Land into whoſe Hands ſoever it came, and the Feoffor or Donor have no other Remedy but by Entry, which is their Title, as the Tenant on Condition, who is diſſeiſed, has; for he having a Right, his Remedy for it againſt the Heir of the Diſſeiſor is by Action; and till the Condition broken, as well the *Jus Proprietatis* as the *Jus Poſſeſſionis* is in the Feoffee; but when he is diſſeiſed, and a Deſcent caſt, the Heir of the Diſſeiſor has only the *Jus Poſſeſſionis*.

* Page 39 Co. Lit. 240. b. * He that hath Title to enter upon a Mortmain ſhall not be barred by a Deſcent, becauſe then he would be without Remedy, for he can maintain no Action for it; and ſo where a Woman hath Title to enter *Cauſa Matrimonii prælocuti*, no Deſcent ſhall take away her Entry, becauſe ſhe has no Remedy by Action to recover it.

Co. Lit. 240. If a Man ſeiſed of Lands in Fee, by his laſt Will in Writing deviſes them to another in Fee, and dies, whereby the Freehold in Law is caſt upon the Deviſee, and the Heir, before any Entry made by the Deviſee, enters and dies ſeiſed; this Deſcent ſhall not take away the Entry of the Deviſee, becauſe then he would be without (*a*) Remedy, having never had Poſſeſſion.

(*a*) So if one hath Title to enter for Conſent to a Raviſhment, a Deſcent caſt ſhall not take away his Entry, becauſe he has no other Remedy, nor can maintain any Action for it. Co. Lit. 240. b.

Lit. Sect. 393. If a Diſſeiſor die ſeiſed, and his Heir enters and endows his Mother, the Diſſeiſee may enter upon her for that third Part, becauſe ſhe is in Continuance of her Huſband's Eſtate, and not by the Heir; and therefore, as to that third Part, the Deſcent is (*b*) interrupted or defeated; but till Endowment the Diſſeiſſee could not enter upon any Part, nor after ſuch Endowment can he enter upon the other two Parts, becauſe as to them the Deſcent was perfect, and continues, but as to the third Part, the Wife's Title was paramount to the Deſcent.

(*b*) So of Tenant by the Curteſy. 1 Salk. 241.

Lit. Sect. 395. If a Diſſeiſor enfeoff his Father in Fee, and the Father die ſeiſed of ſuch Eſtate which deſcends to the Diſſeiſor as Heir, yet the Diſſeiſee may enter, becauſe coming again to the Diſſeiſor, he ſhall take no Advantage of the Deſcent *Quia particeps criminis*; but the Diſſeiſee may either enter or have his Aſſiſe againſt him.

Lit. Sect. 396. Co. Lit. 242. If a Man ſeiſed of Lands in Fee hath Iſſue two Sons, and dies ſeiſed, and the younger Son enters by Abatement, and has Iſſue, and dies ſeiſed, and the Lands deſcend to his Iſſue, who enters; yet the eldeſt Son or his Heir may enter upon them, becauſe the Entry of the youngeſt Son ſhall be intended upon a Claim as Heir, and the eldeſt Son claiming as Heir likewiſe, and ſo by the ſame Title, may enter upon him, or any of his Iſſue, be there never ſo many Deſcents; alſo the Entry of the youngeſt may be intended to prevent others, and ſo to continue it in the Family, and not with Deſign to injure or ſtrip his Brother of it; and then his Brother's Entry cannot be taken away; but if the younger Brother, in this Caſe, had made a Feoffment in Fee, and the Feoffee had died ſeiſed, this Deſcent had taken away the Entry of the eldeſt Brother, becauſe the Feoffment made Title by Livery to the Feoffee, and carried it out of the Family.

Co. Lit. 242. b. If the younger Brother of the Half-Blood enters by Abatement, and a Deſcent is caſt, or if the eldeſt Brother hath Iſſue, and dies, and after his Death the younger Brother or his Iſſue enter, and many Deſcents are caſt in

his Line; yet the eldeſt Son, or his Heirs, may enter; for though the Brother of the Half-Blood cannot be Heir to his eldeſt Brother, yet he may by Poſſibility be Heir to his Father if the eldeſt Brother dies before actual Poſſeſſion; and therefore ſhall be preſumed to enter only to preſerve the Feud in the ſame Family, and keep out Strangers, and not in Oppoſition to the lineal Heir of the Family.

But if the elder Brother had firſt entred, and the younger Brother had entred upon him; this had been in Deſtruction of the elder Brother's Poſſeſſion, and as much a Diſſeiſin as if it had been committed by a Stranger, and then his dying ſeiſed ſhall take away the Entry of the eldeſt Brother, or his Iſſue. Lit. Sect. 397.

If after the Death of the Father a Stranger abates, and the younger Son enters on him, and dies ſeiſed; this Deſcent ſhall bind the eldeſt, because *Poſſeſſio terræ* muſt be *vacua* when the youngeſt Son enters, which here it was not; but his Entry on the Abator having no Right, was a Diſſeiſin, and by Conſequence a Deſcent thereon will take away the Entry of the eldeſt Brother; for his Entry was a Diſſeiſin, not an Abatement. Co. Lit. 242. b. * Page 40

Lands are given to Huſband and Wife, and the Heirs of their two Bodies; they have Iſſue a Daughter, and the Wife dies, the Huſband has Iſſue a Son by another Wife, who upon the Deceaſe of the Father abates, and dies ſeiſed; this Deſcent ſhall take away the Entry of the Daughter, for by the Limitation in ſpecial Tail, the Son by another *Venter* was utterly incapable of inheriting them; and being an Eſtate which the Son could not in any Caſe make Title to as Repreſentative of the Father, his Entry is an Abatement; for the Law cannot make that charitable Conſtruction here, that he entred to preſerve the Eſtate from Strangers that might have abated upon the Eſtate, ſince the Son himſelf is a Stranger, and could not inherit; but in the Caſe of the Brother of the Half-Blood it was otherwiſe, becauſe he might have inherited his Father. Co. Lit. 242. a. b.

If a Man be ſeiſed of Land of the Nature of Borough Engliſh, and hath Iſſue two Sons, and dies, and the eldeſt Son, before any Entry made by the youngeſt, enters into the Land by Abatement, and dies ſeiſed; this ſhall not take away the Entry of the youngeſt Brother, becauſe the eldeſt Son ſhall be preſumed to enter to preſerve the Eſtate in his Family, which he or his Heirs may ſome Time or other, upon Failure of his Brother's Line, happen to enjoy. Co. Lit. 242, 243.

The ſame Law holds likewiſe in Intruſions as well as in Abatement; therefore if a Father make a Leaſe for Life, and hath Iſſue two Sons, and dies, and the Tenant for Life dies, and the youngeſt Son intrudes, and dies ſeiſed; this Deſcent ſhall not take away the Entry of the Eldeſt, for the Reaſons before given; otherwiſe if the Father had made a Leaſe for Years only, becauſe the Poſſeſſion of the Leſſee for Years made an actual Freehold in the eldeſt Son, ſo that the Entry of the Youngeſt cannot have ſuch Conſtruction, but is a Diſſeiſin, becauſe there is no *Vacua Poſſeſſio*. Co. Lit. 243.

If one Coparcener enter into the Whole, claiming it to herſelf, and takes all the Profits, yet ſuch Entry ſhall be intended only in Preſervation of the Eſtate, and therefore a Deſcent in ſuch Caſe ſhall not bind the other Siſter as to her Moiety; but if ſhe diſſeiſes the other, after both have entred, and dies ſeiſed, there ſuch Deſcent will take away the Entry of the Eldeſt, or her Iſſue. Co. Lit. 243. a.

So if ſuch Coparcener enter, claiming the Whole, and make a Feoffment in Fee, and takes back an Eſtate to her and her Heirs, and hath Iſſue, and die ſeiſed; this Deſcent ſhall take away the Entry of the other Siſter, becauſe the Feoffment leaves no Room for a Preſumption that her Entry was to preſerve the Eſtate of the other Siſter; and in the other Caſe, the Claiming the Whole only makes the Abatement as to her Siſter's Moiety; for if one Coparcener enters generally, and takes the Profits, this Co. Lit. 243. b.

this ſhall be accounted in Law the Entry of them both, and no Deveſting of the Siſter's Moiety.

Lit.Sect.407, 408. If an Infant diſſeiſe one, and aliens in Fee, and the Alienee dies ſeiſed, and the Lands deſcend to his Heir, being an Infant, the Entry of the Diſſeiſee is taken away; but if the Infant Diſſeiſor enter upon the Heir of the Alienee, as he may well do, not being bound by his Alienation made under Age, then may the Diſſeiſee enter upon him, becauſe the Deſcent to the Heir of the Alienee, which took away the Entry of the Diſſeiſee, is now avoided, and the Infant Diſſeiſor may enter at any Time within or after full Age.

Lit.Sect.409. So if a Diſſeiſor make a Feoffment in Fee, upon Condition, and the Feoffee dies ſeiſed, this gains a Right of Poſſeſſion to his Heir, and takes
* Page 41 * away the Entry of the Diſſeiſee; but if the Diſſeiſor enter for the Condition broken, then is the Deſcent defeated, and the Entry of the Diſſeiſee revived, becauſe the Diſſeiſor is then in of his defeaſible Eſtate, having only a naked Poſſeſſion without any Right.

Co.Lit.248.b. A Civil Death, as Entry into Religion, does not take away an Entry, for this was the Voluntary Act of the Anceſtor; and though there be a Deſcent caſt upon it, yet it is not ſuch a Deſcent as came by the Act of God, and therefore ſhall not take away the Entry of the Diſſeiſee.

Lit. ſ. 411. If I demiſe Lands to a Man for Years, and am diſſeiſed, and my Termor ouſted, and the Diſſeiſor die ſeiſed, and a Deſcent is caſt, I cannot enter, but my Leſſee may, becauſe his Entry is only to regain his Term, and leaves the Freehold and Fee in the Heir by Deſcent, as it was before.

Co.Lit.249.a. So ſuch Deſcent ſhall not take away the Entry of Tenant by *Elegit*, Statute-Merchant, *&c.* for theſe are only particular Intereſts, of which, as of a Term for Years, there can be no dying ſeiſed, or Deſcent thereof to the Heir; but the Freehold, which did deſcend, they leave as it was before, in the Heir by Deſcent.

Co. Lit. 249. Lit. ſ. 412. In the Times of Domeſtick War, when the Courts of Juſtice are ſhut, a Deſcent ſhall not take away an Entry, though the Diſſeiſin were in Times of Peace; for then the Diſſeiſee would be without all Remedy, there being no Courts open wherein to bring his Action; alſo the Deſcent, which is an Act of Law, can give no Right, when the Law itſelf is ſilent; but in the Times of Foreign War only, a Deſcent ſhall take away an Entry; for to encourage Enterpriſing in ſuch War was this Privilege chiefly given to the Heir of the Diſſeiſor.

Co. Lit. 250. Lit. ſ. 243. No dying ſeiſed of Biſhops, Abbots, Deans, Parſons, *&c.* where the Lands come to his Succeſſor, ſhall take away an Entry; for the Succeſſor comes in by his own Act and Concurrence, and therefore ſhall have no more Privilege than his Predeceſſor had; alſo the Succeſſor pays no Relief, unleſs by Grant or Preſcription; for the Eccleſiaſtical Lands were not relieved into the Hands of the Lord.

(H) Whoſe Entry is preſerved notwithſtanding a Deſcent.

Gilb.Ten. 28. Lit. ſ. 402, 403. AS to Infants and (*a*) Feme Coverts, their Entry is not taken away by a Deſcent, by Reaſon of their Weakneſs and Incapacity to claim, which is not imputed to them.

(*a*) But if a Feme Sole is diſſeiſed, and after her Huſband dies ſhe takes another Huſband, and then the Deſcent happens; this Deſcent ſhall take away the Entry of the Feme, for ſhe had once an Opportunity of Entring. 1 Salk. 241.

If

If a Man ſeiſed of Lands in Fee die, his Wife *prevement enſeint* with a Son, and a Stranger abates, and dies ſeiſed; and after the Son is born, he ſhall be bound by the Deſcent, becauſe at the Time of the Deſcent he had no Right to enter, not being then *in eſſe*, and by Conſequence had no Wrong then done him; and the Lord had none to avow upon for his Services at the Time of the Deſcent. Co. Lit. 245. a.

B. Tenant in Tail enfeoffs *A.* in Fee, who hath Iſſue within Age, and dies, *B.* abates and dies ſeiſed, the Iſſue of *A.* being ſtill within Age; this Deſcent ſhall blind the Infant; becauſe the Iſſue in Tail is remitted to his former and elder Right, which is to be preferred before the defeaſable Title of the Diſcontinuee's Heir. Co. Lit. 246. a.

* If a Feme ſole ſeiſed of Lands in Fee be diſſeiſed, and then takes Huſband, and the Diſſeiſor die ſeiſed, and a Deſcent is caſt, this ſhall take away the Entry of the Wife after her Huſband's Death, becauſe being diſſeiſed when ſhe was ſole, ſhe might have entered, and her taking a Huſband, who would not enter, was her own Act and Folly; but if ſhe were under Age at her Marriage, the Privilege of her Infancy then, and Coverture after, ſhall preſerve her Right of Entry, though a Deſcent be caſt. * Page 42. Co. Lit. 246. a. b.

If a Deſcent be caſt, this ſhall bind a Perſon *non compos*, *&c.* but not his Heir, becauſe if any Action ſhould be brought againſt ſuch Perſon after Recovery of his Underſtanding, he could only plead his Inſanity in Excuſe at the Time of ſuch Deſcent: And the Law does not permit a Man to ſtultify himſelf. Lit. Sect. 405. Co. Lit. 247. Gilb. Ten. 29.

A Deſcent caſt, during Impriſonment, ſhall not bind, becauſe during ſuch Confinement he cannot be ſuppoſed to know of the Deſcent, and by Conſequence not capable of taking any Meaſure to prevent it. Co. Lit. 259. a. Lit. Sect. 436.

So a Deſcent caſt, during the Abſence of one in foreign Parts, ſhall not bind, but that on his Return he may enter, becauſe he cannot be ſuppoſed to know his Affairs at Home, or to take ſuch Ways as might ſecure it; but if he were within the Realm at the Time of the Diſſeiſin, or at the Time of the Dying ſeiſed, then a Deſcent caſt, though in his Abſence after, ſhall bind, becauſe he might be preſumed to have Conuzance of it, and therefore ought to have taken Care to prevent it before his Departure, or before the Death of the Diſſeiſor. Lit. Sect. 439. 440. Co. Lit. 260, 261.

If an Abbot of a Monaſtery die, and during the Vacation a Diſſeiſin is committed, and a Deſcent caſt before the Election of a new Abbot, this ſhall not bind his Entry after, becauſe there was no Perſon during the Vacation that could make continual Claim, (the Convent being in Law all dead Perſons) and therefore there can be no Laches imputed to any. Lit. Sect. 443. Co. Lit. 263.

(I) How the Entry may be preſerved by continual Claim: And herein,

1. Of the Nature of continual Claim, and the Effects of it.

COntinual Claim is where a Man, who hath a Right and Title to enter into any Lands or Tenements, whereof another is ſeiſed in Fee or in Tail, makes continual Claim to them before the Perſon dies ſeiſed thereof, the Effect of which is, that, notwithſtanding any Deſcent caſt after, yet he, who made ſuch continual Claim may enter, becauſe he hath done all that, perhaps, he could or durſt do to regain his Poſſeſſion, and ſo no Default Lit. Sect. 414. Gilb. Ten. 33.

being in him, his Right of Entry remains as it was before, notwithſtanding any Deſcent.

Lit.Sect.415. If Tenant for Life alien in Fee, he in Reverſion or Remainder may enter on the Alienee, or make continual Claim to the Land before the Dying ſeiſed of the Alienee, and then he may enter at any Time after his Death, though a Deſcent be caſt.

Lit.Sect.416. Lands are let for Life, Remainder for Life, Remainder in Fee; Tenant for Life aliens in Fee, and the Remainder Man for Life makes continual Claim before the Death of the Alienee, and then the Alienee dies ſeiſed, and then the Remainder Man for Life dies likewiſe before any Entry; yet in this Caſe he in the Remainder in Fee may enter by virtue of the continual Claim * Page 43 made by the Remainder Man for Life; for ſince the Efficacy of this continual Claim, if there had been a ſubſequent Entry made by the Remainder Man for Life, would have extended to the Remainder in Fee by reveſting that too, it is but reaſonable to allow the Remainder Man in Fee a Power of Entry under ſuch continual Claim, eſpecially ſince by Reaſon of the intermediate Remainder, he himſelf could not make continual Claim.

2. What is neceſſary to a continual Claim to make it effectual.

Lit.Sect.417. If a Man hath Cauſe to enter into Lands lying in ſeveral Towns in the *ſame County*, and enter into Parcel in one Town only in the Name of all the Reſt, this ſhall be ſufficient to ſecure his Entry into all the Reſt.

Spelm. Gloſſ. 97. Title *Calumnia*. But if the Lands lie in *two Counties*, the Entry muſt be in each, becauſe the Atteſtation of both Facts, if controverted, muſt be by the *Pares* of each County.

Co. Lit. 252. If three Men diſſeiſe me *ſeverally* of three ſeveral Acres of Land in *one County*, and I enter into one Acre in the Name of all the three Acres, this is good for no more than that one Acre, becauſe each Diſſeiſor made a diſtinct Entry, which being diſtinct Acts of Notoriety require diſtinct Solemnities to defeat them; likewiſe each having an Independant Poſſeſſion, an Entry upon one of them can never affect the Reſt, ſo as to deſtroy their ſeparate Poſſeſſions.

Co.Lit.252.b. 4Leon. pl. 35. *Holland* and *Hopkins*. Dal. 88. pl. 2. So if one Man diſſeiſe me of three Acres of Ground, and deviſes them ſeverally to three Perſons for their *Lives*, my Entry upon one Leſſee in the Name of the whole will only reveſt what belongs to that Leſſee; for where there are *different Liveries* there muſt be different Acts of Notoriety to overthrow them, and therefore a different Entry muſt be made on each Tenant of the Freehold.

4Leon. pl. 35. Co.Lit.252.b. Palm. 402. Lady *Argol* and *Cheyney*. But if the Diſſeiſor had demiſed the three Acres ſeverally to three Perſons for *Years*, then an Entry upon one of the Leſſees in the Name of all the three Acres would have recontinued and reveſted all the three Acres in the Diſſeiſee, for though they are different Demiſes, yet being all Terms for Years, there are *not different Liveries* to be defeated by diſtinct Entries, and therefore one Entry will ſuffice to regain the Poſſeſſion from the Diſſeiſor by overthrowing his Entry by an Act of equal Notoriety.

Co.Lit.252.b. I am diſſeiſed by the ſame Perſon of one Acre at one Time, and of another Acre in the *ſame County* at another Time; in this Caſe my Entry into one of them in the Name of both is good, for though there are two Entries, yet it is but one continued Act of Wrong, and but one Poſſeſſion is gained, for which but one Aſſiſe lies, therefore one Entry of the Diſſeiſee is an Act of ſufficient Notoriety to reveſt the Poſſeſſion of both Acres.

Co.Lit.252.b. If one diſſeiſe me of two ſeveral Acres in *one County*, and I enter into one of them generally, without ſaying in the Name of both, this ſhall reveſt only that Acre where Entry is made; for the *Intent*, which is the Rule to judge of a Man's Actions, appearing to extend no farther than that one Acre, ſhall not be enlarged to reveſt the Poſſeſſion of the other.

Livery within View and Entry afterwards is equal to an Entry on the Land itſelf, and if a Man cannot enter for fear of an Outrage, yet it is good; ſo alſo a Claim within View is good when a Man fears to enter, for in the Caſe both of Entry and Claim a Man ought to take Poſſeſſion where he can, becauſe it is the Change of Poſſeſſion makes the Notoriety in both Caſes; but if the Diſſeiſor menace to hurt the Perſon that has * Right, then the Law allows him to make his Claim as near the Land as he dares to come. Co. Lit. 252. Lit. Sect. 419, 420, 421. 2 Inſt. 483. * Page 44.

But every Apprehenſion of Danger will not warrant a Claim within View; for if a Man fears the Burning of his Houſes, or the taking away or ſpoiling of his Goods, this is not a ſufficient Ground to warrant a Claim within View, becauſe if he ſhould ſuffer what is threatened, he may recover what he loſes, or Damages to the Value, without any corporal Hurt. Co. Lit. 253. b. 2 Inſt. 483.

The *Apprehenſion* then that will juſtify a Man's Claiming within View muſt be of the Perſon's lying in Wait with Weapons, or by Words menacing to *beat, maim, or kill the Perſon* that offers to enter; as alſo the *Fear of Impriſonment*; for the Law will never oblige a Man to hazard his Perſon in ſuch a Manner as may render him unfit to ſerve his Country, when he may recover his Right without ſuch Danger, *viz.* by making Claim within View. Co. Lit. 253. b. 2 Inſt. 483.

In pleading, the Diſſeiſee muſt ſhew ſome juſt Cauſe of Fear, that the Court may judge of the Reaſonableneſs of an Apprehenſion of Danger to his Perſon; but in a ſpecial Verdict, if the Jurors find that the Diſſeiſee did not enter for Fear of corporal Hurt, it is ſufficient, and it ſhall be intended they had Evidence for what they find.

3. Of the Time in which it is to be made.

In ancient Times, if the Diſſeiſor had been in long Poſſeſſion, the Diſſeiſee could not have entered upon him; ſo if the Feoffee of the Diſſeiſor had continued a Year and a Day in quiet Poſſeſſion, the Diſſeiſee could not have entered upon him, for the Diſſeiſee's Neglect of Entry for that Time formed a Preſumption, that either he had no Right to the Lands, or that he relinquiſhed it, eſpecially in the Caſe of the Feoffee of the Diſſeiſor, becauſe he came in by a legal Conveyance and the Solemnity of Livery, which gave Notice to the Diſſeiſee, in whom the Poſſeſſion was, ſo that he might have entered on the Feoffee immediately, and reveſted the Poſſeſſion. Co. Lit. 237. b. 254. b.

But the Law has been altered in this Point; for if a Man is now diſſeiſed, and the Diſſeiſor continues in Poſſeſſion for forty * Years without any Claim made by the Diſſeiſee, yet if the Diſſeiſee at laſt make his Claim before the Death of the Diſſeiſor, it ſhall ſecure his Entry for a Year and a Day after ſuch Claim made, to be computed from the Day of the Claim incluſive, notwithſtanding any Deſcent caſt in that Time; but if he ſuffers the Year and Day after the Claim made to elapſe, then a Deſcent after will bind him, and ſo *toties quoties* after a Year and a Day after any Claim made, a Deſcent will conclude his Entry. Lit. Sect. 427. Co. Lit. 255. a. * By 21 Jac. 1. c. 16. No perſon ſhall make *Entry* into any Lands, *&c.* but in twenty Years next after his Title of Entry, which ſhall firſt accrue, to the ſame; and in Default thereof ſuch Perſon ſo not entring, and his Heirs, ſhall be diſabled utterly from ſuch Entry. And by ſtat. 4 *Ann.* c. 16. No Entry or Claim ſhall be ſufficient, unleſs an Action be proſecuted within a Year after. The Entry or Claim muſt be made upon the Land, unleſs it be prevented by a ſpecial Cauſe. R. 1 Salk. 285. 6 Mod. 44. A Joint-tenant is not barred by Non-entry in twenty Years, if his Companion was in Poſſeſſion. R. 6 Mod. 44. Nor one Parcener, who has the whole by Deviſe, where the other Parcener takes the Profits. *H.* 1 *Ann. inter Reading* and *Roiſton.* 1 Salk. 423.

The Rules of Law concerning continual Claim, and the Effects of it, hold as well in Relation to Abators and Intruders, their Donees and Feoffees, as Lit. Sect. 428. Co. Lit. 255, 256.

as in Relation to Diſſeiſſors, their Donees and Feoffees, and for the ſame Reaſons.

Lit. Sect. 426. If the Diſſeiſor dies ſeiſed within a Year and a Day after the Diſſeiſin, and before any Entry by the Diſſeiſſee, this gives a Right of Poſſeſſion to the Heir, becauſe when the Diſſeiſſee yields up the Poſſeſſion peaceably, the preſumptive Right is in the Diſſeiſor, and the Year and Day which ſhould aid the Diſſeiſee in ſuch Caſe ſhall be taken only from the Time of the Claim made by him, not from the Time the Title of Entry accrued to him; and therefore it is adviſeable for the Diſſeiſſee to make his Claim as ſoon after the Diſſeiſin as he can.

32 H. 8. c. 33. Co. Lit. 238. Since *Littleton* wrote, an Alteration as to the Entry of the Diſſeiſſee on the Death of the Diſſeiſor has been made by 32 *H.* 8. *cap.* 33. by which it is enacted, "That except ſuch Diſſeiſſor hath been in the peaceable "Poſſeſſion of ſuch Manors, Lands, *&c.* whereof he ſhall die ſeiſed, by
* Page 45
"the Space of five Years next after ſuch Diſſeiſin, *&c.* without Entry or "continual Claim, *&c.* that ſuch Dying ſeiſed, *&c.* ſhall not take away the "Entry of ſuch Perſon or Perſons, *&c.*

Co. Lit. 238. a. But ſtill after the five Years, continual Claim muſt be made as at the Common Law, ſince the Statute which is introductive of a new Law does not provide for it after the five Years.

Co. Lit. 238. a. Plow. 47. a. *Quære.* 'Tis ſaid that Abators and Intruders are not within this Statute, becauſe it is Penal, and extends only to a Diſſeiſor in expreſs Words, which was the moſt common Miſchief, *& ad ea quæ frequentius accidunt Jura adaptantur.*

Co. Lit. 238. a. 256. a. The Feoffee of a Diſſeiſor for the ſame Reaſon is held to be out of this Statute, but in Reſpect of the Diſſeiſor himſelf the Statute is conſtrued with that Latitude that may beſt preſerve the antient Right, therefore tho' the Statute ſpeaks of him that at the Time of ſuch Deſcent had Title of Entry, or his Heirs, yet the Succeſſors of Bodies Politick, ſo they be confined to a Diſſeiſin, are within the Remedy of this Act, for the Statute extends clearly to the Predeceſſor's being diſſeiſed, and conſequently without naming the Succeſſor extends to him, for he is the Perſon that at the Time of ſuch Deſcent had Title of Entry.

Co. Lit. 238. a. Plow. 47. a. If a Man make a Leaſe for Life, and the Leſſee is diſſeiſed, and the Diſſeiſor die ſeiſed within five Years, the Leſſee for Life may enter; but if he dies before he enters, it is ſaid the Entry of the Reverſioner is not lawful, becauſe his Entry was not lawful upon the Diſſeiſor at the Time of the Deſcent, as the Statute ſpeaks; but if Leſſee for Life had died firſt, and then the Diſſeiſor had died ſeiſed, he in Reverſion had been within the Remedy of the Statute, becauſe he had Title of Entry at the Time of the Deſcent, and ſo within the expreſs Letter of the Statute, tho' he was not the immediate Diſſeiſee. The ſame Law of a Remainder.

Detinue.

DETINUE is an Action that lies for the Recovery of Goods and Chattels, tho' the Party came to the Poſſeſſion of them by (a) lawful Means, as by Bailment, borrowing or pledging; and in this Action the Plaintiff is to recover the Thing in Specie or (b) Damages for the Detainer.

(a) It lies againſt a Man that hath Goods either by Delivery or finding. ‖

Co. Lit. 286. Rol. Rep 128. (b) 2 H. 6. 15. Rol. Abr. 575.

‖ If the Plaintiff does not want to recover the Thing in Specie, but only Damages, Trover is the moſt uſual Action; and in ſuch Action, if the Plaintiff on the Trial offers to accept nominal Damages, and accept the Thing in Specie, it may be done by Rule, Defendant conſenting, and is frequently done; and ſhould a Defendant, who can reſtore the Thing in Specie, refuſe ſuch Offer, the Jury will give the full and original Value in Damages.

But as in this Action the Defendant was allowed to (c) wage his Law, (for it was thought but reaſonable that the Bailor truſting to the Bailee's Honeſty and Integrity at firſt, ſhould alſo truſt to his Oath in a Court of Juſtice, ſince the Reſtitution might have been ſecret) which being (d) found exceeding inconvenient, it being often experienced that thoſe, who were ſo diſhoneſt as to retain the Goods of another, would generally purge themſelves on their Oaths, occaſioned the ſubſtituting the Action of (e) Trover and Converſion in the Place thereof, which being the Action uſually made Uſe of at this Day in thoſe Caſes, I ſhall but briefly conſider,

(c) For this *vid*, Tit. *Wager of Law*.
(d) 10 Co. 57. a Moor 481. Cro. Jac. 244. Yelv. 178.
(e) *Vide* Tit. *Trover and Converſion*.

* Page 46

(A) By and againſt whom Detinue lies. 46
(B) For what Things it may be brought. 46.

(A) By and againſt whom Detinue lies.

IF a Bailee deliver the Goods to another, he ſhall have an Action of Detinue againſt him, (f) becauſe he hath his Poſſeſſion, and undertakes for the Cuſtody, and the original Bailor may have his Action againſt either of them, becauſe in him is the Property, which both are bound to anſwer to him.

Roll. Abr. 607.
(f) A Man that hath a ſpecial and limited Property, as a Carrier that hath Goods delivered, or a Sheriff by *Fieri facias*, ſhall have this Action againſt a Stranger that takes away the Goods, becauſe they are anſwerable in Damages to the abſolute Owner. 2 Bulſt. 311. Sid. 438. Mod. 30. 2 Sand. 47. 2 Keb. 588. Yelv. 44. Cro. Jac. 73. Dyer 98, 99. Lev. 282. Vent. 52. Danv. Abr. 20. pl. 4, 5.

If *A.* takes the Goods of *C.* and *B.* takes them from *A. C.* ſhall have his Action againſt *A.* or *B.* at his Election, becauſe both damnified *C.* in their Taking.

Sid. 438.

If a Man detains the Goods of a Feme Covert which came to his Hands before Marriage, the Huſband can (g) only bring Detinue, becauſe the Law transfers the Property to the Huſband, but both ſhall join in *Trover*, becauſe the Wrong was originally commenced at the Time when the Wife was ſole; and if ſuch Injury be puniſhed, the Wife herſelf, who received this Injury, muſt be Party to the Action, and the Wife's Demand is ſufficient to prove a Converſion in the Defendant, ſince one of the Parties to the Action is denied the Goods; but if the Poſſeſſion be laid in both it is ill, becauſe if both were poſſeſſed, it is in the Poſſeſſion of the Huſband only.

Sid. 172. Keb. 641. Noy 70. Styl. 261. Yelv. 165.
(g) So if Goods come to a Feme Covert before Marriage, Detinue only lies againſt the Huſband, but Trover and Converſion lies againſt both, becauſe both were concerned in the Treſpaſs. Roll. Abr. 607. but for this *vide* Title *Trover and Converſion*.

9H. 6. 58. b. 60. Rol. Abr. 606. 2 Ld. Raym. 752. And ſee 2 Ld. Raym. 867.

If *A.* delivers Goods to *B.* to be delivered over to *C.* either *A.* or *C.* may have Detinue againſt *B.* for the not delivering it over, according to the Undertaking, is an Injury done each of them.

If a common Carrier carries Goods delivered to him, he may detain them till he is paid for the Carriage of them.

(B) For what Things it may be brought.

a) 7 H. 4. 3. *b.* Co. Lit. 286. Cro. Eliz. 457. Moor 394. N. Dyer 22. 2 Bulſt. 308.

IT has been (*a*) held formerly that Detinue will not lie for Money, unleſs in a Box or Bag, nor for Corn out of a Sack, becauſe theſe Things have no Mark whereby they may be known in order to be re-delivered to the Plaintiff.

Rol. Rep. 59, 60. Lit. Rep. 242. Noy 12. *Q. & vide* Title *Trover and Converſion*, that *Trover* will lie for Money out of a Cheſt or Purſe. ‡

‡ But an Action for Money had and received may be more eligible.

* Page 47 18H.6.20.b. Rol. Abr. 606. (*b*) Where if a Wife loſes Money at Play, the Huſband may maintain Trover ‖ for it, Title *Trover and Converſion*.

* It ſeems, however, clear, that if a Man (*b*) lends a Sum of Money to another, Detinue does not lie for it, but he muſt bring Debt on the Contract, or *Aſſumpſit*.

‖ Aſſumpſit for Money had and received may be more eligible, as there cannot be any Doubt but that ſuch Action will lie.

Cro. Eliz. 867.

So where a Man comes to buy Goods, and they agree upon a Price, and *a Day for the Payment*, and the Buyer takes them away, Detinue does not lie, but an *Aſſumpſit* for the Money, becauſe the Property was changed by a lawful Bargain, and by that Bargain the Buyer was to convert the Goods before the Money was due; but if a Man comes to buy Goods, and they agree on a Price *for preſent Money*, and the Buyer takes the Goods away without Payment, Detinue lies becauſe the Property is not altered; and therefore the taking away the Goods without Payment of the Money is an injurious Taking, for which the Action lies; but if a Man ſell Goods on Payment of Money on a Day to come, and the Money be paid, and the Goods not delivered, Detinue lies, becauſe the Property is in the Buyer.

Co. Lit. 286. 17 E. 3. 45. Rol. Abr. 606.

Detinue lies for Writings in a Box, or for Writings themſelves tho' not in a Box, and tho' the Date § be not mentioned, or the Delivery of the Writings, as a Deed; and it lies for a Huſband and Wife, for a Deed by which an Annuity is granted to the Wife, for every Man that has a Property in Deeds may bring his Action for the (*c*) detaining them.

(*c*) In Detinue of Charters, if the Iſſue be upon the Detinue, and it is found that the Defendant hath burnt the Charters, the Judgment ſhall not be to recover the Charters, for it appears he cannot have them; but he ſhall recover the Value of the Land in Damages. 17 E. 3. 45. b. Rol. Abr. 607.

§ The more general the Deſcription, the better, if not too general, for if the Deſcription be particular and not preciſely proved, the Plaintiff will be nonſuited.

Cro. Jac. 39. *Coupledike* and *Coupledike*.

Detinue lies not for a Houſe, and therefore where the Plaintiff had declared *de una Domo vocat'* a Beehouſe, upon a Writ of Error the Judgment for this Default was reverſed.

Salk. 223. *Roberts* and *Wetheral*, adjudged. 5 Mod. 193.

By the Act of Navigation 12 *Car.* 2. *cap.* 18. certain Goods are prohibited to be imported here, under Pain of forfeiting them, one Part to the King, another to him or them that will inform, ſeize or ſue for the ſame; and it was adjudged that in this Caſe the Subject may bring Detinue for ſuch Goods, as the Lord may have replevin for the Goods of his Villein diſtrained, for the bringing the Action veſts a Property in the Plaintiff.

Devises.

* Page 48

(A) Who may devise Lands, and to whom. 49.
(B) Of what Estate or Interest in the Devisor he may dispose. 51.
(C) What Words pass a Fee in a Will. 53.
(D) What Words create an Estate-Tail, or for Life. 56
(E) Of Terms for Years, and uncertain Interests by Devise. 62.
(F) Of Devises for Payment of Debts. 64.
(G) Of Devises by Implication. 66.
(H) Of the Disposition of Goods and Chattels by Will, by what Description, and to whom good. 68.
(I) Of Executory Devises of Lands of Inheritance: And herein of contingent Remainders, and cross Remainders, as far as they relate to this Place. 71.
(K) Of Executory Devises of Leases for Years: And herein of the Limitation of the Trust of a Term, as far as it relates to, and agrees with a Devise thereof. 76.
(L) Of void Devises: 79. And herein,

1. By devising what the Law already gives, or what the Policy of the Law will not admit. 79.
2. By Incertainty in the Description of the Thing devised. 81.
3. By Incertainty in the Description of the Person to take. 84.
4. By the Devisee's dying in the Life-time of the Devisor. 86.

What Circumstances are necessary by the 32 *H.* 8. *c.* 1. and 34 & 35 *H.* 8. *c.* 5. and 29 *Car.* 2. *c.* 3. What shall be a Revocation and a new Publication, *vid.* Tit. *Wills.*

(A) Who

* (A) Who may deviſe Lands, and to whom.

* Page 49.

6 Co. 16 b. * Rol. Abr. 608.

THE (a) Statutes of 32 *H.* 8. *c.* 1. and 34 and 35 *H.* 8. *c.* 5. give this Power to all Perſons, except Infants, Ideots, Feme Coverts, and Perſons of (b) *non ſane* Memory; and every Perſon may be a Deviſee within theſe Statutes, except Bodies Politick and Corporate; and theſe were excepted becauſe they never anſwered the feudal Services, and were reſtrained from purchaſing any Lands by the Statute of *Mortmain*.

(a) That a Conveyance by Will was a Privilege anciently allowed by the Civil Law only to Perſons *in Extremis*, who had not Time nor Aſſiſtance neceſſary to make a formal Alienation, and was chiefly intended for military Men, who were always ſuppoſed to be under thoſe Circumſtances, and therefore the Ceremonies and Number of Witneſſes required of others were diſpenſed with as to Soldiers, though now the Rules for military Teſtaments are allowed in moſt Caſes; but as to Lands and Houſes, our Law gave no Liberty of diſpoſing thereof by Will, except in certain Boroughs and Places where ſuch Cuſtom had obtained Time out of Mind. Show. P. Caſes 147. Sir *Edward Hungerford* v. *Noſworthy*. (b) That it is not ſufficient that they be able to anſwer to familiar and uſual Queſtions. Cro. Jac. 497. 6 Co. 23. a.

(c) 43 Eliz. cap. 4. for which *vide* Head of *Charitable Uſes*, and *Mortmain*.

Yet, ſince the (c) Statute of Charitable Uſes it has been held that a Deviſe to the Principal, Fellows and Scholars of *Jeſus College* in *Oxford*, and their Succeſſors, for Maintenance of a Scholar, is good, though ſuch Deviſe had been *Mortmain* by the Statute of *Wills*.

Hob. 136. *Flood's* Caſe. Lev. 284. S. P.

2 Vern. 104. Counteſs of *Portland* and *Progers*; for this *vide* Tit. *Baron and Feme*.

Although a Wife, by Reaſon of the Subjection ſhe is under to her Huſband, cannot make a Will, yet a Woman, whoſe Huſband is baniſhed for his Life by Act of Parliament, may make a Will, and act in every Thing as a Feme Sole.

Cro. Eliz. 27. Cro. Car. 219, 376, 597.

Alſo a Huſband may bind himſelf by Covenant or Bond to permit his Wife by Will, to diſpoſe of Legacies, &c. and this will be ſuch an (d) Appointment as the Huſband will be bound to perform.

(d) But it does not operate as a Will, neither ought it to be proved in the Spiritual Court. Mod. 211, 212. See 2 Danv. Abr. 512, 513. For the Property paſſes from him to her Legatee, and it is his Gift. Mod. 211. *per Curiam*. 11 Mod. 221. pl. 14. Vern. 244, 245, 408. 2 Vern. 329, 330. Pre. Ch. 44, 84, 255. 2 Will. Rep. 82. pl. 18. 2 Stra. 891, 1111.—If he once aſſents, he cannot after diſſent; and where he is bound by Agreement to let her make a Will, his Conſent ſhall be implied till the Contrary appears; and what ſhall be ſufficient Evidence of an Aſſent, *vide* 2 Mod. 172, 173. Eq. Caſ. Abr. 66, 171, 172. Ld. Raym. 515. Salk. 235. Carth. 511. 12 Mod. 288, 290. Comyns 67. pl. 42. Freem. 512. pl. 687. Holt. 309. pl. 12. Lil. Ent. 214. 2 Vern. 104, 535. Will. Rep. 126. 2 Will. Rep. 144. pl. 31, 243. pl. 62, 316. pl. 91, 341. pl. 98, 364. pl. 105, 496. pl. 158. and the above Authorities.

Rol. Abr. 608. (e) Of Things in Action, or of what ſhe hath as Executrix by her Huſband's Conſent, ſhe may make a Will, and this is properly a Will in Law, and ought to be proved in the Spiritual Court. Mod. 211, 212. (f) That a Feme Covert Executrix may make an Executor without his Aſſent, *vide* Moor 340. 2 And. 92. Rol. Abr. 608, 912. Mod. 211, 212.

A Feme Covert Executrix cannot deviſe any of the Goods, which ſhe hath as (e) Executrix, without the (f) Aſſent of the Huſband, or his Agreement after.

Plow. 344. 11 Mod. 157.

If a Feme Covert makes and publiſhes her Will, and deviſes Land by it, and her Huſband dies, and then ſhe dies, the Deviſe is void, becauſe the Conſummation is founded upon the making and publiſhing, which are void Acts.

Co. Lit. 112. Rol Abr. 610.

A Wife may be a Deviſee, though not a Grantee to the Huſband, for as the Grant had been void, becauſe the Huſband and Wife are but one Perſon in Law, ſo the Deviſe is good, becauſe it does not take Effect till after the Death of the Huſband, and then they are no more one Perſon.

*An Infant cannot deviſe his (*a*) Lands; and therefore if one under the Age of 21 makes his Will, and thereby deviſes his Lands, and after attains the Age of 21 Years, and dies without making any new Publication thereof, this Deviſe is void. * Page 50

Sid. 162. *Herbert* and *Forbale*, agreed *per Cur.* on a Trial at Bar. 11 Mod. 157. for this *vide* Dyer 143. Raym. 84.

(*a*) An Infant Male at the Age of 15, or Female at 12, if proved to be of Diſcretion, may make a Will, and diſpoſe of their perſonal Eſtate. 2 Vern. 469.——Other Books mention 17 or 18, at which Years an Infant may make his Teſtament and conſtitute his Executors for his Goods and Chattles. Co. Lit. 89. b.——But as the Common Law has appointed no Time, and as this is a Matter properly cognizable in the Spiritual Court, which proceeds according to the Civil Law, by which Law a Will at 14 is good; it ſeems agreed that a Will made by an Infant at the Age of 14 of his perſonal Eſtate will not be controlled in Chancery, or the temporal Courts. 2 Mod. 315. Godol. 276. Eq. Abr. 172, 283. Ld. Raym. 262. Vern. 255, 328, 461. 2 Vern. 8, 49, 76, 469. Pre. Ch. 316. Gilb. Eq. Rep. 74, 203, 209. Fitzgib. 1, 164, 176. Stra. 73, 481, 666, 667, 703. 2 Stra. 847. Barnard. K. B. 223. Fitzgib. 110. 2 Stra. 857. Andr. 365. Fitzgib. 125. 2 Stra. 961. 2 Jon. 210. Salk. 299. pl. 11. Carth. 457. Show. 294.

If there be two Jointenants of Lands, and one of them deviſes that which belongs to him, and dies, this is a void Deviſe, and the Deviſee takes nothing, becauſe the Deviſe does not take Effect till after the Death of the Deviſor, and then the ſurviving Jointenant takes the whole by a Prior Title, *viz.* from the firſt Feoffment; but in this Caſe, if the Deviſor ſurvives the other Jointenant, then the Deviſe is good for the whole, becauſe he being the ſurviving Jointenant has the whole by Survivorſhip, and then the Words of the Will are ſufficient to carry the whole Eſtate; beſides, at the Time of making the Will, though he was not ſole Tenant, yet he was ſeiſed *per Moy et per Tout*; and it is impoſſible to fix upon any particular Part which he meant to deviſe, becauſe he could not then call one Part of the Land more his own than another, and the moſt genuine Conſtruction ſeems to give the whole Land, ſince he was ſeiſed *per Tout* of it at the Time of the Deviſe.

Lit Sect. 287. Perk. Sect. 500.

It has been much doubted whether a Deviſe to an Infant *in Ventre ſa Mere* be good, becauſe it is not in Being to take at the Time of the Death of the Deviſor, and ſince by the Deviſe the Perſon is to take (*b*) immediately after the Death of the Deviſor, the Freehold cannot be put in Abeyance by the Act of the Parties.

That ſuch a Deviſe is not good ſeems to be ſupported by the following Authorities:

Dyer 303. 11 *H.* 6. 13. Bro. Deviſe 30. Salk. 231. pl. 10. Moor 637. 12 Mod. 278.

(*b*) It is ſaid by *Finch* Lord Keeper, that at Common Law, without all Queſtion, a Deviſe to an Infant *in Ventre ſa Mere* is good of Lands deviſable by Cuſtom, but the Doubt ariſes upon the Statute, which enacts that it ſhall be lawful for a Man by Will in Writing to deviſe to any Perſon or Perſons. 2 Mod. 9.—†Poſthumous Children, how enabled to take a Contingent Remainder which hath no Truſt-Eſtate to preſerve it, ſee 10 & 11 *W.* 3. c. 16.

Others (*c*) of as good Authority hold that ſuch Deviſe is good, though the Infant be not *in eſſe* at the Death of the Deviſor, and that the Freehold ſhall not be in Abeyance, but ſhall deſcend to the Heir at Law in the mean Time.

(*c*) As Moor 177. Lev. 135. Sid. 153. Raym. 163. Keb. 851. 2 Bulſt. 273.

But all agree in this, that a Deviſe to an Infant, when he ſhall be born, or when God ſhall give him Birth, is a (*d*) good Deviſe, and that the Freehold ſhall deſcend to the Heir at Law in the mean Time.

Sid. 153. *Snow* and *Cutler*. Lev. 135.

S. C. Raym. 162. Freem. 244. (*d*) So if a Deviſe to an Infant *in Ventre ſa Mere*, with a new Publication of the Will after his Birth. Cro. Eliz. 423.

So it is out of Doubt that if Land be deviſed for Life, the Remainder to a Poſthumous Child, that this is a good contingent Remainder, becauſe there is a Perſon in Being to take the particular Eſtate; and if the contingent Remainder veſts during the Continuance of the particular Eſtate, or *eo inſtanti* that it determines, it is ſufficient.

Moor 637. *Church* and *Wiat*. 3 Lev. 408. 4 Mod. 359. Salk. 227. Carth. 309.

Reeve and *Long*, *vide* 10 & 11 *W.* 3. c. 16. 8 Vin. Abr. 87. pl. 12. and Head of *Remainder and Reverſion*.

* Page 51 Lev. 59.

* A Deviſe to an Alien, ſo to the Heir of an Alien, is void, becauſe an Alien, according to the Policy of our Law, can have no Heir, either to (*a*) inherit or take by Purchaſe.

(*a*) But a Baſtard may be a Deviſee of Land though he cannot take by Deſcent. Dyer 323. But a Monk cannot be a Deviſee of Land. Dyer 323. But as to Religious Perſons who are diſabled from making a Will, or taking by Deviſe, *vide* Rol. Abr. 608.

(B) Of what Eſtate or Intereſt in the Deviſor he may diſpoſe.

Co. Lit. 111. Abr. Eq. 174.

BY the Common Law, no Lands or Tenements were deviſable, except by particular Cuſtom; neither could they be transferred from one to another but by ſolemn Livery and Seiſin, or Matter of Record; the (*b*) true Reaſon hereof ſeems to be owing to the Nature of the Feudal Tenures; for by theſe, though the Lord had given Lands to his Tenant and his Heirs, which were Words of Limitation, and appropriated to meaſure out the Length and Continuance of the Eſtate; yet as they were underſtood the Heirs of the preſent Tenant who came in by the Donation of the Lord, the Tenant could not deviſe them even to his own Heir, thereby to make him a Purchaſer, and ſo deprive the Lord of the Profits of Wardſhip, Marriage, and Relief, which were incident to the Feudal Tenure; much leſs could he deviſe them to a Stranger, who perhaps might not have Ability of Mind, or Strength of Body, though the one was requiſite to aſſiſt his Lord in his Courts, and the other to defend his Perſon in the Field.

(*b*) Becauſe it was preſumed that the Teſtator would do that *in extremis* that he would not do in his Health, that it proceeded from the Diſtemper of his Mind by the Anguiſh of his Diſeaſe, or by ſiniſter Perſuaſions, to which he was more liable in his Illneſs than at other Times. Rol. Abr. 608.

50 Aſſ. 1. Rol. Abr. 609.

But an Eſtate for Years might have been deviſed at Common Law, for this, as now, was only conſidered as a Chattel, and formerly was of very ſhort Duration.

Plow. 343.

The Statute of 32 *H.* 8. *c.* 1. which firſt introduced this Diſpoſition of Lands by Will, requires that the Deviſor ſhould have a proper Title and Intereſt in them for that Purpoſe; and therefore if a Man deviſes Land, in which he has nothing, and after purchaſes them, ſuch a Deviſe is void, not being within the Statute of *Wills*, for he is not a Perſon *having* as the Statute ſpeaks.

Salk. 237. pl. 16. Holt. 248. pl. 14. 11 Mod. 129. Fitzgib. 231. *Bunter* and *Cook*, adjudged in *C. B.* and affirmed in *B. R.*

So where a Man deviſed to his Wife all ſuch Sums of Money, Lands, Tenements, and Eſtate whatſoever, whereof at the Time of his Deceaſe he ſhould be poſſeſſed, and after the making of the Will he purchaſed Lands in Gavelkind, and died without making any new Publication, and it was held that thoſe new purchaſed Lands did not paſs; for they were not *ſua* at the Time of making the Will, and the conſtant Form of (*c*) Pleading is, that the Teſtator was ſeiſed, and that being ſo ſeiſed, *&c.* which at leaſt is an Evidence of the Law, and there is no Difference as to Lands deviſable by Cuſtom, or by Statute, but ſuch Deviſe of Things perſonal is good, tho' the Teſtator had them not at the Time of making his Will, becauſe they go to the Executor, to whom the Will is only directory.

(*c*) That in Pleading a Deviſe it muſt be ſhewn of what Eſtate the Deviſor was ſeiſed at the Time of making the Will. Cro. Eliz. 530. And that he died ſeiſed of that Eſtate. Mod. 217.

If

* If *A.* makes his Will, and thereby deviſes Lands, and is afterwards diſſeiſed and dies (*a*) before Re-entry, the Deviſe is (*b*) void. * Page 52 39H.6.18.b. Mod.217. S.P.

(*a*) But if he re-enters, the Deviſe ſhall be good, for he was ſeiſed *ab initio*. Salk. 238. (*b*) But if the Father deviſes Lands to his youngeſt Son, and the eldeſt Son knowing thereof enters into the Land, and diſſeiſes the Father, and ſo continues till the Death of the Father, by which the Will is void, yet becauſe it was made void by Deceit and Covin, it ſhall be made Good in Chancery. Roll. Abr. 378. *per* Lord Chancellor, in the Caſe of *Boſwell* and *Emery*.

A. agrees with *B.* for the Purchaſe of Copyhold Lands, which were ſurrendered out of Court to the Uſe of *A.* but before Admittance *A.* dies, *A.* was ſeiſed of other Copyhold Lands, and after the ſaid Contract with *B.* had made his Will, and deviſed all his Copyhold Lands to *J. S.* And it was ruled that the Copyhold Lands agreed for, paſſed by the Will, for after the Agreement the Purchaſer might in Equity recover the Land, and oblige *B.* to execute a Conveyance, and till ſuch Conveyance executed, the Vendor ſtood ſeiſed in Truſt for the Purchaſer as he ſhould appoint; and therefore if after Articles agreed on for a Purchaſe, the Purchaſer deviſes the Land, and dies before a Conveyance executed, yet the Land paſſeth in Equity; for though according to the ſtrict Notions of Law the Deviſor has not Lands within the Statute till a Conveyance be executed, and he thereby becomes ſeiſed of them, yet after Articles of Purchaſe the Purchaſer only is conſidered as Maſter of the Land, and therefore in (*c*) Equity will be allowed to diſpoſe of them. Chan. Ca. 39. Ca. *Darcy* and *Beardſham*. 2 Chan. Ca. 144.

(*c*) That an equitable Intereſt is as well deviſeable as a legal Eſtate. 2 Vern. 679. adjudged.

So where a Treaty of Marriage Articles was entered into, whereby the Sum of 700 *l.* being the Wife's Portion, and 700 *l.* more added to it on the Part of the Huſband, in all 1400 *l.* was agreed to be laid out in the Purchaſe of Lands, to be ſettled on the Huſband for Life, Remainder to the Wife for Life, Remainder to Truſtees, to ſupport contingent Remainders, *&c.* the Marriage takes Effect, the Huſband dies without Iſſue, and before any Purchaſe made purſuant to the Articles, having firſt deviſed all his Perſonal Eſtate to the Defendant, who was his Wife, and all his Real Eſtate to the Plaintiffs, who were his Nephews, and one of them his Heir at Law, and made his Wife Executrix; but took no Manner of Notice of the 1400 *l.* On a Bill brought by the Plaintiffs to have this 1400 *l.* as they would have the Land, if the Purchaſe had been made purſuant to the Articles, for the Wife took more by the Deviſe than ſhe would be intitled to under the Settlement, had it been made; and therefore it was argued that if it were to be conſidered as Lands, ſhe could not have both; the Deviſe of the Perſonal Eſtate being more than an Equivalent, and therefore a Satisfaction; and it was held by my Lord Chancellor, that as this Caſe is, if a Purchaſe had been made even after making the Will, though at Law ſuch Lands would not paſs; yet in this Court there could be no Queſtion but the Plaintiffs would have the Benefit thereof by the Relation to the Articles; and though no Purchaſe was made, yet by the Agreement the 1400 *l.* is to be looked upon in a Court of Equity as a Real Eſtate, and as ſuch muſt go to the Plaintiffs. Abr. Eq. 175. pl. 5. Gilb. Eq. Rep. 91. Pre. Ch. 400. Will. Rep. 172. pl. 42. 2 Eq. Abr. 353. pl. 7. 10 Mod. 39, 528. *Lingen* and *Souray*, decreed by Lord *Harcourt*, and affirmed by Lord *Cowper*.

A Guardian by Knight's Service might have deviſed the Ward of the Body and Land; ſo of a Guardian in (*d*) Socage. 26 E. 3. 65. Fitz. Gard. 159.

Rol. Abr. 609. (*d*) But a ſpecial Guardian appointed purſuant to the Statute 12 Car. 2. *c.* 24. cannot tranſfer the Cuſtody of the Ward, by Deed or Will, to any other. Vaugh. 179.

(a) But Tenant in Tail may deviſe to a Charity, and ſuch Deviſe ſhall be good by the Statute of Charitable Uſes, by Way of Appointment. Duk. Charitable Uſes 110. 2 Vern. 453. (b) 31 Aſſ. 3. adjudged, but a Q. *Rationem* added.——Whether ſuch a Reverſion could be deviſed by Parol within the Cuſtom, Styl. 409, 410, *dubitatur*. (c) But a Remainder after an Eſtate-Tail may be deviſed. 2 Aſſ. 60. Bro. Deviſe 42. Fitz. Aſſiſe 259.

Page 53

* Tenant (*a*) in Tail to him and the Heirs of his Body, with Reverſion expectant in Fee, (*b*) cannot deviſe the Land in Fee to another, tho' he dies without Iſſue becauſe, but a meer (*c*) Poſſibility, and not grantable or aſſignable.

3 Lev. 427. *Biſhop* and *Fountaine*, decreed in Chancery by the Aſſiſtance of *Treby*, C. J. and *Powel*, J.

A Man ſeiſed in Fee deviſed his Lands in Truſt, to ſell Part for Payment of his Debts, and till his Debts were paid, to pay 100 *l. per Ann.* to his Natural Daughter *M.* and after the Debts paid, 300 *l.* for her Life; and if ſhe have Children, to convey ſucceſſively to thoſe Children; but if ſhe die without Iſſue, then to convey to the eldeſt Son and Heir of *J. S.* his Nephew, and the Heirs of his eldeſt Son; but if he claim any Thing during the Life of *M.* then both Father and Son to be excluded from having any Thing out of his Eſtate; the eldeſt Son of *J. S.* was *A.* who had two Siſters, *B.* and *T.* *A.* died, leaving Iſſue *J.* who in the Life of *M.* deviſed the Lands in Queſtion to *J. S.* and died without Iſſue, and after the Death of *M.* without Iſſue, the Truſtee conveyed to the Siſters of *A.* and their Heirs; and it was held that this being but a meer Poſſibility during the Life of *M.* the Deviſe was void, and the Lands well conveyed to the Siſters of *B.*

Abr. Eq. 175, 176. *Drew* and *Merry*. decreed.

J. S. who was to have had a conſiderable Advantage by a Will, was drawn in by Fraud and falſe Suggeſtions to make a Compoſition for his Intereſt, and to give a Releaſe; afterwards *J. S.* being ſenſible of the Fraud, makes his Will, and thereby (after other Legacies) he deviſes all the Reſt of his Goods and Chattels whatſoever to his Wife, upon Condition that ſhe paid all his Debts, and made her ſole Executrix; and it was held that his Right to ſet aſide the Releaſe was deviſeable, and the Words proper for that Purpoſe.

(C) What Words paſs a Fee in a Will.

Co. Lit. 6. b. Bulſt. 222. Bendl. 11. Moor 57. *vid.* Title *Eſtate in Fee-ſimple*.

ALTHOUGH a ſet Form of Words, and the Word *Heirs* particularly, are neceſſary in Deeds to convey an Inheritance, yet may they be diſpenſed with in Laſt Wills, at which Time it is preſumed that the Teſtator is *inops Concilii*; hence great Regard is paid to the Intention of the Teſtator, and ſuch Intention is to govern in all Caſes where it can ſquare with the Rules of Law; therefore if a Man deviſes Lands to another *in perpetuum*, or in *Feodo Simplici*, or to him and his Aſſigns for ever, or to him and his, or that ſuch a one ſhall be univerſal Heir; in all theſe Caſes, a Fee paſſes by the Will; for it is evidently the Deviſor's Intention that the Gift ſhould continue beyond the Life of the Deviſee.

Rol. Abr. 834.

So if *A.* deviſes Land to *B.* to give, ſell or do what he pleaſes with it; theſe Words by the Intent of the Deviſor convey a Fee to *B.* or if the Words were to *B.* or *Sanguini ſuo*, they would paſs a Fee, becauſe the Blood runs through the Collateral as well as Lineal Line.

Cro. Jac. 416. Rol. Abr. 835.

A Deviſe to a Man and his Succeſſors carries a Fee; for by the Word *Succeſſors* is intended *Heirs*, *quia Hæres ſuccedit Patri*.

If

* If a Deviſe be in theſe Words; I releaſe all my Lands to *A.* and his Heirs, *A.* has a Fee-ſimple; for where the (*a*) Intention of conveying appears, the Law diſpenſes with a Form in a Will.

* Page 54 Bendl. 30.

(*a*) I appoint that *J. S.* ſhall have my Inheritance, if the Law allows it, or that *J. S.* ſhall be Heir of my Lands, theſe Words are ſufficient to convey a Fee. Hob. 2.

If Lands are deviſed to Truſtees, without any Words of Limitation to ſupport the Truſt of Eſtates of Inheritance, they by Implication muſt have an Eſtate of Inheritance ſufficient to ſupport the Truſt, for there is no Difference between a Deviſe to a Man for ever, and to a Man upon Truſts which may continue for ever. Abr. Eq. 176. adjudged in the Caſe of *Sparrow* and *Shaw*.

If a Man deviſes Land to his Wife for Life, and after her Death to his three Daughters, equally to be divided, and if one dies before the other, then one to be Heir to the other, equally to be divided; this laſt Clauſe gives a Fee to the Daughters, for the Word *Heir* is *Nomen operativum*, and chiefly in a Will ſhall be taken in its full Extent, and then it reaches the moſt remote Heir. *Paſch.* 1. Geo. 2. Rol. Abr. 833.

A. deviſes Land to his Son and Heir, and if he dies before his Age of 21 Years, and without Iſſue of his Body then living, the Remainder over, he ſurvives the 21 Years, and ſells the Land, and the Sale was adjudged good, for he had a Fee-ſimple preſently, the Eſtate-Tail being to commence upon a ſubſequent Contingency. Sid. 148.

If *A.* deviſes Land to *B.* for Life, the Remainder to *C.* paying ſeveral Sums in Groſs, *C.* hath a Fee, tho' all the Sums together do not amount to the Annual Rent of the Land; for the Deviſe ſhall be intended for his Benefit; and if he had only an Eſtate for Life, he might die before he would receive the Legacies out of the Land, and conſequently be a Loſer, which could never be the Intention of the Teſtator; and therefore, wherever there is a Sum in Groſs to be paid, the Deviſee hath a Fee, though the Sum be not to the Value of the Land. 6 Co. 16. *Collier's* Caſe, Cro. Eliz. 378. Cro. Jac. 527. Cro. Car. 158. Co. Lit. 9. b. 5 Co. 21.

So if *A.* deviſes Land to *B.* in Conſideration that *B.* will releaſe 100 *l.* due to him to Executors of *A.* *B.* has a Fee-ſimple upon his Releaſe of the Debt; for the Deviſe ſhall be intended for his Benefit, and an Eſtate for Life might be determined before he could receive 100 *l.* out of the Land. Bendl. 15.

If a Man deviſes 100 *l* in Legacies, to be paid within a Year to ſeveral Perſons out of Land of the Value of 10 *l.* yearly, and then deviſes the Land to another, the Deviſee has a Fee in the Land; for tho' the Deviſe be not to him, paying 100 *l.* yet ſince he muſt take the Land ſubject to the Charge of the Legacies, he muſt have a Fee to have any Benefit by the Deviſe. 2 Lev. 249. 2 Salk. 685.

But if *A.* deviſes Lands to *B.* paying ſo much, or ſuch Sums out of the Profits of the Lands, the Deviſee takes but an Eſtate for Life; for altho' he takes the Land charged, yet he is to pay no (*b*) farther than he receives, and ſo can be no Loſer. 6 Co. 16. 2 Mod. 25.

(*b*) Whether the Word *paying* out of Lands in general, and not mentioning any certain Time, ſo that the Loſs may appear, paſſes a Fee-ſimple. *Q.* & *vide* 2 Vern. 106.

So if the Deviſe had been to *B.* paying an Annual Sum to another, this had been an Eſtate for Life, for he may pay this out of the yearly Profits without any Loſs to himſelf.* Cro. Car. 158. Jon. 211. Bulſt. 194.

* This is a very general Propoſition, and perhaps not to be taken in its fulleſt Extent. See the Caſes *ſupra*. If to be paid *out of the Profits*, the Propoſition might be right, there he could not be a Loſer, *contra*, where he might be a Loſer. See 1 Eq. Ca. Abr. 177, *&c.*

Cro. Jac. 527. 2 Vern. 687. Salk. 239. pl. 18. *Hopſwell* and *Ackland*, adjudged on a ſpecial Verdict. in *C. B.* Hil. 8 Ann.

If a Man deviſes to his younger Brother all his Lands, Tenements, and Hereditaments, and all his Perſonal Eſtate, and whatever elſe he had in the World, and makes him Executor, deſiring him to pay his Debts and Legacies, the Deviſee has a Fee-ſimple by theſe Words.

* Page 55 2 Vern. 564. *Murray* and *Wyſe*. Pre. Ch. 264.

* If a Man deviſes 50 *l.* to be paid in three Months, and all the Reſt and Reſidue of his Real and Perſonal Eſtate whatſoever he gives to his dearly beloved Wife, whom he makes ſole Executrix, by theſe Words the Wife has a Fee-ſimple in the Lands.

4 Mod. 89. Show. 348. Skin. 195. 3 Danv. 175. pl. 12.

So where the Teſtator, being ſeiſed of Coyyhold and Freehold Lands, deviſed all the Reſt of his Eſtate, whether Freehold or Copyhold, to his Wife and Children, equally to be divided between them; and it was held that the Word *Eſtate* muſt ſignify the Intereſt he had in the Land, and ſo paſs a Fee.

Eq. Abr. 177 pl. 16. Salk. 234. pl. 13. 3 Mod. 45. See Swinb. 152, 153. Caſes Temp. Talb. 110, 157, 285, 286. Ld. Raym. 187. 2 Ld. Raym. 831, 1325. Vern. 340. Pre. Ch. 37, 264, 471. 8 Mod. 255. 10 Mod. 94, 287, 525, 526, 528. 11 Mod. 90, 102. pl. 9, 207. pl. 10. Gilb. Eq. Rep. 77, 87. 2 Will. Rep. 335. pl. 96, 523. pl. 169. 3 Will Rep. 193. pl. 47, 295. pl. 74, 386. Comyns 337. pl. 171. that the Word *Eſtate* paſſes the Intereſt or Fee in the Lands, *vide* Styl. 281. 2 Lev. 91. Mod. 100. 2 Chan. Ca. 262.——If a Man deviſes Lands to *A.* for Life, and after his Deceaſe, the whole Remainder of theſe Lands to *B.* theſe Words paſs a Fee in the Remainder to *B.* by the manifeſt Intention of the Teſtator. Lutw. 762.—A Deviſe of all a Man's Real and Perſonal Eſtate paſſes a Fee in the Real Eſtate, adjudged between the Counteſs of *Bridgwater* and *Bolton*. Salk. 236. pl. 15. 6 Mod. 106. S. C. adjudged, and largely debated.

Abr. Eq. 178. *Barry* and *Edgworth*. Paſch 1729. decreed at the Rolls. See 2 Will. Rep. 524.

A. a young Lady, being in eight Days Time to be married to the Defendant, being taken ill made her Will, and after ſeveral ſpecifick and pecuniary Legacies deviſes in theſe Words: *Item, I give and bequeath all my Land and Eſtate in* Upper Cateſby *in* Northamptonſhire, *with all their Appurtenances, to* William Edgworth *of St. Margaret's, Eſq*; and made him and Mrs. *Rudge* Executors and Reſiduary Legatees, and died ſeiſed of a Real Eſtate of the Value of 200 *l. per Ann.* and poſſeſſed of about 3000 *l.* Perſonal Eſtate, and the Plaintiff's Wife was her Siſter and Heir; and the only Queſtion was Whether the Defendant had an Eſtate in Fee, or only for Life; and it was agreed that a Deviſe of all his Eſtate would have paſſed a Fee; but a Difference was endeavoured between ſuch a Deviſe of all his Eſtate generally, and a Deviſe of all his Eſtate at ſuch a Place, that this was only a Deſcription of the Place where the Eſtate lay, and no Deviſe of the Intereſt which he had in that Eſtate, farther than for Life; and it was agreed clearly, that a Deviſe of all his Lands would paſs only an Eſtate for Life, and not the Eſtate in Fee which he had in thoſe Lands. But the Maſter of the *Rolls* was clearly of Opinion that he had an Eſtate in Fee, becauſe the Lands paſſed by the firſt Words, and the Intereſt in thoſe Lands by the ſecond; and if the Word *Eſtate* meant nothing more than the Lands, it would be uſeleſs; but if the Deviſe had been of all his Lands or Eſtate at ſuch a Place, he thought that would have paſſed the Fee, but would have been taken according to the common Acceptation for his Lands at ſuch a Place; but as this was, it muſt be a Fee, and decreed accordingly.

Cro. Car. 447. *Wilkinſon* and *Merryland*. Roll. Abr. 834. Jones 380.

But where a Man ſeiſed of Black Acre in Fee by Mortgage, which was forfeited, and of White Acre as his own Inheritance, deviſed White Acre to his Brother, and then deviſed all the Reſidue of his Goods, Leaſes, Mortgages, Eſtates, Debts, ready Money, and other Goods, whereof he was poſſeſſed, after Debts and Legacies paid, to his Wife, and made her Executrix, and died; and it was held that this was no Deviſe in Fee to the Wife of the mortgaged Land; for the Word *Eſtate* is coupled here with Chattels, which ſhew that he meant only Eſtates for Years, and the rather becauſe the Words *whereof he was poſſeſſed* ſhew that he intended only to

give her Chattels, and the Mortgage-Money, and not the Inheritance of the Land.*

* Why ſhould it not have paſſed, under the Words, *Mortgages, Eſtates*, as it ſeems to me, he intended to give her all his Intereſt, Right and Title?

A. deviſed his Houſe or Tenement, wherein *J. S.* dwelt, called the *White-Swan* in *Old-ſtreet*, to *J. N.* for ever; this carries the (*a*) Fee-ſimple, and though *J. S.* had but a ſeparate Apartment in the Houſe, and * the other Rooms were inhabited by other Perſons, yet the whole Houſe paſſed, becauſe the Houſe in which he dwelt was deviſed, and which was called the *White-Swan*, which Sign extending to the whole Houſe, ſhews the Intent of the Deviſor.

Cro. Car. 129. *Chamberlain* and *Turner*. Sav. 195. Dyer 357. *in Margine.*

* Page 56.

(*a*) *A.* deviſes in theſe Words; "I give, ratify and confirm all my Eſtate, Right, Title, and Intereſt which I now have, and all the "Term or Terms of Years, which I now have, or may have in my Power to diſpoſe of, after my Death, in "whatever I hold by Leaſe from *J. P.* and alſo the Houſe called the *Bell Tavern*, to *B.*" and it was held by three Judges againſt *Holt*, that the Deviſee took an Eſtate in Fee in the *Bell Tavern*. Salk. 234.

(D) What Words create an Eſtate-Tail, or for Life.

AND here the former Rule will hold good, that the Intent of the Deviſor will ſupply the Want of thoſe Words which are neceſſary in a Conveyance at Common Law; and therefore (*b*) if *A.* deviſes Land to *B.* and his Heirs Male, the Law will ſupply theſe Words, *of his Body*, and make it an Eſtate-Tail.

Bro. Tit. *Deviſe* 1. Co. Lit. 9. b. 25. a. 27. a. Hob. 33. Vent. 228, 229. *vide*

(*b*) But a Deviſe cannot direct an Inheritance to deſcend againſt the Rules of Law; and therefore in this Caſe if *B.* hath Iſſue a Daughter, who hath Iſſue a Son, he ſhall never inherit; for the Rule is, that whoever claims as Heir in Tail-Male, muſt convey his Deſcent wholly by Heirs Male. Rol. Abr. 835. Vent. 228. *vide* Tit. *Deſcent*.

So a Deviſe to one and *Semini ſuo* creates an Eſtate-Tail; ſo if Lands are deviſed to one, and if he die before Iſſue, or if he depart not leaving (*c*) Iſſue, or if he die, not having a (*d*) Son, all theſe Limitations create an Eſtate-Tail.

2 Vern. 766. Abr. Eq. 179.

(*c*) And if it ſhall pleaſe God to take my Son *R.* before he ſhall have Iſſue of his Body, ſo that the Lands deſcend to his Brother, this is an Eſtate-Tail. Owen 29. adjudged. (*d*) For the Word *Son* is *Nomen Collectivum*. Vent. 231.

But if a Man deviſes Lands to another without more Words, this is but an Eſtate for Life; and if the Deviſe had gone farther, to him and his Aſſigns, theſe Words of themſelves had not enlarged the Eſtate; but if it had been to him and his Aſſigns for ever, it had been a Fee.

Co. Lit. 9. b. Bro. Title *Deviſe* 33. Rol. Abr. 834.

If *A.* deviſes Lands to his eldeſt Son *J. S.* and the Heirs Male of his Body for the Term of 500 Years; provided if he, or any of his Iſſue Male, alien the Premiſſes, then to remain over, this is an Eſtate-Tail, and the Limitation for 500 Years void; for tho' generally a Deviſe to a Man and the Heirs of his Body, for 1000 Years, is a Term, and not an Inheritance; yet here the Teſtator's Intent was that it ſhould be an Inheritance, becauſe by the Proviſo he took Care to advance the Iſſue of *J. S.* but if it ſhould be a Term, then by the Deſcent of the Inheritance on *J. S.* the Term would be merged, and the Iſſues would be unprovided, for *J. S.* might alien the Eſtate.

10 Co. 78. Moor 772. S. C.

A. ſeiſed

Rol.Abr.834. *A.* ſeiſed in Fee of a Houſe and Lands belonging to it, deviſes the Moiety of the Houſe to his Wife for her Life; *Item*, he deviſes the other Moiety of the Houſe to his ſecond Son; *Item*, he deviſes the ſaid Houſe, and all the Lands belonging to it, to his ſecond Son; yet the Son took but an Eſtate for Life; for the ſecond Deviſe to the Son had its Effect by conveying that Moiety of the Houſe, and the Land which he had not by the firſt Deviſe, and there are no Words in the Will to create a larger Eſtate.

Cro.Eliz.498. *A.* having Iſſue two Sons, deviſes Black Acre to the eldeſt, and White Acre to the youngeſt; and if either of them died, his Acre ſhould go to the Survivor, and farther deviſed (having two Daughters) to each of them 10*s.* it was adjudged the Sons took but an Eſtate for Life; for though the Conſideration generally gives a Fee, yet where there are expreſs Words to determine the Intent of the Deviſor, (which is always the Rule in * Wills) there the Deviſe ſhall be (*a*) conſtrued accordingly; and here it is provided that after the Death of either of them the Survivor ſhould have both Acres, which declares his Intent that they ſhould have it but for Life, notwithſtanding the Sums appointed to be paid to the Daughters.

* Page 57.

(*a*) If Lands are deviſed to *A.* and *B.* equally to be divided they have but Eſtates for Life, for this can mean no more than that they ſhould ſeverally occupy the Land. Rol. Abr. 834.

9 Co. 128. Owen 29. Vent. 227. Pollex. 487. If *A*, deviſes Land to his Son *B.* and if he hath Iſſue Male of his Body lawfully begotten, then that Iſſue to have it, and if he hath no Iſſue Male, then to others in Remainder; by this Deviſe *B.* hath an Eſtate-Tail; for where the Deviſor ſaith, if he have no Iſſue of his Body, then it ſhall remain over, that is as much as if he had ſaid, if *B.* dies without Iſſue Male, which had been ſufficient to create an Eſtate-Tail in him.

Cro. Jac. 695. *Chadock* and *Cowley*. Pollex. 487. See Sid. 148. *A.* having two Sons *B.* and *C.* deviſed *Blackacre* to *B.* and his Heirs, and *Whitacre* to *C.* and his Heirs, and farther willed that the Survivor of them ſhould be Heir to the other, if either of them died without Iſſue; though the firſt Words were ſufficient to paſs an Eſtate in Fee, yet the ſubſequent Words correct them, and paſs only an Eſtate-Tail, and the Remainder in Fee was not contingent, but executed, each Son being Tenant in Tail of the Part to him deviſed, with the Remainder to the Survivor in Fee.

Cro. Jac. 448. *King* and *Rumball*. Rol Abr. 836. Pollex. 487. A Man deviſed all his Free Lands to his Wife for Life, and after her Death to *A. B.* and *C.* his three Daughters, equally to be divided; and if any of them die before the other, then the others to be her Heirs, equally to be divided; and if they die without Iſſue, then to others named in the Will; adjudged that the Daughters had an Eſtate-Tail.

Noy 64. Dyer 330. Rol. Abr. 835. So where the Deviſe was to a Man and his Heirs, and if he die without Iſſue, that then the Land ſhall go to *A.* and *B.* or the Survivor of them; adjudged an Eſtate-Tail in the firſt Deviſee, for in theſe Caſes the (*b*) Extent of the Word *Heirs* is confined to the Deſcendants or Iſſue of the Body of the Deviſee, ſince otherwiſe the Limitation over cannot veſt according to the Intent of the Deviſor, for even in Wills they will not allow a Limitation of a Fee upon a Fee.

(*b*) Where a Man deviſed Land to *A.* his Son for ever, and after his Deceaſe the Remainder to his Heir Male for ever, with other Remainders over, and held an Eſtate-Tail in *A.* for though the firſt Deviſe being to him for ever would give him a Fee-ſimple, yet the ſubſequent Words *to his Heir Male*, ſhew what Sort of Inheritance the Deviſor intended him. Bulſt. 219 to 223. *Whiting* and *Welkins*. Rol. Abr. 836.

Rol Abr.837. If a Man deviſes Lands to his Wife for her Life, and after to her Son, and if he dies without Iſſue having no Son, that then *J. S.* ſhall have it; the Son by this Deviſe takes an Eſtate in Tail Male, for though the Deviſe to the Son, and if he dies without Iſſue, had been a good Tail general, yet when the Deviſor went further and ſaid, having no Son, he thereby explained

plained what Iſſue he intended ſhould inherit the Land, and limited it to the Iſſue Male.

A. having Iſſue *B.* and *C.* deviſed ſome of his Lands to *B.* his eldeſt Son, and the Heirs of his Body, after the Death of his Wife, and if *B.* died living his Wife, then to *C.* his Son, and deviſed other Lands to *C.* his Son and the Heirs of his Body, and if he died without Iſſue, then to remain over; *B.* died in the Life of the Wife, yet adjudged that *C.* could not enter into the Land, while any Iſſue of *B.* remained; for the Words, *if* B. *died living the Wife*, did not abridge the Eſtate-Tail which was given by the former Words, becauſe the Teſtator could not be ſuppoſed to intend to prefer a younger Son before the Iſſue of his eldeſt, eſpecially when he had in the former Part of the Will ſettled it on the Iſſue of the eldeſt, and made the ſame Proviſion of other Lands the ſame Way for the youngeſt Son. Cro.Car. 185 *Spalding*'s Caſe. Bulſt. 230. S. C. Vent. 230. 3 Lev. 434. S. P. Will. Rep. 427. S. P. 2 Will. Rep. 196. S. P. Ld. Raym. 524. S. P.

A. ſeiſed of Lands deviſed them to his Wife, if ſhe did not marry, but if ſhe do marry, then his eldeſt Son preſently after her Deceaſe to enter, * and hold the Land to him and the Heirs Male of his Body, the Remainder to his other Sons in Tail Male; the Wife did not marry, yet the Court reſolved that the Lands were intailed by the Will, taking the Intent of the Deviſor to be, that the Intail ſhould be created in all Events, but that the eldeſt Son ſhould not enter till after the Deceaſe of the Wife, unleſs in Caſe of her Marriage, and then to enter preſently. 3 Lev. 125. *Luxford* and *Cheek*. Raym. 427. 2 Show. 152. pl. 134. * Page 58

A Man had Iſſue *A. B.* and *C.* and having three Houſes deviſed them all to his Wife, with Remainder of one Houſe to each Child, and their Heirs, and if any of his ſaid Iſſue die without Iſſue of his Body, the Survivors to have *totam illam Partem* between them, equally to be divided; theſe laſt Words carry only an Eſtate for Life in the Houſe of him that firſt dies to the Survivors, for they imply no more than that the whole Part of him that dies firſt ſhall go to the Survivors, and there being no Eſtate limited it can be only for Life.† 2 Leon. 129, 194. 3 Leon. 180. Cro. Eliz. 53. *Hawkins*'s Caſe.

† Why was he not Tenant in Tail? See the Caſes, *ſupra*.

A. deviſed all his Lands to his Wife till his Son ſhould be of the Age of 24 Years, and then to his Heir and to his Heirs for ever, and when he comes to the Age of 24 Years, that ſhe ſhall have the third Part for her Life, and if he dies before the Age of 24 Years, then ſhe to have it all for Life; and after her Deceaſe, if the Heir has no Iſſue, the Remainder to *B.* the Remainder to the right Heirs of the Deviſor; the Heir came to the Age of 24 Years, but no Intail was created by the Will, for the Fee-ſimple deſcended to him, and the Limitations were to take Place if he died before the Age of 24 Years, which he did not. Dyer 124. Rol. Abr. 839.

A. deviſed Lands to *B.* his Son, and if *C.* his Daughter ſurvived *B.* and his Heirs, then ſhe ſhould have the Lands; it was adjudged that *B.* had but an Eſtate-Tail, for the Word *Heirs* muſt be intended Heirs of his Body, for he could not die without (*a*) collateral Heirs while his Siſter was alive; but if the Will had ſaid that if *J. S.* a Stranger ſurvives *B.* and his Heirs, then he ſhould have the Lands; there *B.* had a Fee-ſimple, and then the intended Remainder over muſt be void, for it is to veſt on a Contingency of *B.*'s dying without Heirs, which is too (*b*) diſtant to expect. Roll. Abr. 836. Cro. Eliz. 525. Cro. Jac. 415, 416, 448. Bulſt. 193. Cro. Car. 41. 2 Lev. 162. (*a*) Salk. 233. pl. 12. Ld. Raym. 568. Will. Rep. 23. pl. 5. Comyns 82. pl. 51. S. P. adjudged. (*b*) *Vide Vaugh.* 270, 271.

So where *A.* deviſed to *B.* for his Life, and to his Heirs, and for want of Heirs to him, to *C.* in the ſame Manner, and for want of Heirs of him, to *D.* and his Heirs for ever. The Jury found that *B.* and *C.* were Brothers, and that *D.* was next Couſin and Heir to them, though not mentioned in the Will; and the Court held that they had but an Eſtate-Tail, 3 Lev. 70. *Parker* and *Thacker*, adjudged.

and the Remainder in Fee to *D.* good, for *D.* being Couſin and Heir to them, proves that he intended Heirs of the Body; (*c*) alſo want of Heirs of him are to be taken for want of Heirs of his Body.

(*c*) 7 Co. 4. S. P.

If *A.* deviſes Lands to *B.* for Life, and if he die without Iſſue, then to remain to *C.* this is an Eſtate-Tail in *B.* for it is not to (*d*) remain to *C.* till the Iſſue of *B.* be ſpent.

Robinſon's Caſe, Hob. 30. 2 Brownl. 271.

Moor 682. Lit. Rep. 259. S. C. cited. And in Will. Rep. 57. Vent. 230. S. C. cited. (*d*) And therefore wherever the Anceſtor takes an Eſtate for Life, and there is a Limitation to his Heirs or Iſſue, theſe Words ſhall be Words of Limitation, and not of Purchaſe, and veſt the Inheritance in the Anceſtor; laid down as a Rule in *Shelley's* Caſe, Co. 99. But on this Rule of creating by Implication an Eſtate of Inheritance in the Anceſtor, there have been ſeveral nice Diſtinctions, as appears by the Caſes on this Head.

So of a Deviſe to *B.* for Life, the Remainder to the next Heir Male, and for Default of ſuch Heir Male, the Remainder over; this is a good Eſtate-Tail, for the Words *Heir* and *Iſſue* are *Nomina collectiva*, and carry the Land not only to the immediate Heir or Iſſue, but to all that deſcend from the Deviſee.

Vent. 230. *Burley's* Caſe, cited by Hale C. J. to have been adjudged 43 Eliz. but Q. whether there be any ſuch Caſe on the Roll.

* Page 59

* But if Lands are deviſed to *A.* for Life, the Remainder to his firſt Heir Male, and the Heirs Male of the Body of ſuch Heir Male; the Deviſee hath but an Eſtate for Life, by the expreſs Words of the Will, and the Limitation of the Remainder to the Heir Male, and to the Heirs Male of ſuch Heir Male, is a good contingent Remainder in the Heir Male, becauſe it may veſt *eo inſtanti* that the particular Eſtate determines.

2 Co. 66. *Archer's* Caſe. 2 Anderſ. 37.

Lands were deviſed to *A.* and his Wife, and after their Deceaſe to their Children, they having then a Son and a Daughter; it was adjudged that *A.* and his Wife had but an Eſtate for Life, the Remainder to the Children for Life; for no greater Eſtate had paſſed at Common Law; and the Intent of the Deviſor muſt plainly appear, or they will never admit of a Conſtruction different from what they would allow in Conveyances executed in the Life of the Party; and for that Reaſon, if the Deviſe had been to *A.* and his Children, or Iſſue, *A.* having Children at the Time, *A.* and the Children would have been Jointenants for Life.

6 Co. 16. b. *Wyld's* Caſe. Moor 397. S. C. Cro. Eliz. 743. S. C. Vent. 229. 10 Mod. 376. S. C. cited.

But if *A.* had deviſed Land to *B.* and his Children or Iſſue, and *B.* had none at the Time of the Deviſe, then he takes an Eſtate-Tail, for it is plainly the Intent of the Deviſor, that the Children ſhall have the Land; and they cannot take as immediate Deviſees, for they were not *in eſſe*, nor by way of Remainder, for the Deviſe was immediately to *B.* and his Children; and therefore they ſhall be taken as Words of Limitation, *viz.* as Children of his Body.

6 Co. 17. Vent. 229. 2 Lev. 59, 60.

One having two Sons *A.* and *B.* by his Will in Writing deviſes Lands to his Son *A.* for his natural Life, and after his Deceaſe he gives the ſame to the Iſſue of his Body lawfully begotten on a ſecond Wife, (he having a firſt then living), and for want of ſuch Iſſue to *B.* and his Heirs for ever, with Power to *A.* to make a Jointure to ſuch ſecond Wife for her Life, and dies; *A.* in the Life of his firſt Wife ſuffers a Recovery to the Uſe of himſelf in Fee, and dies without Iſſue; and the Queſtion was, Whether by this Deviſe *A.* was Tenant in Tail, for then by the Recovery the Remainder was deſtroyed; or if he was only Tenant for Life, for then this Recovery was a Forfeiture of his Eſtate; and it was adjudged in *B. R.* againſt the Opinion of *Hale* Ch. Juſt. that *A.* had but an Eſtate for Life; but this Judgment was reverſed in the *Exchequer Chamber*, and adjudged that *A.* had an Eſtate-Tail.

Vent. 214, 225, &c. 2 Lev. 58. 3 Keb. 42, 52. Poliex. 101. Fitzgib. 23. S. C. cited. 8 Mod. 263, 384. S. C. cited. See 2 Will. Rep. 472. pl. 134. S. C. between *King* and *Melling*; as this ſeems to be the moſt ruling and eſtabliſhed Caſe relating to this Doctrine, it may not be improper briefly to inſert the Reaſons of the Reſolution, which are theſe: 1. Becauſe that Iſſue is *Nomen collectivum*, and is a ſtronger Word

Upon

Upon a ſpecial Verdict, the Caſe was; *Richard Gooch* ſeiſed in Fee of Lands in *Suffolk*, by Will in Writing deviſes to *Richard*, Son of his late Brother, all his Lands commonly called *P.* and alſo all other his Lands during his natural Life, and to the Heirs Male of his Body begotten; and for want of ſuch Iſſue, he the ſaid *Richard* to have the ſaid Eſtate but during his natural Life, and no longer; and then his Will was, that the aforeſaid Eſtate ſhould deſcend to *Philip* his Nephew: *Richard* ſuffers a Common Recovery to the Uſe of himſelf and his Heirs, and deviſes this Land to the Defendant in Fee, and dies without Iſſue Male; and it was adjudged to be an Eſtate-Tail in *Richard*, and ſo the Remainder barred by the Recovery, and not an Eſtate for Life, and ſo forfeited by the * Recovery; for the Words *and for want of ſuch Iſſue, he the ſaid* Richard *to have but an Eſtate during his natural Life*, is no more than the Law implies; for if Tenant in Tail has no Iſſue, it reſolves into an Eſtate for Life, and ſo it was adjudged; the Objection was, that it ſhould be conſtrued thus: I give the Land to *Richard* during his Life, and no longer, in caſe he has no Iſſue Male of his Body; and ſo an Eſtate-Tail upon a contingent; and he dying without Iſſue Male, it is now become but an Eſtate for Life *ab initio*, but the Judgment was *ut ſupra*. *Fountain* and *Gooch*, adjudged, Hil. 29 & 30 Car. 2. Rot. 1247. * Page 60

A Copyholder in Fee ſurrenders to the Uſe of his Will, and by Will deviſes his Copyhold Lands to his Wife, and if ſhe hath Iſſue by the Deviſor, that Iſſue ſhall have it at his Age of 21 Years; and if the Iſſue die before that Age, or before his Wife, *or if ſhe hath no Iſſue*, then ſhe ſhall chooſe two Attornies, and ſhe to make a Bill of Sale of my Lands to her beſt Advantage; and *per Curiam*, ſhe hath only an Eſtate for Life; and having no Iſſue, hath no Intereſt to diſpoſe, but an Authority only to nominate two, who ſhall ſell, and the Vendee ſhall be in by the Will.† Cro. Jac. 199. *Beal* and *Shepbard*, adjudged. 4 Mod. 318. 319. S. C. cited.

† As the Sale was to be *to her beſt Advantage*, did not the Teſtator mean ſhe ſhould have the Money ariſing from the Sale; and if ſo, might ſhe not, at her Election, have held the Land as one ſeiſed in Fee.

One by Will deviſes Lands to *A.* for Life, without Impeachment of Waſte; and in caſe he ſhall have Iſſue Male, to ſuch Iſſue Male and his Heirs for ever; and after the Death of *A.* in caſe he ſhall leave no Iſſue Male, to *B.* and his Heirs for ever, and dies; *A.* ſuffers a Recovery, and declares the Uſe to himſelf in Fee, and by his Will deviſes it to *C.* in Fee, and dies without Iſſue; and the firſt Queſtion was, Whether by this Deviſe *A.* took an Eſtate in Tail Male, or only for Life; and it was held to be but an Eſtate for Life in *A.* 1*ſt*, Becauſe it was deviſed to him expreſsly for Life, and that without Impeachment of Waſte, which would have been needleſs if it were an Eſtate-Tail. 2*dly*, The Words, *and in caſe* A. *die without Iſſue Male, or leave no Iſſue*, are not to be taken ſubſtantively and abſolutely, but relatively to what was ſaid before, *viz.* if *A.* die without Iſſue, who ſhall take the Fee as before is appointed; and theſe oblique Words cannot be intended to deſtroy by Implication the Eſtate expreſsly deviſed before to the Iſſue Male of *A.* and there is no Uncertainty in theſe Words, *to the Iſſue Male*, 3 Lev. 431. Ld. Raym. 203. S. C. cited in 8 Mod. 256. See Fitzgib. 21. 10 Mod. 403. between *Loddington* and *Kime*; and the Court being ready to give Judgment on this Point, *J. Powell junior* ſtarted another, *viz.*

Word than *Children*, which takes in only the immediate Deſcendants of the Parent; but Iſſue takes in all from Generation to Generation; and ſo long as there are any Iſſue of *A.* the Remainder is not to take Place. 2. In Acts of Parliament, Iſſue is as comprehenſive as Heirs of the Body; as in *Weſt.* 2. *de Donis*, it is ſaid, *quo minus ad exitum deſcendat*, which takes in all Iſſues *in Secula Seculorum*. 3. He had no Iſſue at this Time, for then it would, as this Caſe is, veſt in them by way of Remainder; but having none, leaves it to the Conſtruction of Law, upon the Import of the Word *Iſſue*. 4. It is Iſſue of his Body begotten, which is an Eye of an Eſtate-Tail. 5. It is ſaid, and for want of ſuch Iſſue, which is a Phraſe agreeable to an Eſtate-Tail. 6. It is in Caſe of the Creation of an Eſtate-Tail, where *Voluntas donatoris* has ſome Influence. 7. It is in Caſe of a Will, where the Intention of the Teſtator is to govern.

Whether theſe Remainders could take

Male, which of them ſhall take, if there be ſeveral, for the Eldeſt ſhall take the Fee by Purchaſe, *&c.*

Place as executory Deviſes, or contingent Remainders; upon which it was twice argued; but before any Judgment the Parties agreed; but in Salk. 224. pl. 1. S. C. it is ſaid to have been further held, that this Limitation to the Iſſue was not an Executory Deviſe, being after a Freehold, but a contingent Remainder, ſo that a Poſthumous Son could never take; † but there is no Judgment; but *per* Raym. Ch. Juſt. in the Caſe of *Sparrow* and *Weigh* it was determined, and Judgment entred, Paſch. 9 *W.* 3. that it was only an Eſtate for Life; and it was likewiſe decided in the ſame Manner in Chancery, and on an Appeal to the Houſe of Lords. Abr. Eq. 183.

† This was before the Stat. which enables poſthumous Children to take a contingent Remainder which hath not any Truſt-Eſtate to preſerve it, *vide* 10 & 11 *W.* 3. *c.* 16.

2 Vern. 427. 449. *Popham* and *Bamfield.* S. C. cited in 8 Mod. 260. Fitzgib. 26, 27. See Will. Rep. 333.

A. deviſes his Eſtate to Truſtees and their Heirs, in Truſt for *B.* for Life, and to his firſt and other Sons in Tail; but in Caſe *A.* died without an Heir Male of his Body begotten, the Truſt to be void; and in ſuch Caſe he gave the Eſtate to *J. S.* and it was held, that theſe Words, *if he die without Heir Male of his Body begotten*, did not give him an Eſtate-tail by Implication, nor inlarge an expreſs Eſtate deviſed to him for Life.

Skin. 240. pl. 5. 3 Mod. 82, 311. S. C. cited. Vent. 230. 4 Mod. 318. Pollex. 657. * Page 61 2 Show. 405. pl. 377. Eq. Abr. 184. pl. 25. *Friend* and *Bouchier.*

If *A.* deviſes to *D.* his Daughter for Life, and after her Deceaſe to her firſt Son, and the Heir of his Body; and if he dies without Heirs of his Body, then to her ſecond and other Sons, and the Heirs of their Bodies, and after them to *N. in eadem forma*, and for Default of ſuch Iſſue, to *J. S.* in Fee; and after the Will was finiſhed, but before Publication, the Teſtator adds this Clauſe: *Memorandum, The Intent and Meaning of the Teſtator is, that* D. *ſhall not alien the Lands given to her, but that they ſhall* * *be to her Heirs Male, and for want of ſuch Iſſue to* N. this reſtrictive Clauſe explains the Intent of the Teſtator, and therefore *B.* ſhall have an Eſtate for Life, and not an Eſtate-tail by Implication.*

* According to the preceding Caſes, this Deviſe to *B.* being an expreſs Deviſe for *Life*, it ſhould ſeem that the reſtrictive Clauſe does not alter the Caſe.

2 Vern. 526. between *Leonard* and Earl of *Suſſex*, decreed in Chancery.

If *A.* deviſes Lands to Truſtees to pay Debts and Legacies, and then to ſettle the Remainder of one Moiety of what ſhould remain unſold to *H.* and the Heirs of his Body by a ſecond Wife, and in Default of ſuch Iſſue to her Son *F.* and the Heirs of his Body; the other Moiety to *F.* and the Heirs of his Body, with Remainders over, taking ſpecial Care in ſuch Settlement, that it never be in the Power of either of my ſaid Sons *F.* or *H.* to dock the Intail of either of the ſaid Moieties given them, as aforeſaid, during their or either of their Life or Lives; this Eſtate being only executory, it muſt be conſtrued as if like Proviſion had been contained in Marriage-Articles; and therefore the Sons ſhall have Eſtates for Life conveyed to them; but it muſt be without Impeachment of Waſte.

4 Mod. 316. Skin. 359. pl. 1. Ld. Raym. 37. S. C. *Moor* and *Parker.*

A. makes a Settlement of his Eſtate on *B.* his Son, for Life, Remainder to his firſt, *&c.* Son in Tail Male, afterwards the Reverſion in Fee being in himſelf, he made his Will as followeth: *As touching my Lands and Tenements*, &c. *my Will is, that if my Son's Wife die, during the Life of her Husband, without Iſſue Male, that then he ſhall have Power to make a Jointure to any other Wife; and for Want of ſuch Iſſue Male of his ſaid Son, then the Lands ſhall be and remain to his Son*, &c. *by any other Wife, and his Grandaughter ſhall have* 4000 *l. And in Caſe of Failure of Iſſue Male by his Son, then all his Lands ſhall go to his Grandchildren and their Heirs, Share and Share alike.* Adjudged, that the Settlement and Will being diſtinct Conveyances, the

Eſtate for Life in the Settlement cannot be tacked to the Eſtate in the Will, ſo as to create an Eſtate-tail in the Son, ſo that he continued only Tenant for Life.

A Man ſeiſed in Fee, deviſed to *J. B.* for his Life only, without Impeachment of Waſte, and from and after his Deceaſe, then to the Iſſue Male of his Body lawfully to be begotten, if God ſhall bleſs him with any, and to the Heirs Males of the Bodies of ſuch Iſſue lawfully begotten; and for Default of ſuch Iſſue, Remainder to *J. C.* and the Heirs Males of his Body; and for Want of ſuch Iſſue, he limits two Remainders over in the ſame Words; and it was adjudged that *J. B.* took only an Eſtate for Life, for the Eſtate was given to him for Life, and there was a Limitation afterwards to his Iſſue, which was a Deſcription of the Perſon who was to take the Eſtate-tail. Abr. Eq. 184. pl. 27. 2 Will. Rep. 476. 10 Mod. 181. cited in Fitzgib. 12, 22. 8 Mod. 261. 383. Forteſc. 133. Ch. Caſ. 173. *Backhouſe* and *Wells*. 2 Ld. Raym. 1439.*

* Gilb. Ca. 8vo. 20, 129. Judgment more fully ſtated, 2 Stra. 731. which alſo *vide*.

A. deviſed certain Lands to his eldeſt Son for Life, without Impeachment of Waſte, Remainder to *J. S.* his Grandchild for Life, without Impeachment of Waſte, with Power to him to limit a Jointure of the ſame Land to any Woman he ſhould marry, for her Life; and after his Death he deviſed the Lands to the firſt Son of *J. S.* the Grandchild in Tail, and ſo to the ſixth Son; and then deviſed, that if *J. S.* the Grandchild, ſhould die without Iſſue Male, the Land ſhould remain to *J. B.* Held that *J. S.* took an Eſtate-tail; for if there had been a ſeventh Son, he could not have taken; and there it was neceſſary to create an Eſtate-tail by Implication. Abr. Eq. 185. Wil. Rep. 759. S. C. cited in Will. Rep. 59. 8 Mod. 258, 384. Fitzgib. 14. *Langley* and *Baldwin*, certified to be an Eſtate-tail by the Court of Common Pleas, and decreed accordingly in Chancery.

A. deviſed the Surplus of his Perſonal Eſtate to be laid out in a Purchaſe of Lands to be ſettled on *B.* his Nephew for Life, and after his Deceaſe to the Heirs Males of the Body of the ſaid Nephew, and to the Heirs Males of the Body of every ſuch Heir Male ſeverally and ſucceſſively one after another, as they ſhall be in Seniority of Age and Priority of Birth, every Elder, and the Heirs Males of his Body, to be preferred before every Younger; and for Want of ſuch Iſſue, to his Brother in the ſame Manner. On a Caſe ſtated for the Opinion of the Court of Common Pleas, three of the Judges certified, that the Nephew ſhould have an Eſtate-tail conveyed to him, but Judge *Tracy* held it only an Eſtate for Life. † *Legatt* and *Shewell*, 2 Vern. 551. S. C. but no Reſolution. Eq. Abr. 389, 394. pl. 7. Gilb. Eq. Rep. 145. Will. Rep. 87, 90, 91. pl. 17.

* See *ſupra* the Caſe of *Leonard* and the Earl of *Suſſex*; as it was deſigned to be by Settlement, it ſhould ſeem the Teſtator meant *B.* ſhould have only an Eſtate for *Life*. See likewiſe *infra*, the next Caſe.

* The Plaintiff's Father, by his Will, deviſed the Eſtate in Queſtion to the Plaintiff for Life, without Impeachment of Waſte, Remainder to Truſtees during his Life, to ſupport contingent Remainders, with Remainder to the Heirs of the Body of his ſaid Son, Reverſion to himſelf in Fee, with a Power to the Son to make a Jointure of ſuch a Part; and deviſed likewiſe a conſiderable Perſonal Eſtate to be laid out in a Purchaſe of Lands, and ſettled to the ſame Uſes; and the only Queſtion was, Whether the Plaintiff took an Eſtate-tail, or only an Eſtate for Life; and it was held, that he took only an Eſtate for Life, as the Words were expreſs, and had all the other Marks attendant on an Eſtate for Life; and conſequently that the Heirs of the Body ſhould take by Purchaſe; and though the Eſtate would veſt in the firſt Son as Tenant in Tail by Way of Purchaſe, yet not ſo as to exclude the other Sons, or their Iſſue, from taking the like Eſtate, whenever his Eſtate determined for Want of Iſſue. * Page 62. Abr. Eq. 185, 6. *Papillion* and *Voyce*, decreed at the Rolls. 2 Will. Rep. 471. pl. 150. Fitzgib. 38. S. C. cited in *Talbot*'s Caſ. 8.

Abr. Eq. 184. pl. 28. Gilb. Eq. Rep. 28. See Cro. El. 742. S.C. cited Vent. 231. Andr. 339. 3 Danv. Abr. 178. pl. 26. 8 Mod. 253, 382. Forteſc. 58. Stra. 798. Barnard. K.B. 54. Fitzgib. 7. *Shaw* and *Weigh*, adjudged an Eſtate-tail in the Siſter, in the Great Seſſions of *Wales*, but that Judgment reverſed by *B. R.* where it was held only an Eſtate for Life; but the Judgment of *B. R.* reverſed in the Houſe of Peers, by The Opinion of *Eyres*, C. J. neceſſary Implication

A. deviſes Lands to his Wife for Life, and for her better Support he gives and bequeaths unto her the Sum of 500 *l.* to be raiſed by his Executors or Adminiſtrators, by Sale of Timber, or by Sale of any Part of the Premiſſes, or otherwiſe, by Digging, Sinking, Getting, and Sale of Coal on the Premiſſes, or any Part thereof, at hers, her Executors and Adminiſtrators Choice and Election; and if my ſaid Wife ſhall happen to die before the ſaid Sum be raiſed, as aforeſaid, then ſuch Perſon whom ſhe had appointed in her Life-time to raiſe, *&c.* for which I give them and her full Power and Authority; provided nevertheleſs, that if either of my Siſters hereafter named, or ſuch Perſon for whom my Truſtees hereafter named ſhall be Truſtees, ſhall pay unto my Wife, her Executors, *&c.* the ſaid Sum of 500 *l.* that the ſaid Power of ſelling ſhall ceaſe; and after the Deceaſe of my ſaid Wife, I deviſe all my Eſtate before-mentioned to *A. B.* and *C.* and the Survivor and Survivors of them, upon the Truſts hereafter mentioned, that is to ſay, in Truſt for my Siſters *A. L.* and *D. E.* equally betwixt them, during their natural Lives, without committing any Manner of Waſte, from and after the Deceaſe of my ſaid Wife; provided always, that what Sum or Sums of Money, in part or in full of the ſaid 500 *l.* hereby left my Wife, ſhall be really paid my Wife, her Executors, *&c.* by either of my ſaid Siſters, that in that Caſe my Will is, that ſuch Money be likewiſe raiſed by getting of Coal on the Premiſſes only; and if either of my ſaid Siſters happen to die, leaving Iſſue or Iſſues of her or their Bodies lawfully begotten, or to be begotten, then in Truſt for ſuch Iſſue or Iſſues of the Mother's Share, or elſe in Truſt for the Survivor or Survivors of them, and their reſpective Iſſue or Iſſues; and if it ſhall happen that both my ſaid Siſters die without Iſſue, as aforeſaid, and their Iſſue or Iſſues to die without Iſſue or Iſſues lawfully to be begotten; the ſaid Truſtees to ſtand and be intruſted to and for my Kinſman *J. S.* and the Heirs Males of his Body, *&c.* and for Want of ſuch Iſſue, then in Truſt for *R. G.* and this was held an Eſtate-tail in the Siſters.

Pengelly and *Forteſcue*. Deviſe "for Life and no longer," may create an Eſtate in Tail, by neceſſary Implication, to effectuate the manifeſt general Intent of the Teſtator. Bur. Rep. 50, 51, 52.

(E) Of Terms for Years, and uncertain Intereſts by Deviſe.

8 Co. 96. a. Cro. Eliz 315. Rol. Abr. 829. S. C.

IF a Man deviſes Lands to his Executors for Payment of his Debts, and after Debts paid the Remainder over; the Remainder is good; but it ſhall not veſt at the Death of Executors, but the Eſtate ſhall be conſidered as an uncertain Intereſt, which ſhall go from Executor to Executor for the Payment of the Debts; for if it were to determine by the Death of the Executors, the Debts might never be paid.

* Page 63 Co. Lit. 112. b. 236. a. *vid.* Head of *Heir and Anceſtor*.

* If a Man deviſes his Land *to be ſold by his Executors*, or *to his Executors to be ſold*, the Executors ſhall have the Profits to their own Uſe, and not as Aſſets, therefore they are obliged to ſell to the firſt Purchaſer; but if the Deviſe had been, *that his Executor ſhould ſell the Land*, there they have not the Profits of the Land before the Sale; for there are no Words to break the Deſcent from the Heir, and carry it from him; and for that Reaſon the Land ſhall deſcend to him till the Sale.

Rol. Abr. 831.

If a Man poſſeſſed of a Term for Years, deviſes the Land to another generally, the Deviſee ſhall have all the Term, without any Limitation to determine upon his Death.

3 Co. 20. *Boraſton's* Caſe. Chan. Ca. 113. S. P.

A. deviſes his Lands to his Executors till his Son comes of Age; the Profits to be employed in the Performance of his Will; tho' the Son dies before he be of Age, yet the Intereſt of the Executors continues till he might be

be of Age, if he had lived; for ſince the Intent of the Deviſor governs in Wills, it might deſtroy that, if the Executor's Intereſt ceaſed at the Death of the Son; for it is reaſonable to believe that the Teſtator found on a Computation, that the Profits of the Land in that Time would anſwer his Debts, ſo hat this is a good Deviſe of the Term till the Son would be twenty-one, tho' he die before.

If a Man deviſes Land to his Wife *till his Son comes of Age*, to provide his Children with Neceſſaries; tho' the Wife dies before the Son comes of Age, yet her Intereſt does not determine by her Death, becauſe it was not a Matter of meer Confidence, but ſhall go to her Executors; but (*a*) if the Deviſe had been, *that his Land ſhould deſcend to his Son*, but *that his Wife ſhould have the full Profits thereof until the full Age of his Son*, for his Education; here is nothing deviſed to the Wife, but a meer Confidence that ſhe ſhall take Profits for the Education of the Son; and by the Will ſhe is but in Nature of a Guardian or Bailiff, for the Benefit of the Infant, which determines by her Death.

Cro. Eliz. 252. 2 Leon 211. Dyer 210.

(*a*) 2 Leon. 221. S. P.

A Man deviſed certain Lands to his Wife till his Son and Heir apparent ſhould attain to his Age of twenty-one Years, and when his Son ſhould attain to his Age, then to his Son and his Heirs, and died; the Son lived to the Age of thirteen Years, and then died; and the Wife, ſuppoſing that ſhe had a Title to hold the Lands till ſuch Time as the Son would have attained his Age of twenty-one Years, in caſe he had lived to that Time, continues in the Perception of the Rents and Profits of the ſaid Lands for ſeveral Years; and the Bill was brought againſt her by the Heir at Law of the Son, to have an Account of the Rents and Profits from the Death of the Son; and tho' the Wife was Executrix likewiſe of her Huſband, yet it not being deviſed during that Time, *for Payment of Debts, nor any Creditors, nor Want of Aſſets appearing*, * it was held by my Lord *Chancellor*, that the Wife's Eſtate determined by the Death of the Son, and that the Remainder veſted preſently in the Son upon the Teſtator's Death, and was not to expect till the Contingency of his attaining his Age of twenty-one Years ſhould happen, for then in this Caſe it never would have veſted, he dying before that Age; and therefore decreed the Wife to account for the Profits from the Time of the Son's Death; and upon a Re-hearing his Lordſhip continued of the ſame Opinion, and grounded himſelf on the Diſtinctions taken in 3 *Co.* 19. and 6 *Co.* 35.

Abr. Eq. 195. Gilb. Eq. Rep. 36. *Marſfield* and *Dugard*, decreed Hill. 1713.

* This diſtinguiſhes it, from the Caſe above.

A Term was deviſed to *B.* and if he died within the Term, the Reſidue to go to *C.* after he attained his Age of twenty-one Years, *B.* died, and then *C.* before he came to that Age; by this Deviſe *B.* had the (*b*) whole Term in him (for if a Termor deviſes his Houſe, or his Term, * without more Words, the Deviſee has the whole Term) and the Reſidue of it was to go to *C.* on a precedent Contingency, *viz.* when he came of Age, which never happened, and conſequently his Executors can never have it; and the Executors of the Deviſor have neither an Intereſt, nor a Poſſibility of one, becauſe he made a total Diſpoſition of the Term; as if a Copyholder for Life ſurrenders to the Uſe of *B.* for Life, who is admitted, and dies in the Life of the Surrenderor; yet he ſhall have no Benefit by ſurviving him, becauſe the whole Intereſt was ſurrendred; therefore it was adjudged in the principal Caſe, that the Executors of *B.* ſhould have the Remainder of the Term.

Sid. 151. Rol. Abr. 831.

* Page 64

(*b*) So if a Term for 1000 Years be deviſed to *A.* the Remainder to *B.* and the Heirs of his Body; the whole Term is veſted in *A.* and *B.* has only a Poſſibility, and no Intereſt veſts in him till the Death of *A.* becauſe, by the ſtrict Rules of Law, an Eſtate of Freehold is greater than any Term for Years. 3 Lev. 264. *Douſe* and *Earl.**

* See farther as to the general Doctrine, relative to a Deviſe of a Term, with Remainders over, &c. *Fearne's Eſſay*, 3 Ed. 342, 345, 360 375, 385.

without

2 Lev. 191. Vent. 326. 2 Mod. 223. 2 Jon. 73. *Paget* and *Voscius*.

A. devised to *B.* during his Exile, and if it please God to restore him to his Country, or if he die, then to *J. S.* *B.* was a *Dutchman*, and had a Pension from the States, but upon some Displeasure the States deprived him of the Employment, and of his Pension, and gave them to another, whereupon he voluntarily left the Country, and lived here with *A.* who had been his Acquaintance beyond Sea; and after his coming hither a War happened between the *Dutch* and *English*, and afterwards a Peace was concluded between the two Nations, yet *B.* continued here; and whether his Estate was determined, was the Question. And the Court held it was not, for that the Exile intended by *A.* was the leaving his Country, because of the States Displeasure to him, and the withdrawing of his Pension upon that Displeasure.

Cro. Jac. 259. Yelv. 183. *vide* Bulst. 48. cont'.

If a Copyholder devises his Land to *A.* and *B.* his two Sons, and to the Heirs of their two Bodies begotten, and wills, that each of them shall enter at the Age of twenty-one Years; the Executors shall not take the Profits till they are both of full Age, but he who comes of Age first shall enter, and then the other when he comes of Age, and they shall hold the Land jointly.

4 Co. 82. *Corbet*'s Case. Cro. Eliz. 890. Salk. 153. pl. 1.

A. devised his Lands to *B.* and *C.* and the Survivor of them, till 800 *l.* should be raised out of them; and it was adjudged, that *B.* and *C.* should have the Land no longer than they might have received it out of the Profits; and that if a Stranger enters after the Death of the Devisor, they may have an Account of the mesne Profits, but cannot hold the Land longer than the Sum might have been levied; for if that were allowed, they may make it an eternal Charge on the Heir's Estate; but if the Heir himself enters and disturbs them, they may hold over, for the Heir shall have no Benefit of his own Wrong; or they may have their Action against him, at their Election.

(F) Of Devises for the Payment of Debts.

Eq. Abr. 197.

CREDITORS are so far favoured, especially in Equity, that wherever it appears to be the Testator's Intent, that his Lands should be liable to his Debts, they shall be subjected thereto, altho' there are not express Words to charge them; and it seems remarkable, that in all the Cases on this Head, the Lands have been held liable, and that chiefly on the Intention of the Testator; and therefore it seems difficult to lay down any Rules in this Matter, which depends purely on Construction. Thus much however may be inferred from the very Cases on which the Lands have been held liable, that *a bare Declaration by the Testator, that his Debts should be paid* is *not* sufficient; for this being no more than the Law says, shall be intended of Personal, and not out of the Real Estate.

Vern. 457.

* Page 65. Vern. 411. *Clowdsley* and *Pelham*. 2 Vern. 229. S. C. cited, and the Decree said to be affirmed in the House of Lords. 2 Vern. 228. *Alcock* and *Sparhawk*,

A. devised all his Lands to *B.* and the Heirs of his Body, and in another Part of his Will, reciting, that he owed *B.* Money upon Account, he therefore devised to him all his Personal Estate, and made him Executor, willing him to pay his Debts; and upon the reading of the Will, though the Clause, as to the Payment of Debts, seemed to relate to the Personal Estate only; and though the Lands were devised to *B.* in Tail, with a Remainder over to another; and that it was objected, that a Tenant in Tail could not be a Trustee; yet the Court decreed both Real and Personal Estate to be sold for Payment of the Testator's Debts.

If *J. S.* devises his Lands to his Brother, who is his Heir at Law, in Fee, and likewise devises several Legacies, and makes his Brother Executor, de-

siring

ſiring him to ſee his Will performed according to the Truſt and Conſidence he had repoſed in him; this makes the Real Eſtate liable, for the Teſtator needed not have deviſed the Eſtate to his Brother, being Heir at Law, unleſs he intended that he ſhould take them chargeable with the Debts and Legacies. decreed in Chancery, and affirmed in the Houſe of Lords.

A. deviſed in the following Words, *I do by this my Will diſpoſe of ſuch worldly Eſtate as it hath pleaſed God to beſtow upon me: Firſt, I will that all my Debts be paid and diſcharged, and out of the Remainder of my Eſtate I give and bequeath unto my Wife* 300l. *my Mind and Will is, that my Wife have one Moiety of what is left, after my Debts paid:* Item, *I give to my dear Brother* R. B. *a Cloſe lying in the Pariſh of —— and for the remaining Part of my Eſtate, as well Real as Perſonal, I give and bequeath unto my Brother* J. B. *whom I make Executor*; and it was held clearly, that theſe Words ſubjected his Real Eſtate to the Payment of his Debts. 2 Vern. 690.

So where *A.* being ſeiſed of a Real Eſtate, and alſo poſſeſſed of ſome Perſonal Eſtate, made his Will in Writing, and thereby deviſed in theſe Words: Imprimis, *I will and deviſe, that all my Debts, Legacies, and Funeral Charges ſhall be paid and ſatisfied in the firſt Place.* Item, *I give and deviſe*; and then proceeds to diſpoſe of his Real and Perſonal Eſtate, the Perſonal Eſtate not being ſufficient; and the Queſtion was, whether that Clauſe in his Will ſhould amount to a Charge on his Real Eſtate for the Payment of his Debts, Legacies, and Funerals; and my Lord Chancellor *Cowper* was clearly of Opinion, that it ſhould; for as to his Debts, it was but natural Juſtice they ſhould be paid, and his Perſonal Eſtate would have been liable to the Payment thereof, whether he had given any Directions in his Will about them, or not; when therefore he wills and deviſes, that his Debts, Legacies and Funerals ſhall be paid and ſatisfied in the *firſt Place*; theſe Words muſt be intended to give a Preference, for thoſe Purpoſes, to any other whatſoever; and ſince he does not deviſe his Real or Perſonal Eſtate to any Perſon in particular, for thoſe Purpoſes, the Perſons who come within this Deſcription muſt be ſuppoſed to be within his View; and it muſt be taken as a Deviſe for their Benefit, preferable to any other Diſpoſition whatſoever, either of his Real or Perſonal Eſtate, and conſequently both of them are thereby made liable thereto. Abr. Eq. 198-9. *Trot* and *Vernon*. 2 Vern. 708. S. C. where it is ſaid, that ſome Streſs was laid on the Word *Deviſe*.

If Lands are deviſed to Truſtees for the Payment of Debts and Legacies out of the Rents and Profits, the Truſtees may ſell the Land itſelf. Vern. 104. 2 Chan. Ca. 205. S. P. decreed.

But if the Deviſe be to pay Debts and Legacies out of the annual Rents and Profits; by theſe Words the Land ſhall not be ſold. Vern. 104.

If there be a Deviſe of a Sum certain to be raiſed out of the Profits of Lands, and the Profits will not amount to raiſe the Sum in a convenient Time: *Per* Lord Chancellor, It is the Law of this Court to decree a Sale. Vent. 256. 2 Vent. 357. S. P.

A. deviſes, that his Executors ſhall receive the Rents, Iſſues and Profits of his Perſonal Eſtate, in the firſt Place to pay 60*l. per Annum* to one for Life; and after that Perſon's Death, out of the Remainder of his Eſtate, his Debts being paid, to raiſe Portions for ſeveral Children, payable at twenty-one, and Maintenance in the mean Time, and deviſes all his Lands in ſeveral Parcels to ſeveral Perſons, at future Times; and the Maſter of the *Rolls* held, that the Lands were liable to be ſold, and that the Sales ſhould be out of all the Deviſee's Lands, unleſs the Perſonal Eſtate were ſufficient, or the Rents and Profits in a reaſonable Time; and ordered an Account to be taken thereof in the firſt Place. 2 Vern. 26. *Berry* and *Aſkam*. * Page 66

(G) Of Deviſes by Implication.

Vaugh. 261. 3 Lev. 260. Rol.Abr.843. 13 *H.* 7. 17. b. Cro. Jac. 75. *Horton's* Caſe. Bro. Tit. *Deviſe* 52. 2 Sid. 53. 2 Lev. 207.

THE Law in conveying of Eſtates did not regularly ſuffer any to paſs by Implication, becauſe it is a Manner of transferring no Way agreeable to the Plainneſs and Solemnity of the Law; as if *A.* ſurrenders to the Uſe of *B.* and for Want of Iſſue of *B.* the Remainder over to *C.* this in a Conveyance at Law had been but an Eſtate for Life to *B.* and no Eſtate-Tail by Implication; but as there has been greater Favour and Latitude allowed in the Diſpoſition of Eſtates by Will; and in the Conſtruction of them, the Judges to ſupport the Intent of them, where it is very apparent, have admitted Eſtates by Implication, though to the Diſheriſon of the Heir at Law; but in thoſe Caſes, ſuch Eſtates have been allowed only to ariſe by a neceſſary, and not a poſſible Implication or Intention in the Deviſor; for the Heir's Title being plain and obvious, no Words by Conſtruction ſhall impeach it, which will bear a contrary Signification.

Vide the Authorities in the preceding Section, and Vern. 22. 2 Vern. 572. 2 Vent. 223.

As if *A.* deviſes Lands to his (*a*) Heir after the Death of his Wife; this is a good Deviſe to the Wife for Life by Implication; for by the expreſs Words of the Will, the Heir is not to have it during her Life; and if the Wife has it not, none elſe can, for the Executors cannot intermeddle.

S. P. (*a*) So if one having a Wife, and two Daughters, Heirs at Law, deviſes Lands to one of the Daughters after the Wife's Death; this gives the Wife an Eſtate for Life, though the Daughter is but one of the Coheirs. 2 Vern. 723.

Bro. Dev. 52. Cro. Jac. 75. Vern. 22. 2 Vern. 572. 2 Vent. 223.

But if a Man deviſes to a Stranger, after the Death of his Wife, this gives the Wife no Eſtate for Life by Implication; for it is but a Demonſtration when the Eſtate of the Stranger ſhall commence.

Rol.Abr.844.

So if a Man deviſes his *Term* to his Son, after the Death of his Wife; this raiſes no Eſtate for Life in the Wife by Implication; for here is no neceſſary Implication, that the Wife ſhall have it as in the former Caſe, becauſe the Son is not by Law to have the Term, as the Heir at Law is to have the Inheritance, without a particular Deviſe, but the Executor; and therefore the Term in this Caſe may go to the Executor during the Life of the Wife.

Rol.Abr.844.

If a Man deviſes Land to *J. S.* and his Heirs, after the Death of *J. D.* or after twenty Years, and the Deviſor dies during the Life of *J. D.* or before the twenty Years expired, the Land in the *Interim* ſhall deſcend to the Heir at Law; for during the Time this Deviſor has made no Diſpoſition of it, but left it to deſcend according to the Rules of Law, which carry it to the Heir.

Vaugh. 262. Cro.Car.368.

If a Man deviſes all his Paſture Lands in *D.* to his youngeſt Son, and alſo wills that all Bargains, Grants, *&c.* which he had from *C.* ſhould be to his youngeſt Son, and the Heirs of his Body; it was reſolved, that the youngeſt Son ſhould not have an Eſtate-Tail in the Paſtures of *D.* by Implication, for the Words of a Will to diſinherit the Heir at Law, muſt * Page 67 * have a clear and apparent Intent; and this at moſt could have been but a poſſible Implication, that the Deviſor might have intended the Son an Intail in the Paſtures, which is not ſufficient to deſtroy the plain Title of Deſcent to the Heir at Law.

Cro. Jac. 75. Vaugh. 266. Rol. Abr. 844.

A. leaſes, upon Condition that the Leſſee ſhall not alien to any beſides his Children; the Leſſee deviſeth the Term to *H.* his Son, after the Death of his Wife; it was adjudged, that this Deviſe was no Breach of the Condition, for the Wife took no Eſtate by Implication; for there can be here but a poſſible Implication at moſt; and ſince the Intent of the Deviſor is the beſt Rule to conſtrue Wills by, it would be abſurd to ſay, that the Deviſor intended

tended to convey ſuch an Eſtate which muſt forfeit his own, therefore the Executor ſhall have it (*a*) while the Wife lives.

(*a*) If a Term be deviſed to Executors after the Death of the Wife: *Quære*, Whether ſhe ſhall have an Eſtate for Life, or ſhall the Executors have it during her Life, to perform his Will, and after her Death as Legatees. *Vide* Cro. Jac. 75. Vaugh. 261.†

† Why ſhould not the Wife have an Eſtate by Implication, (the Executors being the proper Perſons to take the Term, if not deviſed) as in Caſe of a Deviſe of an Eſtate in Fee to the Heir, after the Death of the Wife?

A. ſeiſed of a Manor, Part in Demeſne and Part in Services, deviſed all the Demeſne to his Wife expreſsly, for her Life, and all the Services, for fifteen Years, and then deviſed the whole Manor to a Stranger after her Death; it was reſolved, that the laſt Deviſe ſhould not take Effect till after her Death, and yet ſhe ſhould not have the Services for her Life by Implication, but that the Heir ſhould enjoy the Services after the fifteen Years, while ſhe lived; for there appears no neceſſary Implication that ſhe ſhould have the whole for her Life, with an Excluſion of the Heir; and a poſſible Implication is not ſufficient to exclude him; for nothing but the apparent Intent of the Deviſor can do that; but if the Deviſor had ſaid, that after the Death of his Wife and the Stranger, the Heir ſhould have the Manor, there the Wife by a neceſſary Implication ſhall have the whole Manor while the Stranger and Wife live, and the Stranger cannot take any Thing whilſt ſhe lives. Moor, pl. 24. Vaugh. 265.

From this it appears that the Rule, *viz.* where a Deviſee takes any Thing by an expreſs Deviſe, he ſhall not have any other Thing deviſed by the ſame Will by Implication, is deſtroyed by the Diſtinction of a neceſſary and a poſſible Implication; for the former Caſe proves, that a neceſſary Implication will give an Eſtate, though the Deviſee took by an expreſs Deviſe before; and a poſſible Implication is ſufficient in no Caſe to convey an Eſtate to the Diſheriſon of the Heir; for that is the principal Point between *Gardner* and *Sheldon*, in *Vaugh.* 263. where the Words of the Will are, that if my Son *G.* and my Daughters *M.* and *K.* die without Iſſue of their Bodies, then my Lands to remain to my Nephew *W.* it was adjudged, that the Deviſe to *G.* being Son and Heir, was void, and that the Daughters took no Eſtate by that poſſible Implication; but their dying without Iſſue is only a Deſignation of the Time when the Nephew is to take. Cro. Eliz. 16. Vaugh. 263.

A. deviſed to his Wife 600*l.* to be paid to *J. S.* for the Payment of Lands he purchaſed from him, and are already ſettled on her for her Jointure; the Lands were not ſettled on her; and adjudged they did not paſs by the Will by Implication, for there appears no Intent that ſhe ſhould have them by the Will, and conſequently they cannot paſs from the Heir at Law by Implication, ſince the Deviſor was only miſtaken as to the Settlement of them in his Life-Time. 3 Lev. 259. 2 Vent. 57. Moor 31. *Wright* and *Wivell.*

A. deviſed all his Eſtate Real and Perſonal for the Payment of Debts and Legacies, and deviſed 100*l.* to his Heir at Law; this was decreed a good Deviſe in Fee, but no implied Truſt aroſe to the Heir at Law for the Surplus; for by that Conſtruction the Deviſee would have no Benefit by the Deviſe; beſides, the Legacy of 100*l.* to the Heir at Law is in this Caſe an Excluſion of the Heir from any further Benefit. Chan. Ca. 196. *North* and *Compton*, *vide* Head of *Uſes and Truſts*, of *Truſts by Implication.*

* *A.* has two Sons *B.* and *C.* and deviſes Part of his Land to *B.* in Tail, and the other Part to *C.* in Tail; and if any of his Sons died without Iſſue, then the whole Land ſhould remain to a Stranger in Fee; *C.* died, yet the Stranger could not enter into his Part, for the other Brother took it by Implication, the Words of the Will being, that the whole Land ſhall remain to a Stranger, which he cannot have while either of the Sons or any Iſſue of their Body be living. * Page 68 4 Leon. 14.

Another

Vide ſupra Letter (D). 56. &c. Dyer 171. a. Bendl. pl. 114. Moor 113. 2 Leon. 226. Vent. 230.

Another Rule relating to Deviſes by Implication is this, that where the Deviſee takes a particular Eſtate of Inheritance by expreſs Words in the Will, ſuch Eſtate ſhall not be inlarged by Implication; for ſince Deviſes by Implication are allowed in Favour to Wills, that where the Intention of the Teſtator may be preſumed, the Judges will purſue it, though it be not expreſſed in plain Words, yet there is no Room for ſuch Conſtruction where the Deviſee has an Eſtate given him by expreſs Words in the Will; for that would be to over rule the plain Meaning of the Teſtator againſt his own Words; therefore if *A.* deviſes to *B.* for Life, the Remainder to *C.* and the Heirs Male of his Body, and if it happens that *C.* ſhall die without Heirs of his Body, then the Remainder to *D.* this is but an Eſtate in Tail Male to *C.* becauſe that Eſtate being given to him by expreſs Words ought not to be over-ruled by a bare Implication, that the Teſtator intended him a greater Eſtate by the Words, *if he* chance to die without Heirs of his Body.

Bulſt. 63. Dyer 171. a. *in Margine.*

If a Deviſe be to *A.* and his Heirs Male, and if he dies without Heirs of his Body, then to remain to *B.* in Fee, this is but an Eſtate in Tail Male to *A.* for the Law ſupplies the Words *of his Body*, and ſince the Deviſor only gave it by (*a*) expreſs Words to him and his Heirs Male, it would be againſt his plain Words to let in his Iſſue Female by Implication on the other Words, *if he die without Heirs of his Body.*

(*a*) So if a Man deviſes to *A.* and the Heirs of his Body, and if he dies without Heirs, theſe laſt Words will not againſt the expreſs Declaration of the Teſtator give the Deviſee a Fee-ſimple by Implication. 2 Vern. 451.

Bendl. 212. *Clatches's* Caſe. Dyer 330. Vaugh. 267.

B. having Iſſue a Son and two Daughters by ſeveral Venters, the Son died leaving two Daughters, and then *A.* deviſes one of his Meſſuages to *B.* his own Daughter, and her Heirs for ever, and his other Meſſuage to *C.* his Daughter, and her Heirs for ever; and if *B.* died without Iſſue, living *C.* then *C.* ſhould have *B.*'s Part to her and her Heirs; and if *C.* die before her Age of ſixteen Years, then *B.* ſhould have her Part in Fee; and if both his ſaid Daughters ſhould die without Iſſue of their Bodies, then his Grand-daughters ſhould have the Meſſuages; *C.* died without Iſſue having paſſed her Age of ſixteen Years; the Grand-daughters had Judgment for her Part, and the Words of the Will, *if his two Daughters died without Iſſue of their Bodies*, did not create croſs Remainders for each other's Part by Implication, but only denoted the Time when the Heirs at Law ſhould have the Meſſuages; for, ſays the Book, no ſuch Implication will ſerve when there is an expreſs Gift and Limitation made to the Deviſees by the Teſtator himſelf.

(H) Of the Diſpoſition of Goods and Chattels by Will, by what Deſcription, and to whom good.

2 Vern. 688. *per Curiam.* Swin. 418. *Page 69

IF a Man deviſes to his Wife all his Perſonal Eſtate at a Place called *W.* all his Perſonal Eſtate, as Coaches, Horſes, *&c.* there at the Time of his Death ſhall paſs, though not there at the Time of making the Will, the * Perſonal Eſtate being (*b*) fluctuating and varying until the Time of the Teſtator's Death.

(*b*) *Vide* Salk 237. pl. 16. That a Deviſe of Things Perſonal is good, though the Teſtator had them not at the Time of making his Will, becauſe they go to the Executor, and paſs not by the Will, but by the Aſſent of the Executor, to whom the Will is only directory, *vide ſupra*, Letter (B) 51, *&c.*

But if *J. S.* deviſes all his Houſhold Goods and Furniture which ſhould be in his Houſe at *R.* at his Death to his Wife, and afterwards going beyond Sea, his Steward gets the Head Landlord of the Houſe to accept of a Surrender of the Leaſe of the Houſe, and removes the Goods to another Houſe, and writes an Account of this to *J. S.* who approves of it, the Goods will not paſs by the Will to the Wife; otherwiſe if they had been removed by Fraud to defeat the Legacy, or by any tortious Act without the Privity of the Teſtator. 2 Vern. 747. Gilb. Eq. Rep. 172. decreed between the Earl and Counteſs of *Shaftſbury*.

So if a Man deviſes to his Son the Furniture of his Houſe at *D.* and two Years afterwards orders Goods which he had bought in *London* to be carried to his Houſe in *D.* and agrees with Carriers for that Purpoſe, but dies before the Goods are removed from *London*, theſe Goods ſhall not paſs by the Will as Part of the Furniture of the Houſe at *D.* 2 Vern. 739. decreed between the Duke of *Beauford* and Lord *Dundonald*.

If a Man who has Debts due to him by Bond, and who is likewiſe poſſeſſed of a Term for Years, deviſes one Moiety of his Perſonal Eſtate to his Wife, and afterwards ſeveral Legacies to other Perſons, and the Reſidue to *J. S.* the Wife ſhall have one complete Moiety, if the other is ſufficient to pay the Debts, and ſhe ſhall have a Moiety of the Leaſe, though it was objected that a Leaſe was not uſually reckoned Perſonal Eſtate. Chan. Ca. 16. *Lee* and *Hale*.

If a Man poſſeſſed of a Leaſe for Years bequeaths ſeveral Legacies of Plate and other Goods to ſeveral Perſons, and after deviſes all the Reſidue of his Goods to his Wife, his Debts and Legacies being paid, and makes her ſole Executrix; by this Will the Leaſe paſſes to her as Legatee, for though by a Grant of *omnia bona* a Leaſe paſſes not, yet by the Civil Law *bona* including all Chattels, and this being a Legacy, the Judges of the Common Law in this Caſe ought to be guided by that Law. Cro. Eliz. 387.

If a Man deviſes 1200 *l.* to *J. S.* and by general Words deviſes all his Goods, Chattels, and Houſhold-Stuff in and about his Houſe to the ſaid *J. S.* Money in the Houſe will not paſs, he having a particular Legacy deviſed to him. 2 Chan. Rep. 190.

A. deviſed to his Niece all his Goods, Chattels, Houſhold-Stuff, Furniture, and other Things which then were or ſhould be in his Houſe at the Time of his Death, and ſome Time after died, leaving about 265 *l.* in ready Money in the Houſe; and it was decreed that this ready Money did not paſs; for by the Words *other Things* ſhall be intended Things of like Nature and Species with thoſe before-mentioned. Abr. Eq. 201. between *Trafford* and *Berrige*.

Plate (*b*) and Jewels will not paſs by a Deviſe of Utenſils, but (*c*) by a Deviſe of Houſhold Goods Plate wil paſs. (*b*) Dyer 59. (*c*) 2 Vern. 638.

If a Nobleman poſſeſſed of a Collar of SS, and of a Garter of Gold, and a Buckle annexed to his Bonnet, and many other Buttons of Gold and precious Stones annexed to his Robes, and of many other Chains, Bracelets and Rings of Gold and precious Stones, deviſed all his Jewels to his Wife, and dies, the Garter and Collar of SS paſs not, becauſe they are not properly Jewels, but Enſigns of Honour and State; and the Buckle in his Bonnet and Buttons paſs not, becauſe annexed to his Robes; but all the other Chains, Rings, Bracelets, and Jewels paſs. Owen 124. Earl of *Northumberland's* Caſe, S. C. cited in Styl. 289.

J. S. by Will deviſes thus: *Item* my Will and Pleaſure is, that the Furniture and Pictures in my Houſes at *A. B.* and *C.* ſhall always remain there, and not in the Power of my Executors to diſpoſe of, but ſhall go with my ſaid Houſes to ſuch of my Grandchildren as ſhall be in the Poſſeſſion thereof, and then appoints that Plate gilt with Gold, belonging to his Chapel at *A.* together with the Ornaments thereof, ſhould remain to the perpetual * Uſe of the ſaid Chapel, and makes *D.* Executor, to whom he gives all his Perſonal Eſtate, except what is before bequeathed, of what Nature or Kind ſoever, for his own proper Uſe; and the Queſtion was, if the Plate the Teſtator conſtantly uſed, and removed with him when he went from one Houſe to another, ſhould go to the Executor by the laſt Clauſe, or belong Abr. Eq. 200. Mich. 1705. *Franklin* and the Earl of *Burlington*. 2 Vern. 502. S. C. ill reported. Pre. Ch. 251. * Page 70

long to the Houſes under the Word *Furniture*; and my Lord Keeper was of Opinion that Furniture in a large Senſe takes in Plate, but not here, becauſe he diſtinguiſhes the Chapel Plate from the Furniture; and the Plate of ordinary Uſe that was carried with him could no more be ſaid the Furniture of one Houſe than of the others, and he meant only the particular Furniture of each Houſe; ſo the Plate went to his Executors, and liable to Plaintiffs who were Creditors.

2 Vern. 538. *Gayre* and *Gayré, per* Lord Keeper, Hill. 1705.

If a Man deviſes his Houſe, and all his Goods and Furniture therein, to his Wife for Life, and after her Deceaſe to his Son *R.* and his Heirs, except his Pictures, which he gives to his Sons *A.* and *B.* and he has Pictures in Boxes as well as thoſe hung up in the Houſe, and likewiſe Pictures at his Death, which he had not at the Time of making his Will, and it is proved in the Cauſe that he had Skill in Pictures, and frequently bought Pictures and ſold them again; the Exception of the Pictures ſhall extend as well to the Pictures hung up as Furniture, as to thoſe in Boxes; and as well to thoſe in the Houſe at the Time of the Will, as to thoſe bought in after the Will made, ſo that they ſhall paſs to his Sons *A.* and *B.*

Abr. Eq. 201. *Att. Gen.* and *Bury*, Trin. 1701.

A Man deviſed all the Arrears now due, and unjuſtly detained from me by the *Dean* and *Chapter* of *York*, to be employed in a certain Charity; and the Queſtion was, Whether the Arrears incurred after the making of the Will, and a ſmall Time before the Death of the Teſtator, and which were never demanded by the Teſtator, ſhould paſs; and *per* Lord Keeper, not; for though a general Deviſe of all a Man's Goods will carry all he had at his Death, though purchaſed after the making his Will; yet here it is confined to the Arrears due at the making the Will.

Abr. Eq. 201, *Moſeley* 47. S. C. S. P. *Hunt* and *Berkley*.

If a Man deviſes his Silver Tea-kettle and Lamp, with the Appurtenances, nothing ſhall paſs but the Kettle and Lamp, and the Box wherein the Lamp was placed, and not the Silver Tea-pot, Milk-pot, Tongs, Strainer or Caniſters.

2 Chan. Ca. 198. *Martin* and *Clerk*.

If a Man deviſes 40 *l.* to be paid to *J. S.* by him to be diſpoſed of in ſuch Manner as the Teſtator ſhould by a private Note acquaint him with, and dies without ſuch Appointment, this is a good Bequeſt to the Party.

2 Vern. 181. *Robinſon* and *Duſgale*. S. P. in 2 Jo. 261. 3 Chan. Rep. 1

If one deviſes his Lands to *B.* in Fee, paying 400 *l.* whereof 200 *l.* to be at the Diſpoſal of his Wife, by her laſt Will, to whom ſhe ſhall think fit, and the Wife dies inteſtate, her Adminiſtrator ſhall have this 200 *l.* the Property thereof being abſolutely veſted in the Wife.

2 Freem. 158. pl. 204. Nelſ. Ch. Rep. 63. S. P. in Nelſ. Ch. Rep. 188. *Bretton* and *Bretton* *Chan. Rep.* 224. S. P.

If Money is deviſed to younger Children, where there are divers Daughters and a Son, who by Birth is a younger Child, but is Heir at Law to a fair Inheritance, he ſhall not be conſidered as a younger Child, ſo as to take by the Deviſe.

2 Chan. Rep. 211.

If a Man deviſes Lands to be ſold for the Increaſe of Childrens Portions, a Child born ſince the Will ſhall have a Share.

2 Vern. 105. *Garbland* and *Mayat*, S. C. cited in 2 Freem. 105. (*a*) But if it had been to the Children by the Name, Q. Whether a Child born after making the Will could have taken, *vide Dyer* 177. Co. Lit. 112. *b.* See *poſt.* 71.

So where one deviſed 20 *l.* a-piece to all the Children of his Siſter *B.* and the Queſtion was, Whether a Child born after the making of the Will, and before the Death of the Teſtator, ſhould take by Virtue of the Deviſe; and the Court decreed it to extend to the after-born Child, the (*a*) Word *Children* comprehending all.

1 Vern. 35. *Danvers* and Earl of *Clarendon*.

A Man by Will deviſed all his Goods in ſuch a Houſe to *G.* for Life, and after his Deceaſe to the Heirs of *J. S.* and the Point was, whether he * that was Heir of *J. S.* ſhould take theſe Goods as Deviſee, and the ſaid Goods go to his Executors, although ſuch Heir die in the Life-time of *G*

* Page 71

or whether he that was Heir to *J. S* at the Time of *G.*'s Death ſhould have them; and though it was urged that thoſe Goods were only the Furniture of the capital Houſe, yet my Lord Chancellor was of Opinion, that they abſolutely veſt in him that was Heir of *J. S.* at the Time of the Death of *J. S.* and decreed accordingly.

If one deviſes his Lands for Payment of his Debts and Legacies, and deviſes 400 *l.* a-piece to two of his Siſters, and to his third as much as his Executors ſhall think fit; the third ſhall have 400 *l.* alſo, and be made equal to her other Siſters if the Eſtate will hold out. 2 Vern. 153. *Wareham* and *Brown.*

If a Man deviſes the Surplus of his Eſtate to his Grandchildren living at his Death; Grandchildren born after his Deceaſe ſhall not take, for if he had ſo intended it, he would not have reſtrained it to Children living at his Death. 2 Vern. 710. *Muſgrave* and *Perry.*

If one deviſes the Surplus of his Perſonal Eſtate to the Children of *A.* and *B.* and neither of them has a Child at the Time of making the Will, or the Death of the Teſtator, the Deviſe is executory, and ſhall extend to any Children that *A.* and *B.* ſhall afterwards have, and the Children of each ſhall take *per Capita*, and not *per Stirpes*, they claiming in their own Right, and not as repreſenting their Parents. 2 Vern. 405. *Weld* and *Bradbury.*

The Duke of *Bolton* by Will deviſed in theſe Words, *viz. Item, I give and bequeath unto ſuch of my Servants, as ſhall be living with me at the Time of my Death one Year's Wages*: *Per* Lord Keeper, Stewards of Courts, and ſuch who are not obliged to ſpend their whole Time with their Maſter, but may alſo ſerve any other Maſter, are not Servants within the Intention of the Will; but I will not narrow it to ſuch Servants only that lived in the Teſtator's Houſe, or had Diet from him. 2 Vern. 546, 547. Where-ever the whole Property is deviſed, with a particular Intereſt given out of it, the given, and a as a Deſcription

Operation is by Way of Exception out of the abſolute Property; where an abſolute Property is particular Intereſt given in the mean Time, this ſhall not operate as a Condition precedent, but of Time when the Remainder Man ſhall take in Poſſeſſion. Bur. Rep. 233, 234.

(I) Of executory Deviſes of Lands of Inheritance: And herein of Contingent Remainders, and Croſs Remainders, as far as they relate to this Place.

AN (*a*) Executory Deviſe is defined a future Intereſt, which cannot veſt at the Death of the Teſtator, but depends upon ſome Contingency which muſt happen before it can veſt. Abr. Eq. 186. (*a*) Of which there are Three Kinds:

1. Where the Deviſor departs with his whole Fee-Simple, but upon ſome Contingency qualifies that Diſpoſition, and limits a Fee upon that Contingency, which is new in Law, as appears by Brook 234. Dyer 33. Vaugh. 271. And was firſt advanced in the Caſe of *Hind* and *Lyon*, 19 Eliz. 3 Leon. 64. *per* Nottingham. 2 Chan. Caſes, 1. *&c.* in the Caſe of the Duke of *Norfolk*. Second Sort is when the Deviſor gives a future Eſtate to ariſe upon a Contingency, but does not part with the Fee at preſent, but ſuffers it to deſcend to his Heir, as a Deviſe to the Heirs of *J. S.* till he ſhall have one, *&c.* and theſe have been frequent. Of the third Sort are Leaſehold, Intereſt, or Terms for Years, for which *vide infra* Letter (K) *poſt* 76, *&c.* and Salk. 226.

To underſtand this Doctrine, it muſt be obſerved as an eſtabliſhed Rule, that a Fee cannot be limited on a Fee; as if Lands are limited to one and his Heirs, and if he dies without Heirs, that ſhall remain over to another, this laſt Limitation is void; ſo if Lands are given by Deed to one and his Heirs, ſo long as *J. S.* hath Iſſue, and after the Death of *J. S.* without Iſſue, Dyer 41. Co. 85. Plow. 29. 2 Leon. 69. Co. Lit. 19. Poph. 34.

2 Rol. Rep. 220. Godolp. 355. * Page 72. Cro.Eliz.205. Rol.Abr. 626. Dyer 124.

Iſſue, to remain over to another, this Remainder is likewiſe void, becauſe the firſt Deviſee had a Fee, though it was a baſe and determinable Fee.

* Yet, in a Will ſuch Limitations may be good upon a Contingency, that may happen within the Compaſs of a Life or Lives in (*a*) *eſſe*, or nine Months after the Expiration of a Life, or (*b*) a reaſonable Number of Years; for theſe tend not to a (*c*) Perpetuity, which is ſo odious in Law; but this not by Way of direct (*d*) Remainder, but by Way of executory Deviſe.

(*a*) All the Candles muſt be lit, and burning out at the ſame Time, *per Twiſden.*—(*b*) As (*c*) the Caſe of *Gardiner* and *Sheldon* does, which therefore has been denied to be Law, which *vide* in *Vaugh.* 271. That 20, nay 30 Years have been thought a reaſonable Time. Salk. 229. pl. 8. (*d*) Where a contingent Eſtate is limited, and depends upon a Freehold which is capable of ſupporting a Remainder, it ſhall never be conſtrued to be an executory Deviſe, but a contingent Remainder. 2 Sand. 380. *Pureſoy* and *Rogers*. 3 Lev. 434. S. P. Carth. 310.

3 Chan. Ca. 9.

As if Tenant in Fee-ſimple deviſes his Land to *A.* and his Heirs, and if he dies without Iſſue in the Life of *B.* then to *B.* and his Heirs; though this be a Limitation of a Fee-ſimple upon a Fee; yet becauſe the Remainder to *B.* muſt veſt upon a Contingency, which will fall in a Life, it has been held good as an executory Deviſe.

(*e*) Reported Cro. Jac. 590. Rol. Abr. 611. Palm. 131. 2 Rol. Rep. 216. 2 Leon. 111. Vaugh. 272.

So in the celebrated Caſe of (*e*) *Pell* and *Brown*, where one having three Sons, *A. B.* and *C.* by his Will in Writing deviſes Lands to *B.* his ſecond Son, and his Heirs for ever, paying 20*l.* and if *B.* dies without Iſſue, living *A.* then *A.* to have thoſe Lands to him and his Heirs for ever; *B.* enters and ſuffers a common Recovery to the Uſe of himſelf and his Heirs, and then deviſes thoſe Lands to *J. S.* and his Heirs, and dies without Heirs, living *A.* and it was adjudged, firſt, that *B.* had a Fee-ſimple, and yet the Limitation to *A.* good, as an executory Deviſe in Fee; for it was to happen within the Compaſs of a Life; and therefore if *B.* died with Iſſue, living *A.* or without Iſſue, after the Death of *A.* then this future Intereſt was never to ariſe; ſecondly it was adjudged that this being a mere collateral Poſſibility was not bound by the Recovery; for it had not Exiſtence at all when the Recovery was ſuffered; and therefore the Recompence in Value could not extend to it; beſides, to allow the particular Tenant to deſtroy any ſuch future Intereſt would be the Means of fruſtrating the moſt commendable Intentions of the Deviſor, providing for his younger Children, or for the Payment of his Debts, *&c.*

Dyer 127. *in Margine.*

One by Will deviſes his Lands to his Mother for Life, and after her Death to his Brother in Fee, provided that if his Wife (being then *enſient*) he delivered of a Son, that then the Land ſhall remain to him in Fee, and dies, and the Son is born; and it was held that the Fee of the Brother ſhould ceaſe, and veſt in the Son by Way of executory Deviſe upon the happening of the Contingency.

Palm. 135. Dyer 33. *in Margine.* Cro. Eliz. 359. Cro. Jac. 592.

One having Iſſue *A.* his only Daughter and Heir apparent, by Will deviſes Lands in *D.* to her and her Huſband, and her Heir, upon Condition that they ſhould aſſure Lands in Fee to his Executors and their Heirs, to perform his Will; and if they failed, then he deviſed the ſaid Lands in *D.* to his Executors and their Heirs, and died; and it was adjudged to be no Condition; (*f*) for then by the Deſcent to the Daughter being Heir, it would be deſtroyed; but it was held a Limitation, or an executory Deviſe to his Executors, in caſe the Aſſurance was not made, and that they might, for Breach thereof, enter and ſell; for though a Fee cannot be limited upon a Fee abſolute, yet upon a Fee determinable it may, and enures as a new original Deviſe to take Effect when the firſt Deviſee failed to make the Aſſurance.

(*f*) So if a Deviſe of Borough-Engliſh Lands had been to the eldeſt Son, paying ſuch a Sum to the younger Sons, and in Default of Payment, that the Land ſhould go to them and their Heirs, though the Word *Paying* in a Will amounts to a Condition, yet becauſe that muſt deſcend to the Deviſee as Heir, and no one elſe can take Advantage of his Default, it muſt be an executory Deviſe, to veſt in Default of Payment by the eldeſt. 3 Co. 21. a. Cro. Eliz. 833. *Hainſworth* and *Pretty*.

* If *A.* deviſes Lands to *B.* for five Years from *Michaelmas* following, the Remainder to *C.* and his Heirs, this is a good Remainder, altho' it cannot veſt before the particular Eſtate begins, and the Freehold cannot be in Expectancy, for in the mean Time the Fee ſhall deſcend to the Heir. * Page 73 Cro.Eliz.878.

One deviſes Lands to his Wife till his Son came to the Age of 21 Years, and then that his ſaid Son ſhould have the Lands to him and his Heirs, and if he dies without Iſſue before his ſaid Age, then to his Daughter and her Heirs; this is a good contingent or executory Deviſe to the Daughter if the Contingency happens, and in the mean Time the Fee deſcends to the Son as Heir; and if he lives to 21, though he after die without Iſſue, or leaves Iſſue, though he die before 21, yet the Daughter is not to have the Lands, becauſe he is to die without Iſſue, and before 21, or elſe the Daughter cannot take. 2 Rol. Rep. 197. Palm. 132.

But where one having Iſſue three Sons, *A. B.* and *C.* deviſes to his Son *A.* after the Death of his Wife, to him and the Heirs of his Body lawfully begotten in Fee-ſimple; and if he die in the Life-Time of my Wife, that then my Son *C.* ſhall be his Heir, and dies; *A.* hath Iſſue, and dies, in the Life-Time of the Wife; and it was adjudged that the Iſſue ſhould have the Land after the Death of the Wife, and not *C.* for it was in Effect a Deviſe to the Wife for Life, Remainder to *A.* in Tail, Remainder to *C.* in Fee, upon the Contingency of *A.*'s dying in the Life of the Wife, and does not abridge the Eſtate-Tail, expreſsly given *A.* by his dying in the Life of the Wife. Cro.Car.185. *Spalding* and *Spalding*, S.C. cited. 3 Lev. 434. Will. Rep. 427. 2 Will. Rep. 496. Ld. Raym. 524.

Baron and *Feme* being ſeiſed of a Copyhold, to them and the Heirs of the *Baron*, he ſurrenders it to the Uſe of his Will, and then deviſes it to the Heirs of the Body of the Feme, if they attain the Age of 14, and dies without Iſſue, and then ſhe marries a ſecond Huſband and has Iſſue that attains the Age of 14, and then ſhe dies; and whether this was a good Deviſe, by Reaſon of the double Contingency, *ſcilicet*, the having Heirs of her Body, and that ſuch Heir ſhould live till 14, was doubted; but it was admitted that if the Deviſe was good, it muſt be by Way of executory Deviſe, which is allowable, when to take Effect within the Compaſs of a Life, but not after a Dying without Iſſue; for that tends to a Perpetuity, and it cannot take Effect by Way of Remainder; for it is a new Deviſe to take Effect after her Death, and is not as a Remainder joined to her Eſtate; but the Court being divided upon the Point of the Contingency, it was agreed to be adjourned into the Exchequer Chamber, and the Reporter ſuppoſes the Parties agreed afterwards, for he heard no more of it. 1 Lev. 135. *Snow* v. *Cutler*. Eq. Ca. Abr. 188. See *Fearne*'s Eſſay, 3d Edit. 229, 426.

If a Man having only one Siſter and Heir, who had Iſſue *A.* and after married *B.* by whom ſhe had Iſſue *C.* and *D.* deviſes Lands to his Siſter until *C.* attains 21, and after *C.* attains that Age, to *C.* and his Heirs; and if *C.* dies before 21, then to the Heirs of the Body of *B.* and their Heirs, as they ſhall attain their reſpective Age of 21, and dies, *C.* dies before 21, living *B.* and after *B.* dies, *D.* either as Heir of *C.* in whom the Fee was veſted, or as Heir of the Body of *B.* (though he could not be ſo during the Life of *B.*) being of Age after the Death of *B.* ſhall have the Eſtate by Way of executory Deviſe, and not the right Heir of the Deviſor. 2 Mod. 289. *Taylor* and *Biddulph*. Freem. Rep. 243, pl. 256. Abr. Eq. 188. Ld. Raym. 207, 208. Gilb.Eq.Rep. 36, 149. Will.Rep. 54. pl. 10, 142.

pl. 38, 290. pl. 71, 511, 605. 2 Will. Rep. 57, 194, 331, 362, 369. pl. 109, 390. pl. 122. 3 Will. Rep. 258. pl. 64, 300. pl. 76, 304. Vern. 326, 462. 2 Vern. 325, 388, 430, 561, 660, 723. Ch. Pre. 15, 67, 72, 96, 338, 421. 8 Mod. 254, 381, 382, 346. 9 Mod 4, 28, 93, 101. 10 Mod. 419, 422. 11 Mod. 207. pl. 10. 12 Mod. 44, 52, 278, 283, 284, 594. Fitzgib. 314, 321. Talb. 21, 44, 145. Stra. 130, 133, 427. Comyns 232. pl. 130. 2 Stra. 958. 2 Will. Rep 28. pl. 8. 2 Keb 254. pl. 203. 2 Barnard. *K. B.* 209. 2 Stra. 1175. Ld. Raym. 3. 4 Mod. 255. Salk. 226. pl. 4. Skin. 408. pl. 3.

If *A.* hath Iſſue two Sons, *viz. B.* and *C.* and deviſes Lands to *B.* for Life; and if he dies without Iſſue living at his Death, that then the Fee ſhall remain to the Heirs of *B.* for ever, by which Deviſe *B.* has only an Eſtate for Life, the Remainder to his Heir not executed; and though the Lev. 11. *Holmes* and *Plunkett*. Ld. Raym. 28, 47. Keb. 29, 119.

the Reverſion deſcended on *B.* as Heir of *A.* yet it drowned not the Eſtate for Life, againſt the expreſs Deviſe and Intention of the Will, but left an Opening, as it was termed, for the Interpoſition of the Remainder, when it ſhall happen to interpoſe between the Eſtate for Life and * Page 74 *the Fee; and that this being a contingent Remainder, and not an executory Deviſe, was barred by the Recovery ſuffered by *B.*

2 Sand. 380. *Purefoy* and *Rogers.* 4 Mod. 284. 2 Lev. 39. 3 Keb. 11. 3 Salk. 299.

If one deviſes Lands to his Wife for Life, and if ſhe hath a Son, and cauſes him to be called by the Chriſtian and Surname of *Sampſon Shelton*, then after her Death deviſes the ſame to her Son, and if he dies before 21, to the right Heirs of the Deviſor, and dies; and after the Wife marries *Broughton*, by whom ſhe hath a Son, which ſhe cauſed to be chriſtened *Sampſon Shelton*, *&c.* the Deviſe is good by Way of contingent Remainder, but not by Way of executory Deviſe; for when a contingent Eſtate is limited, and depends upon a Freehold, which is capable of ſupporting a Remainder, it ſhall never be conſtrued an executory Deviſe, but a contingent Remainder; adjudged, and that the Reverſion deſcending to the Heir of the Deviſor till the Contingency happened, by the Bargain and Sale, and Fine thereof, by the Heir of Deviſor to *B.* and his Wife, and their Heirs, before the Birth of their Son, the contingent Remainder was deſtroyed.

Salk. 226. pl. 4. *Goodright* and *Corniſh.* Ld. Raym. 3. Skin. 408. pl. 3. 4 Mod. 255. S. C. 12 Mod. 53. S. C. cited in 2 Will. Rep. 56.

A. having two Sons *B.* and *C.* deviſed Lands to *B.* for 50 Years, if he ſhould ſo long live, and for my Inheritance after the ſaid Term I deviſe the ſame to the Heirs Male of the Body of *B.* and for Default of ſuch Iſſue then to *C.* And the Court reſolved, 1*ſt*, that *B.* had not an Eſtate-Tail by Implication upon the Words *without Iſſue*, becauſe the Deviſor had given him an Eſtate for Years by expreſs Words, and the Court cannot make ſuch a Conſtruction againſt expreſs Words, when thereby they would drown the Eſtate for Years, and make an Eſtate of Inheritance. 2*dly*, The Court held this Deviſe to the Heirs Male of the Body of *B.* to be void in its Creation for Want of an Eſtate of Freehold to ſupport it; and they ſeemed not to think it an executory Deviſe, becauſe it was limited as a Remainder, and becauſe it was limited *per verba in præſenti*; for if one deviſes his Eſtate to the Heir of *J. S.* and *J. S.* is living, the Deviſe ſhall not be conſtrued an executory Deviſe, and ſuch Deviſe is therefore void; but if it were to the Heir of *J. S.* after the Death of *J. S.* that is good as an executory Deviſe. 3*dly*, The Court held the Limitation to the Heirs of *B.* was become void by the Event, whatever it was in its Creation, becauſe *John* is now dead without Iſſue. 4*thly*, The Court held that if the Remainder to the Heirs Male of *B.* was void in Point of Limitation, then the next Remainder limited to *C.* took Effect preſently.

Salk. 229. pl. 8. *Scatterwood* and *Edge.* 12 Mod. 278. S. C.

C. ſeiſed in Fee deviſed to Truſtees for 11 Years, and then to the firſt Son of *A.* and the Heirs Male of his Body, and ſo on to the ſecond, third, *&c.* Sons in Tail Male, provided they the ſaid Sons ſhall take on them my Surname; and in caſe they, or their Heirs, refuſe to take my Surname, or die without Iſſue, then I deviſe my Land to the firſt Son of *B.* in Tail Male, provided he take my Surname; and if he refuſe, or die without Iſſue, then to the right Heirs of the Deviſor. *A.* had no Son at the Time of the Deviſe, and died without Iſſue, and *B.* had a Son who was living at the Time of the Deviſe, who took the Surname of the Deviſor. The whole Court agreed that the Deviſe to *B.* was not a contingent Remainder, becauſe of the precedent Eſtate for Years, which could not ſupport it; it appears likewiſe by the Caſe, to be the Opinion of *Treby* C. J. and J. *Powel*, that it could not be good as an executory Deviſe, if it were conſidered as a Deviſe to the Heirs of *A.* being limited *per verba in præſenti*; but *Blencow* Juſt. held that the Deviſe to the Son of *A.* was future; for he ſuppoſed the Teſtator knew that *A.* had no Son, and the rather becauſe he does not name him; but it was adjudged in *C. B.* and affirmed in *B. R.* that the Remainder to *C.* was good, and veſted in him.

A Man deviſed Lands to his Executors till his Son ſhould come of Age, and when his Son ſhould come of Age, then he ſhould enjoy it for him and his Heirs; this is a Remainder executed in the Son, and not in Contingency, for the Words *when* and *then* in this Caſe only denote the Time when the Remainder is to execute, and will no more make the Remainder contingent than in the common Caſe, when a Leaſe is made for Life or Years; and after the Deceaſe of the Tenant for Life, or the Expiration of the Term for Years, then to remain to another; for though the Words be *after the Term it ſhall remain*, yet it is a preſent and not a contingent Remainder, for where Words refer to that which *muſt needs happen*, there ſhall be no Contingency.

3 Co. 19. *Boraſton's* Caſe, *vide* Head of *Remainder and Reverſion.*

* Page 75

A. having Iſſue five Sons, (his Wife being *enſeint* with a ſixth) deviſed two Thirds of his Lands to his four younger Sons, and the Child *in Ventre ſa Mere*, if it were a Son, and their Heirs; and if they all die without Iſſue Male of their Bodies, or any of them; that the Lands ſhall revert to the right Heirs of the Deviſor; by this Deviſe the younger Sons are Tenants in Tail in Poſſeſſion, with croſs Remainders over to each, and no Part ſhall revert to the Heirs of the Deviſor, till all the younger Sons be dead without Iſſue Male of their Bodies.

Dyer 303. Hob. 33.

A Man having two Sons deviſed Part of the Lands to one of them and his Heirs, and the Reſt to the other and his Heirs, and further wills that the Survivor ſhall be Heir to the other, if either dies without Iſſue; by this the Deviſees are Tenants in Tail, with Remainder in Fee executed of each other's Part.

Cro. Jac. 695.

But where a Man having three Sons, and ſeiſed of three Houſes, deviſed a Houſe to each Son and his Heirs, with this Proviſo, that if all his ſaid Children ſhall die without Iſſue of their Bodies lawfully begotten, that then all his ſaid Meſſuages ſhall remain over, and be to his Wife and her Heirs; and it was held in this Caſe, that theſe Words did not raiſe any croſs Remainders, but that at the Death of any of the Sons his Houſe ſhould go immediately to the Wife; and though a croſs Remainder may be by Implication where Lands are limited to two, yet they cannot riſe where three or more Houſes are limited to three, (*a*) without expreſs Limitation.

Cro. Jac. 448. 655. *Gilbert* and *Witty* S. C. cited in Saund. 104.

(*a*) No croſs Remainders can be created by Implication in a Deed, nor by Will between three or more, unleſs the Words of the Will do plainly expreſs the Intent of the Deviſor to be ſo; as where Black Acre is deviſed to *A.* White Acre to *B.* Green Acre to *C.* and if they die without Iſſues of their Bodies, *vel alterius eorum*, then to remain; there by Reaſon of the Words *alterius eorum*, croſs Remainders ſhall be. Vent. 224. *per Hale*, C. J.

A. being ſeiſed of two Meſſuages, and having a Son and two Daughters by ſeveral Venters, deviſed one Meſſuage to *B.* his Daughter in Fee, and another Meſſuage to *C.* his Daughter in Fee; and if *C.* died before her Age of 16 Years, *B.* then living, then her Part to go to *B.* in Fee; and if *B.* died without Iſſue, then both the Meſſuages ſhall go to his Son in Fee; *B.* died without Iſſue, and her Part went to the Son, and not to the ſurviving Daughter, becauſe the laſt Clauſe created no croſs Remainders.

Bendl. 212. Dyer 330. Vaugh. 267. *Clatche's* Caſe.

* Page 76 * (K) **Of Executory Deviſes of Leaſes for Years:** And herein **of the Limitation of the Truſt of a Term as far as it relates to, and agrees with a Deviſe thereof.**

Cro. Car. 198. Rol. Abr. 610. 8 Co. 94.

IF a Farmer deviſes his Term to *A.* for Life, the Remainder to another, tho' *A.* has the whole Eſtate, (for that is in him during his Life) and ſo no Remainder can be limited over at Common Law, yet it is good by Way of (*a*) executory Deviſe.

(*a*) The great Queſtion in theſe Caſes was, Whether the Diſpoſition of the Term to a Man for his Life was not ſuch a total Diſpoſition of it, that no Remainder could be limited over, it being in the Eye of the Law a greater Eſtate than for any Number of Years; and this was reſolved in the Affirmative in the Reign of 6 *E.* 6. Dyer 74. by all the Judges of *England*; but this Reſolution ſeeming very ſevere, and againſt natural Juſtice, that a Man ſhould be hindred from making Proviſion for his Family, and the Contingencies of it, occaſioned a contrary Reſolution, 19 Eliz. Co. Lit. 46. Dyer 35. For the Judges obſerving the good Effect ſuch Limitations by Way of Truſt had, which were allowed in Chancery, permitted Farmers to diſpoſe of their Leaſes in the ſame Manner by Laſt Will; and then the Chancery, the better to fix them in it, allowed of Bills by the Remainder-Man, to compel the Deviſee of the particular Eſtate to put in Security, that he in the Remainder ſhould enjoy it according to the Limitation; but when they perceived that this multiplied Chancery Suits, they reſolved that there was no Need of that Way. 10 Co. 47. a. 52. b. Sid. 451. But that the particular Deviſee ſhould not have Power to bar the Remainder Man; ſo that the Law has been long ſettled, that executory Deviſes of Terms for Years are good, provided the Contingency is to happen within a Life, or 20 Lives all *in eſſe*; for then there can be no Tendency to a Perpetuity, which was the great Miſchief apprehended from theſe Kinds of Limitations. Abr. Eq. 191.

Rol. Abr. 612. *Cotton* and *Heath*, adjudged by *Jones*, *Croke*, and *Berkley* on a Reference out of Chancery.

So if *A.* poſſeſſed of a Term for Years, deviſes it to *B.* his Wife for 18 Years, and after to *C.* his eldeſt Son for Life, and after to the eldeſt Iſſue Male of *C.* for Life, though *C.* had not any Iſſue Male at the (*b*) Time of the Deviſe, and Death of the Deviſor; yet if he had Iſſue Male before his Death, this Iſſue Male ſhall have it as an executory Deviſe; for altho' it be a Contingency upon a Contingency, and the Iſſue not *in eſſe* at the Time of the Deviſe; yet in as much as it limited to him but for Life, it is good, and all one with (*c*) *Manning*'s Caſe.

(*b*) If *A.* poſſeſſed of a Term, deviſes it to *B* his Wife for Life, and after her Death to his Children unpreferred, and after B. dies, *C.* then being the only Daughter of *A.* ſhall have it; for an executory Deviſe, that hath a Dependance on the firſt Deviſe, may be made to a Perſon uncertain. And. 60, 61. (*c*) Where a Term of 50 Years was deviſed to *B.* after the Death of *C.* and that *C.* ſhould have it during his Life, it was adjudged that this was a good Deviſe of as much of the Term as remained at the Death of *C.* 8 Co. 95. *Matthew Manning*'s Caſe.

Cro. Car. 167. Rol. Abr. 610 Sid. 456. Cro. Jac. 461. 4 Inſt. 87. 3 Chan. Ca. 6, 10.

But if *A.* deviſes his Term to his Wife for her Life, and after her Deceaſe to *B.* his Son; and if *B.* die without Iſſue, then to *C.* Adjudged that this Deviſe to *C.* after the Death of *B.* without Iſſue, was void; for ſince it could not veſt while *B.* had Iſſue of his Body, the Deviſe is no more than to *B.* and the Heirs of his Body, which without Doubt had been void; for tho' Men preſumed on the Judges when they firſt allowed of Remainders of Terms after Eſtates for Lives, and endeavoured to bring Remainders upon Eſtates-Tail within the Reaſon of theſe Reſolutions and Conceſſions; yet the Courts would never endure thoſe Remainders, becauſe 'tis too foreign and diſtant to expect them after the Man's Death without Iſſue, and if they were allowed of, would make a direct Perpetuity, which is an undeniable Reaſon againſt any Settlement, for it is againſt the Nature of human Affairs ſo to ſettle an Eſtate in a Family, that upon no Contingency or Revolution of Fortune the Owner ſhall have Power over it.

Therefore

* Therefore the Deviſe to *B.* in the above Caſe is an abſolute Diſpoſition of the Term to him, and veſts it totally in him, and at his Diſpoſal, and ſhall go to his Executors during the Continuance of it, and ſhall never for Default of Iſſue of his Body revert to the Executors of the Deviſor. * Page 77 Sid. 451. Rol. Abr. 611, 831. But *vide* 10 Co. 87. *Leonard Lovie's* Caſe, and Sid. 37. which ſeem *contra*, but have been denied to be Law. 3 Chan. Ca. 6, 10.

If one poſſeſſed of a Term deviſes it to his Wife for Life, the Remainder to his firſt Son for Life, and if he dies without Iſſue, to his ſecond Son, *&c.* the Remainder to the ſecond Son is void, for the Remainder of a Term cannot depend upon a Poſſibility ſo remote, as the Dying without Iſſue; although it was objected that the Deviſe was not to the firſt Son and his Iſſue, (in which Caſe it was agreed it ſhould go to his Executor), but it was given to him for Life only, with an executory Deviſe to the ſecond Son, upon the Contingency of the firſt's not having Iſſue at the Time of his Death. Lev. 290. *Love* and *Wyndham.* 2 Chan. Rep. 14. S. C. Sid. 459. Vent. 79. Mod. 50. 2 Keb. 637.

If a Man poſſeſſed of a Term for Years deviſes it to *D.* his Wife for Life, and after to *W.* his eldeſt Son, and his Aſſigns, and if he dies without Iſſue *then living*, to *T.* this being a perpetual Limitation by Intendment of Law is void; and if Men ſhould be admitted to make ſuch Deviſes, there would not be any End of them, nor any Certainty. Cro. Jac. 459. *Child* and *Baily.* Palm. 333, 336. S. C. Jon. 15. S. C.

Rol. Abr 612, 613. S. C. Mod. 52. cited, and Sid. 37. cited. And in 3 Chan. Caſes 1, *&c.* in the Duke of *Norfolk's* Caſe, where it is denied to be Law; and in Salk. 225. pl. 3 Carth. 266. denied to be Law; and that the eſtabliſhed Law in Caſes of this Nature is the Duke of *Norfolk's* Caſe. See the next Caſe. ‖

‖ Many ſubſequent Caſes have been decided, on the Principles upon which Lord *Nottingham* proceeded in his Deciſion of the Duke of *Norfolk's* Caſe.

A. having Iſſue ſeveral Sons (the eldeſt *Non compos*) created a Term for Years, and by another Deed declared the Truſt thereof to his ſecond Son, and the Heirs Male of his Body, Remainder to his other Sons; provided that if his eldeſt Son died without Iſſue, or not, leaving his Wife *enſient* with a Child, living the ſecond Son, ſo that the Earldom of——deſcended on the ſecond Son, then the ſaid Term to remain to the third Son and the Heirs Male of his Body, with like Limitations to the other Sons; the eldeſt Son died without Iſſue, living the ſecond, and this Limitation to the third Son was held good.† 3 Chan. Ca. 2, *&c.* decreed by my Lord *Nottingham*, but reverſed by *North* Lord Keeper. Vern. 163. But upon an Appeal to the Houſe of Lords, *North's* Decree was reverſed, and *Nottingham's* eſtabliſhed. Chan. Ca. 53. And has been ever ſince admitted to be Law; and note, that executory Deviſes and Limitations of the Truſt of a Term are governed alike. Vern. 234. Pollexfen 15 to 50.

† Upon the Ground of its being a Limitation to take Effect upon the Dying without Iſſue, within the Compaſs of a Life then in being. See *Fearne's* Eſſay on Contingent Remainders and Executory Deviſes, 3d. Ed. 354. (a moſt excellent Treatiſe, and a very great Acquiſition to the Profeſſion.)

If a Man poſſeſſed of a Term deviſes it to his Son; and if he dies unmarried, and without Iſſue to his Daughters; and if his Son be married, and has no Iſſue then living to enjoy it, then after the Death of his Son's Wife he deviſes it to his ſaid Daughters; the Deviſe to the Daughters is void, being a Limitation after the Death of their Brother without Iſſue; for it is not to be taken (as objected) that the Dying ſhould be without Iſſue living at his Death, and ſo the Contingency to happen within the Compaſs of a Life; and if it ſhould be intended of ſuch dying without Iſſue, yet the Court held it would be void, according to *Child* and *Bayly's* Caſe;* for 3 Lev. 22, 23. *Gibbons* and *Summons.* But Q. of this Caſe, for it does not ſeem to be Law; and *vide* the Caſe of *Sanders* and *Corniſh*, Rol. Abr. 612.

* *Supra*, this Page.

Cro. Car. 230. and Cro. Jac. 461. a Caſe cited where *A.* poſſeſſed of a Term for Years deviſed it to his Wife for Life, and then that *J* his Son ſhould have the Occupation thereof as long as he had Iſſue; and if he died without Iſſue unmarried, in the ſame Manner to another Son, the Remainder over; this Remainder upon the Death of the Son unmarried was adjudged good; for here the Limitation is, if he dies without Iſſue unmarried, then the Remainder over which is upon the Matter, if he dies within the Term, unmarried, for he cannot have Iſſue, unleſs he marries; and this is a Poſſibility which the Law will expect, becauſe it will happen in a Life; and there is no Difference between the Occupation or Uſe of a Term, or the Profits of the Land, and the Land itſelf, or the Leaſe or Farm; for a Deviſe of any of them will carry the whole Intereſt. And *vide* the following Caſes.

tho' ſuch a Deviſe hath prevailed in Caſe of an Inheritance, as in *Pell* and *Brown*'s Caſe†, yet it hath not yet prevailed in Caſe of a Term; and the Court ſaid they would not extend the Deviſes of Chattels to make Perpetuities farther than they had been.

† Ante 72

* Page 78
Salk. 225. pl. 3 Comb. 208. *Lamb.* and *Archer.* Carth. 266. S. C.

* If a Term is deviſed to *A.* and the Heirs of his Body; and if *A.* die without Iſſue, living *B.* then to *B.* this is a good Limitation, the Contingency ariſing within the Compaſs of a Life.

2 Vern. 151. *Martin* and *Long.*

A. deviſes to his Son, his Executors, Adminiſtrators and Aſſigns for ever, a Leaſehold Eſtate; but if he died before 21 without Iſſue, in that Caſe he deviſes it over to his Brother; and the Queſtion was, whether the Remainder over was good. It was objected that it was a Perpetuity, for that the Remainder depends on the Son's dying without Iſſue; for if he die before 21, though he leaves a Child, and that Child afterwards dies without Iſſue, the Son may be ſaid to be dead before 21 without Iſſue; yet the Court held the Remainder good.

Abr. Eq. 193. *Fletcher's* Caſe.

One *F.* being poſſeſſed of a Term for Years deviſes it to his Wife for Life, and after her Death to *R. F.* for her Life, and after her Death to *T. F.* and his Children, and then deviſes in this Manner: And if it ſhall happen the ſaid *T. F.* to die before the Expiration of the ſaid Term, not having Iſſue of his Body then living, then to go over to the Plaintiff for the Reſidue of the Term; the Defendant's Title was by an Aſſignment of *R. F.* and *T. F.* of all their Eſtate, Right, Title and Intereſt; *R. F.* was dead, and *T. F.* died without Iſſue; and the Plaintiff brought his Bill to have an Aſſignment of the Term, purſuant to the Will; all that was inſiſted upon, for the Defendant to difference this Caſe from the Duke of *Norfolk*'s of a Term, and of *Pell* and *Brown*'s Caſe of a Fee, was, that this Contingency of his dying without Iſſue was not confined to his own Death; but that the Words *then living* ſhould relate to the Words *before the Expiration of the Term*, and ſo this went farther than any of the Caſes had ever yet been carried; for he might have Iſſue for ſeveral Generations, and yet if ſuch Iſſue failed at any Time before the Expiration of the Term, then it was to go over, and this in a long Term tended plainly to a Perpetuity; and therefore ought not to be allowed but by the Deviſe to *T. F.* and his Children; and the ſubſequent Words, and if he die without Iſſue, the whole Term and Intereſt was veſted in him, and he might diſpoſe thereof as he thought fit, and it could not be reſtrained by the Words *then living*, which related only to the Words *before the Expiration of the Term*, and ſo the Remainder over to the Plaintiff void. But for the Plaintiff it was argued and decreed, that the Remainder to him was good by way of executory Deviſe, and that the Words *then living* muſt relate to the Time of his Death; for otherwiſe there would be no Difference between this and the common Limitations of a Term to one, and the Heirs or Iſſue of his Body; and if he dies without Iſſue, the Remainder to another, which is void; for there it muſt likewiſe be intended if he die without Iſſue before the Expiration of the Term, or during the Term; ſince after the Expiration of the Term he can limit no Remainders over, becauſe nothing remains then to be limited; but here it being limited over upon this Contingency, if he die without Iſſue then living, *viz.* at the Time of his Death,

it is good, becauſe this Contingency muſt happen within one Life, or not at all; for upon his Death it will be certainly known whether he leaves Iſſue or not; if he does the Contingency cannot take Place; if he does not, then it may; and this being to happen within the Compaſs of a Life, is good as an executory Deviſe, and differs in nothing from the Duke of *Norfolk*'s Caſe, ſave only that there it was by *Proviſo*; and alſo upon the Death of another Perſon without Iſſue then living; and here it is upon his own Death, which makes no Manner of Difference.

A Man poſſeſſed of a Term for 31 Years deviſes it to his Son *H.* during his Minority, and if he attains to his Age of 21 Years, then to him during his Life, if the Term ſhall ſo long continue, and no longer, and after his *Death, to ſuch of his Iſſue to whom he ſhall deviſe it; but if he die without Iſſue, then to his other Son *G.* for the Reſidue of the Term; *H.* afterwards died without Iſſue, or without making any Diſpoſition of the Reſidue of the Term; and the only Queſtion was, Whether by the Words of this Will the whole Term did not veſt in *H.* and it was decreed that it did not; for the Words *die without Iſſue* have a twofold Meaning, either without Iſſue at the Time of his Death, or without Iſſue, whenever the Iſſue fails; and though in caſe of an Inheritance, if Lands are deviſed to one, and if he die without Iſſue, the firſt Deviſee takes an Eſtate-Tail by Implication, which ſhall go to his Iſſue, and they ſhall take in a Courſe of Deſcent to all ſucceeding Generations; but to make ſuch a Conſtruction in the Caſe of a Term, which cannot come to the Iſſue by Deſcent, is unneceſſary; and therefore in ſuch Caſe the other Conſtruction of the Words, which is moſt natural and obvious, ſhall take Place; and it ſhall be intended only, if he die without Iſſue living at the Time of his Death; and conſequently the Dying without Iſſue, being confined within the Compaſs of a Life, hinders not the Remainder over, but it may well take Place by way of executory Deviſe, according to former Reſolutions.

Abr. Eq. 193. 194. *Targett* and *Gant*. *Vide* 2 Vern. 43, 195.

* Page 79 The Caſe of *Peacock* and *Spooner*, and 2 Vern. 668. *Webb* and *Webb*, Abr. Eq. 362. Fitzgib. 317, 320. Will. Rep. 432 pl. 121. 10 Mod. 403.

(L) Of void Deviſes: And herein,

1. Of deviſing what the Law already gives, or what the Policy of the Law will not admit.

ALthough the Judges are favourable in their Conſtruction of Wills, that, if poſſible, the Intention of the Teſtator may prevail; yet where the Teſtator makes the ſame Diſpoſition of his Eſtate as the Law would have done, had he been ſilent, or where his Diſpoſition is made in ſuch general Terms, that his Intention is altogether doubtful and uncertain, and cannot be collected from the Words of the Will; or where the Teſtator is eſtabliſhing a Settlement againſt the Reaſon and Policy of the Law; in theſe Caſes the Judges have thought fit to reject the Will.

Therefore if a Deviſe be made to *J. S.* and his Heirs, who is Heir at Law to the Deviſor; this is a void Deviſe, and the Heir ſhall take by Deſcent as his better Title; for the Deſcent ſtrengthens his Title by taking away the Entry of ſuch as may poſſibly have Right to the Eſtate, whereas if he claims only by Deviſe, he is in by Purchaſe.

Rol. Abr. 626. Hob. 30. Plow. 545. Godb. 461.

So if a Man deviſes Lands to his Wife for Life, Remainder to *J. S* who is Heir at Law in Fee; this is a void Deviſe to *J. S.* becauſe after the Diſpoſition of the particular Eſtate, the Reverſion would have come to him by Deſcent, as Heir at Law.

2 Leon. 101. *Baſpole*'s Caſe. Hob. 30. Rol. Abr. 626. *Preſton* and *Holmes*.

A. ſeiſed

3 Lev. 127. *Hedger* and *Row.*

A. ſeiſed of Lands on the Part of his Mother, deviſes them to his Executors for ſixteen Years, for Payment of his Debts, and after deviſes them to his Heir at Law *ex parte Materna*; this is a void Deviſe to the Heir at Law; for though it was urged, to ſupport the Deviſe, that if it obtained, the Heir of the Part of the Father might in the End inherit, which he could never do if the Deviſe be rejected; yet they adjudged the Deviſe to be void, becauſe there is no Alteration made in the Tenure of the Eſtate; nor is the Quality thereof any wiſe altered; but whether the Deviſee takes either by Deſcent, or the Will, it is a Fee-ſimple, and it were but *Actum agere* to make him take by Will.

* Page 80

* But where another Eſtate is created by the Will than would deſcend to the Heir at Law, or where the Quality of the Eſtate is altered by the Deviſe, there the Diſpoſition by the Will ſhall prevail, though it be made to the Heir at Law. Thus, where a Man had Iſſue a Son and a Daughter, and deviſed that his Land ſhould deſcend to his Son, and if he died without Iſſue of his Body, then the Land to go over, *&c.* The Son by this Will took an Eſtate-Tail, though Heir at Law to the Deviſor, becauſe here is an Eſtate-Tail created by the Will; whereas a Fee-ſimple would have deſcended, which if the Deviſee were allowed to take, it would make the Remainder over void.

Hob. 29, 30. *Cownden* and *Clerk.* Moor 860. Godolp. 461. Rol.Abr.610.

3 Lev. 127. Cro.Eliz.431. 2Sid 53,780. *Packman* and *Cole.*

So where a Man has Iſſue only two Daughters, and deviſes his Lands to them and their Heirs; this is a Deviſe to the Heir at Law, (for ſo are the Daughters) and yet good, becauſe the Deviſe makes them Jointenants, in which Survivorſhip takes Place; whereas had they taken by Deſcent, they had been Coparceners, and therefore the Will altering the Quality of the Eſtate ought to prevail.

Hob. 33. Perk. 506.

A. deviſes his Land to *B.* for Life, the Remainder to *C.* in Tail, the Remainder to the next Heir Male of the Deviſor, and the Heirs Male of his Body; *B.* and *C.* died without Iſſue; the next Heir of the Deviſor was a Daughter, and ſhe was adjudged to have the Land by way of Reverſion and Deſcent; and though ſhe have a Son born afterwards, he ſhall not take the Land from her.

Co. Lit. 18. Dyer 33. 3 Chan. Ca. 35. *vide ſupra* Letter (I) 71, *&c.*

Alſo Deviſes are rejected that are againſt the Reaſon and Policy of the Law; hence Deviſes as well as all other Settlements, which tend to introduce a Perpetuity, are void; for Wills, though favourably expounded, are yet to be conſtrued according to the common Rules of the Courts of Law and Equity; therefore a Deviſe to *J. S.* and his Heirs, the Remainder to *J. D.* and his Heirs, is void, becauſe the Law in no Caſe will allow a Limitation of a Fee upon a Fee, becauſe by the Deviſe to *J. S.* and his Heirs, the Deviſor has transferred the whole Eſtate to him, and then the Limitation over muſt be void; nor can this Deviſe be good by way of future Intereſt, or a Remainder to veſt upon a Contingency, becauſe no Man can ſay when the Heirs of *J. S.* will fail; and to allow the Remainder to *J. D.* to be good upon ſuch a diſtant Contingency, is to perpetuate the Eſtate in the Family of *J. S.* to preſerve a Remainder in *J. D.* which probably may never veſt.

2 Vern. 737. *Humberſton* and *Humberſton* decreed.

A. deviſed his Manors, Meſſuages, *&c.* to the *Drapers* Company, and their Succeſſors, upon Truſt to convey to *B.* for Life, and to his firſt Son, and all other his Sons for Life, and to their Iſſue Male for Life; and for want of ſuch Iſſue to *J. S.* for Life, and to his Iſſue Male for Life, *&c.* and ſo to a great Number of them for Life, and ſo to convey *toties quoties*; and the Court held this Attempt to make a perpetual Succeſſion of Eſtates for Life to be vain and impracticable; however, that there ought to be a ſtrict Settlement made, and the Intent of the Teſtator followed as far as the Rules of Law will admit of, and therefore directed a Settlement to be made, ſo that ſuch who were in Being ſhould be only Tenants for Life; but where the Limitation was to a Son not in Being, there he muſt be made Tenant in Tail Male.

A. deviſed all the Reſt of his Perſonal Eſtate by Leaſes, in Truſt, or otherwiſe, to his three Nephews *A. B.* and *C.* and makes them Executors, and wills, that they ſhall give Bond to each other, that in caſe either die without Iſſue of his Body, to leave at their Death all the ſaid Chattels and Perſonal Eſtate to the Survivors and Survivor of them; and the Bill was to have the ſaid Bonds given, but was diſmiſſed, being an Attempt to intail a Perſonalty.*

Abr. Eq. 207. *Williams* and *Williams.* A pecuniary Legacy cannot be limited after a dying without Iſſue. Bur. Rep. 272, 273.

* Why ſhould not the Bonds be given ſo far as reſpected the Leaſehold Eſtates? *Vide ante* 76—79.

* 2. By Incertainty in the Deſcription of the Thing deviſed. * Page 81

Deviſes are void and rejected where the Words of the Will are ſo general and uncertain, that the Teſtator's Meaning cannot be collected from them; and therefore where a Man by Will, *gave all to his Mother, all to his Mother,* 'twas adjudged that theſe general Words did not carry the Lands to the Mother; for ſince the Heir at Law has a plain and uncontroverted Title, unleſs the Anceſtor diſinherits him, it were ſevere and unreaſonable to ſet him aſide, unleſs ſuch Intention of the Teſtator is evident from the Will; for that were to ſet up and prefer a dark and at beſt a doubtful Title to a clear and certain one.

Lev. 130. Sid. 191. Raym. 97. *Bowman* and *Milbank.*

If one having Lands in Fee, and other Lands for Years, deviſes all his Lands and Tenements, the Fee-ſimple Lands only paſs; but if a Man had Leaſes for Years only, and no Fee-ſimple Lands, by the Deviſe of all his Lands and Tenements, the Leaſes for Years paſs, for otherwiſe the Will would be merely void.

Cro. Car. 293.

So if a Man being ſeiſed of a Meſſuage in *A.* and of a Meſſuage and ſeveral Lands in *B.* deviſes to *J. S.* his Houſe in *A.* with all other his Lands, Meadows, Paſtures, with all and ſingular their Appurtenances whatſoever in *B.* yet the Houſe in *B.* ſhall not paſs; for though by a Feoffment or Leaſe of Lands in *D.* Houſes ſhall paſs, becauſe to be taken moſt ſtrongly againſt the Feoffor, *&c.* and the Land paſſing the Houſe thereupon muſt alſo paſs; yet Wills are to be taken according to the Intention of the Deviſor; and when he deviſes his Houſe in *A.* and Lands in *B.* it cannot be preſumed that he would have more paſs than by the Words is expreſſed. *

2 And. 123.

* Perhaps another Reaſon might be aſſigned, *viz.* That the Houſe could not, in Law, be conſidered as appurtenant to the Land, tho' the Land might be appurtenant to the Houſe.

If a Man is ſeiſed of Lands in a Vill, and in *A.* and *B.* two Hamlets within the ſame Vill, and deviſes all his Lands in the Vill, and in *A.* and dies, no Part of the Land in *B.* ſhall paſs; for his naming one Hamlet only, fully ſhews his Intent, that the Lands in the other ſhould not paſs.

Dyer 261.

But where a Man having two ſeveral Moieties of Lands by Purchaſe from the ſame Perſon, one lying in *Kent*, and the other in *Eſſex*, and he deviſed all his Moieties in *Kent*; and it was held, that both paſſed, for the Words being *All his Moieties* they cannot be ſatisfied with one Moiety only.

Bulſt. 117. 2 Bulſt. 176. Hob. 173. *vide* Noy 112. Cro. Eliz. 658.

If one ſeiſed of Land, called *Hayes Land*, lying in two Vills, *viz A.* and *B.* deviſes all his Land in *A.* called *Hayes Land*, to his youngeſt Son and his Heirs, and in another Part wills, that if his ſaid Son dies without Iſſue, that his Wife ſhall have *Hayes Land*, and dies, and the Son dies without Iſſue, the Wife ſhall have only that Part of *Hayes Land* which lies in *A.* becauſe no more was deviſed to the Son; but *per Popham*, if the Deviſe had been to the eldeſt Son, and if he dies without Iſſue, perhaps he

Cro. Eliz. 674.

ſhould have had all, becauſe the eldeſt Son had all, Part by Deviſe, and Part by Deſcent.

Rol. Abr. 613. Cro.Car 447. *vide* Styl. 261. If a Man ſeiſed in Fee of two Houſes in *D.* adjoining the one to the other, and the one is in the Poſſeſſion of *A.* and the other in the Poſſeſſion of *B.* which is alſo the Corner-Houſe in the Street of the Town; and he deviſes his Corner-Houſe in the Poſſeſſion of *A.* and *B.* by theſe Words, only the Houſe which is in the Poſſeſſion of *B.* ſhall paſs, which is the Corner-Houſe, and not the other Houſe which is in the Poſſeſſion of *A.* though it be next adjoining thereto; for his Intent appears to be ſo.

2 Leon. 120. *Throp* and *Thompſon.* *A.* ſold Land to *B.* but before a Conveyance was executed, *B.* ſold the ſame Lands to *C.* and then *A.* conveyed to *C.* and *C.* being thus ſeiſed, deviſed the Land to his younger Son in theſe Words, *I bequeath to* R. *my Son all my Land which I purchaſed of* B. whereas in Strictneſs of *Law he purchaſed them from *A.* who conveyed them to him; yet this was allowed to be a ſufficient Deſcription of the Land, and conſequently a good Deviſe of it, becauſe the Purchaſe was really made from *B.* the Money being paid to him.

* Page 82

Cro.Car.129. Jon. 195. S. C. If one deviſes his Houſe wherein *J. S.* dwells, called *The White Swan in Old Street*, to *J. N. &c.* and dies, and at the Time of his Death and making of the Will *J. S.* occupied the Entry only, and three of the upper Rooms of the Houſe, and others occupied the Garden and other Parts of the Houſe; yet all the Houſe paſſes; for the Houſe imports the whole Houſe, and the Sign of the *White Swan* makes it ſtill more certain.

Cro. Car. 57. If a Man is ſeiſed of a Meſſuage and two Acres of Land in *A.* and of two Acres of Meadow in *B.* and hath uſed and occupied the two Acres of Meadow, being four Miles diſtant from his ſaid Houſe, together with his ſaid Houſe and Lands in *A.* and deviſes the Houſe *cum omnibus & ſingulis pertinentiis ſuis adinde ſpectan'* to *J. S.* the two Acres of Meadow ſhall not paſs; for by the Words *cum pertinentiis* Lands paſs not, but ſuch Thing only as may be properly appertaining; otherwiſe if the Words had been *cum terris pertinentibus*, for then the Lands uſed therewith ſhould have paſſed.

Chan.Ca.262. If *A.* deviſes ſeveral Pecuniary Legacies, and alſo ſome Lands, and then deviſes all the Reſt and Reſidue of his Money, Goods and Chattels, and other Eſtate whatſoever, to *J. S.* whom he makes Executor, he having other Lands, they ſhall paſs by the Will.

Rol. Abr. 613. But if a Man ſeiſed in Fee of three Tenements, and poſſeſſed of divers Goods, and of a Leaſe for Years, deviſes one Tenement to one of his Sons, and another Tenement to one of his Daughters, and then adds, Item, *I make my two Sons Executors of all my Goods, moveable and immoveable, and all my Lands, Debts, Duties and Demands*; by this Clauſe no Eſtate in the three Tenements of which the Deviſor was ſeiſed in Fee, paſſed to the Executors by Force of the Words, *And all my Lands*; becauſe that theſe Words might well be ſatisfied by the Leaſe for Years of Land which paſſed by it.

Abr. Eq. 209, 210. *Piggot* and *Penrice.* *A.* deviſed in the following Manner: *I make my Niece Executrix of all my Goods, Lands and Chattels*; the Teſtator had a real and perſonal Eſtate, but no Leaſes or Intereſt for Years in any Lands whatſoever; and the Queſtion was, Whether any, or what Eſtate paſſed in the Lands, by this Deviſe? And my Lord Chancellor was clearly of Opinion, that the real Eſtatedid not paſs by theſe Words; and that the Word *Lands* was not (as objected) uſeleſs, and to be rejected, for that in all Probability there might be Rents in Arrear of thoſe Lands, which would paſs to the Niece by her being made Executrix.

Skin. 130. pl. 5. *Barrow* and *Gameam.* If *A.* deviſes certain Lands to his youngeſt Son in Fee, and deviſes all his Lands in *D.* to his Wife for Life: *Item*, I give to her for Life the Lands which I hold of *G. T.* *Item*, I give to her all the Lands which I purchaſed of *J. S.* *Item*, I give my Lands to my Son *E.* and his Heirs for ever;

not only the Lands purchaſed of *J. S.* but alſo the Reverſion of all the others do paſs by theſe Words.

If *A.* being ſeiſed of the Manor of *B.* and of other Lands in the County of *S.* deviſes the Manor of *B.* for ſix Years, and Part of the other Lands to *J. S.* in Fee; and then comes this Clauſe, and the Reſt of my Lands in the County of *S.* or elſewhere, I give to my Brother, *&c.* by this Deviſe he ſhall have the Reverſion of the Manor. Allen 28.

A. ſeiſed in Fee, deviſed a certain Houſe by Name to *J. S.* for Life; and by another Clauſe he deviſes to his Wife, the better to enable her to pay *his Legacies, all his Meſſuages, Lands, Tenements, and Hereditaments, *not above diſpoſed of*. Adjudged, that by theſe Words, the Reverſion of the Houſe deviſed to *J. S.* paſſed. * Page 83 2 Vent. 285. *Willoux* and *Lydcot*, adjudged upon a Writ of Error in the Exchequer Chamber. Carth. 50. S. C. where it is ſaid to have been adjudged in King *James* II.'s Time, that the Reverſion did not paſs; but a Note is added, that theſe were King *James*'s Judges, and that *Mich.* 1 *W. & M.* it was adjudged, that the Reverſion paſſed; which Judgment was affirmed in the Exchequer Chamber by all the Judges; and the rather, becauſe it appeared that the Heir at Law had 20*l. per Annum* deviſed to him; ſo that he being taken Notice of, the Intent was more apparent. *Vide* Lev. 212. S. P. adjudged, and 3 Mod. 228. which ſeems contrary, but has been denied to be Law.

A. ſeiſed in Fee, deviſed Black-acre to *B.* for Life, and deviſed to *C.* all his Lands not before deviſed, to be ſold, and the Money to be divided between his younger Children; the Queſtion was, whether the Reverſion of Black-acre paſt by the Deviſe of all his Lands not before deviſed; and it having been referred to the Judges of the *Common Pleas*, they unanimouſly agreed and certified, that the Reverſion was well deviſed. 2 Vern. 461. *Rooke* and *Rooke*, decreed accordingly.

A. by Virtue of ſeveral Settlements, being Tenant in Tail after Poſſibility of Iſſue extinct, of ſome Lands, Remainder in Fee to Truſtees, in Truſt for him and his Heirs, and as to ſome other Lands, being Tenant for Life, Remainder to his firſt and other Sons, Remainder to Truſtees in Fee, in Truſt for the right Heirs of *B.* whoſe Heir *A.* was, and as to other Lands, being Tenant in Tail, Remainder to the right Heirs of his Father, whoſe Heir he likewiſe was; and being likewiſe ſeiſed of a very conſiderable Real Eſtate of his own Purchaſe, and poſſeſſed of a large Perſonal Eſtate, made his Will, and deviſed ſome Part of his Lands to his Wife for Life, and gave ſeveral Legacies, and having no Iſſue, deviſed all other his Lands, Tenements and Hereditaments, *out of Settlement*, to his Nephew, provided he took on him his Surname, ſubject to raiſe 4000*l.* in caſe the Teſtator left a Daughter; and it was held, that all the Eſtates thus ſettled paſſed by the Will, notwithſtanding the Words *out of Settlement*, for the Word *Hereditament* comprehends a Remainder or Reverſion, as well as an Eſtate in Poſſeſſion. 2 Vern. 621. between Sir *Litton Strode* and Lady *Ruſſel*, decreed by my Lord Chancellor, aſſiſted with the Maſter of the Rolls, *Trevor* C. J. and J. *Tracey*.

So where *A.* being ſeiſed in Fee of Lands in *D.* upon the Marriage of his eldeſt Son, ſettled thoſe Lands on him in Tail Male, Remainder to his own right Heirs; and being ſeiſed in Fee in Poſſeſſion of other Lands in *M. L.* and *N.* deviſed all his Meſſuages, Lands, Tenements and Hereditaments in *M. L. N.* or *elſewhere*, not by him formerly ſettled, for the Payment of his Debts; and after Debts paid, then to *J. S.* a ſecond Son, and his Heirs for ever, and died, and ſoon after the eldeſt Son died (not having barred the Remainder) without Iſſue Male, but left ſeveral Daughters; and it was held, 1*ſt*, That the Word *elſewhere* was a ſufficient Deſcription of the Lands in *D.* though of greater Value than thoſe in *M. L.* and *N.* that it was of itſelf a ſignificant and expreſſive Term; and the rather ſo in this Caſe, becauſe there were no Lands or Out-Skirts not particularly enumerated, to which it could be applied, but to thoſe in *D.* 2*dly*, That the Words *Meſſuages, Lands, Tenements and Hereditaments*, were ſufficient to paſs the Reverſion of the Lands in *D.* notwithſtanding the Exception, or reſtrictive Words *not formerly ſettled*. Abr. Eq. 211. *Cheſter* and *Cheſter*, decreed by my Lord Chancellor, aſſiſted by *Raym.* C. Juſt. *Reynolds* C. B. and *Price* J.

But

2 Vent. 351. Sir *Thomas Littleton's* Caſe, decreed, but the Reporter ſays there were other Circumſtances in the Caſe, which ſhewed that it was not his Intention that the mortgaged Lands ſhould paſs; and Vern. 3. S. C. it appears, that there were ſome ſmall Parcels of Land not ſpecified, and of the ſame Nature of thoſe deviſed; to which the Court held the Word *elſewhere* was applicable, and not to the mortgaged Lands, which were of a different Nature, and of greater Value; and that the Teſtator had charged the Lands deviſed with a Rent-charge of 80 *l. per Annum*, which he could never intend ſhould iſſue out of Lands which were every Day redeemable.

But if *A.* deviſes Lands to *B.* in *D. S.* and *T.* and all his Lands elſewhere, and he hath a Mortgage of Lands, not lying in *D. S.* or *T.* which is of more Value than the Lands in *D. S.* and *T.* the mortgaged Lands will not paſs, for he could not be thought to mean to comprehend Lands of ſo much Value, under the Word *elſewhere*, which is like an *&c.* that comes in *currente calamo.*

2 Vern. 623. By a general Deviſe of all Lands, Tenements and Hereditaments, Mortgages in Fee, though forfeited, will not paſs; nor will they paſs by ſuch a general Deviſe, though the Equity of Redemption is *after* the Making of the Will forecloſed or releaſed.

* Page 84 Abr. Eq. 211, 212. *Markant* and *Twiſden.* Gilb. Eq. Rep. 30.

* *A.* having ſettled all his Eſtate of Inheritance upon his Wife for Life, for her Jointure, makes his Will, and thereby deviſes ſeveral pecuniary Legacies to ſeveral Perſons, and then ſays, all the Reſt and Reſidue of my Eſtate, Chattels Real and Perſonal, I give and deviſe to my Wife, whom I make ſole Executrix; and the only Queſtion was, Whether by this Deviſe the Reverſion of the Jointure Lands paſſed to the Wife; and my Lord Keeper, having taken Time to conſider of it, delivered his Opinion, that it did not, becauſe the precedent and ſubſequent Words explain his Intent, to carry only his Perſonal Eſtate; for in the firſt Part of his Will, having given only Legacies, and no Land whatſoever, the Words all the Reſt and Reſidue of his Eſtate are relative, and muſt be intended Eſtate of the ſame Nature with that he had before deviſed, which was only Perſonal; for having before given no Real Eſtate, there could be no Reſt or Reſidue of that out of which he had given away none; then the Words *Chattels Real and Perſonal* explain the Word *Eſtate*, and ſhew what Sort of an Eſtate he meant, and make the Deviſe as if he had ſaid, all the Reſt of my Eſtate, whether Chattels Real or Perſonal, *&c.* and ſo confine and reſtrain the extended Senſe of the Word *Eſtate.*

3. By Incertainty in the Deſcription of the Perſon to take.

Abr. Eq, 212. (*a*) A Deviſe to the eldeſt Son of *J. S.* is good, or to his Second or Youngeſt; ſo is a Deviſe to the Wife of *J. S.* or though ſhe be called *Em.* or *Emlyn*, and to *Robert* Earl of, *&c.* though his Name was *Henry.* Co. Lit. 3.—A Deviſe to the Stock, Family, or Houſe, is good, and it ſhall be intended of the Heir. Hob. 33.

If *A.* deviſes Lands to the eldeſt Son of *J. S.* by the Name of *William*, when in Truth his Name was *Andrew*, the Deviſe is (*a*) good.

Cro. Eliz. 742. If a Man has Iſſue two Sons, and deviſes his Land to his Son, without ſpecifying which he means, this is void for the Uncertainty; for to conſtrue it a Deviſe to the Eldeſt, is to make it an impertinent Deviſe, that being no more than *Actum agere*; and to conſtrue it a Deviſe to the Youngeſt, ſeems ſtill more unreaſonable, becauſe that is to diſinherit the Heir at Law without an apparent Intention of the Teſtator to warrant it, and to ſet up a doubtful Title in Deſtruction of a clear one.

5 Co. 68. If a Man has two Sons named *J.* and deviſes to his Son *J.* all his Lands, this is a void Deviſe for the Uncertainty, unleſs it can be proved that the Teſtator meant one of them in particular; by the elder Son's being beyond Sea, probably dead, *&c.* for theſe Circumſtances clear up the Intent of

of the Teſtator, and ſuch Averment is (*b*) admitted, becauſe it is conſiſtent with the Will; and the Conſtruction and Judgment thereon muſt be genuine, becauſe taken from the Words of the Will.

(*b*) But for this *vide* Head of *Evidence*.

If a Man hath Iſſue two Sons and two Daughters, and deviſes his Land to his Wife for Life, and that after her Death the ſame ſhall remain to his Iſſue; this is a void Deviſe as to the Remainder; for having ſeveral Children, it is (*c*) uncertain what Iſſue intended.

Cro. Eliz. 742. *Taylor* and *Sayor*.

(*c*) But *vide* Raym. 83.

S. C. cited, and denied to be Law; and that it ſhall go to the eldeſt Son, for Iſſue is *nomen collectivum*; and and ſo is 3 Lev. 433. and 6 Co. 17.

If a Man has Iſſue eight Daughters by three ſeveral Venters, and one Son, and deviſes his Land to his youngeſt Daughter, the Remainder to his Son in Tail, the Remainder to his two Daughters by the middle Venter for Life, the Remainder *Proximo de Sanguine* of the Deviſor, and dies, and after the eldeſt Daughter has Iſſue, and dies, and after the Son, and all the other Daughters, except the two Daughters by the middle * Venter, to whom it was given for Life, die without Iſſue, the Iſſue of the eldeſt Daughter ſhall have it.

Palm. 303: *vide* Styl. 240.

* Page 85

If a Man deviſes all his Lands to one of his Couſin *Nich. Amherſt*'s Daughters, that ſhall marry a *Norton* within fifteen Years, and dies, and *Nich. Amherſt* having three Daughters, one of them marries a *Norton* within the fifteen Years; this is a good Deviſe to her notwithſtanding the Uncertainty, and the Law ſupplies the Words, *who ſhall firſt marry*.

Raym. 82. *Bate* and *Amherſt*, adjudged.

If a Man deviſes Lands to *J. S.* in Truſt for *A.* and the Heirs of his Body Remainder to *B.* for Life; and further wills that if *A.* die without Iſſue, and *B.* be then deceaſed; then, and not otherwiſe, he gives the Lands to *J. N.* and his Heirs, though *A.* dies without Iſſue, and *B.* ſurvives; yet after the Death of *B. J. N.* ſhall take, for the Words, if *B.* be then deceaſed, expreſs the Teſtator's Meaning, that *B.* ſhould be ſure to have it for Life, and alſo ſhew when *J. N.* ſhould have it in Poſſeſſion.

2 Vent. 363.

A. deviſes Lands to Truſtees in Fee, in Truſt to pay Debts and Legacies, and after thoſe Debts paid, then to ſell; and if any of the Teſtator's Name would buy, ſuch Perſon to have the Lands 200 *l.* leſs than the Value; one of the Teſtator's Name brings a Bill for this Benefit of Preemption, but not till the Teſtator had been dead twenty-five Years, but the Bill was diſmiſſed; for if two of the Teſtator's Name ſhould claim the Benefit of the Deviſe, who muſt have it?

Vern. 362. *Huckſtep* and *Matthews*.

A. deviſed Lands to Truſtees, in Truſt for his Daughter for Life, Remainder to the ſecond Son of her Body to be begotten in Tail Male, and ſo to every younger Son; and in Default of ſuch Iſſue Male, to her eldeſt Daughter, and to the firſt Son of her Body, taking upon him the Name and Arms of the Teſtator; and adds further, that he did not by his Will deviſe the Eſtate to the eldeſt Son, becauſe that he expected that his Daughter would marry ſo prudently, as that the eldeſt Son would be provided for; the Daughter married, and had Iſſue a Son, who died in twelve Months after his Birth; ſhe afterwards had another Son born, after the Death of the firſt; this ſecond muſt take according to the Words of the Will, though contrary to the Intention of the Teſtator.

2 Vern. 660. *Trafford* and *Aſhton*, decreed.

If *A. B.* and *C.* being Aliens and Brothers, *A.* has Iſſue a Son, and *B.* and *C.* are naturalized, and *B.* purchaſes Lands, and deviſes them to the Heir of his Brother *A.* and his Heirs, and *B.* dies, leaving *A.* and his Son; the Deviſe is void for the Incertainty, who is intended thereby; for *A.* being an Alien, can have no Heir, or however being living, can have none during his Life; but *per Glyn* Ch. Juſt. if it had been found that the Son of *A.* was the reputed Heir of *A.* though *A.* was an Alien, yet his Son might have taken by this Deviſe.

2 Sid. 23, 51. *Forſter* and *Ramſey*.

Hob. 29, 30. *Cownden* and *Clerk*.

A Man had Iſſue a Son and a Daughter, the Daughter was married, and had Iſſue two Daughters; the Father deviſed, that all his Lands ſhould deſcend to his Son, provided that if his Son died without Iſſue of his Body, then my Land to go to my right Heirs Male of my Name and Poſterity for ever; the Son died without Iſſue; and upon Ejectment between the Brother of the Deviſor and the Daughters, this was held a void Deviſe, becauſe neither could claim under the Deſcription of the Will; not the Brother, becauſe, though he was of his Name, yet he was not his *(a)* Heir; and though the Daughters were his Heirs, yet they were not * of his Name, and ſo not within the Words of the Will, and conſequently the Limitation void for the Uncertainty.

* Page 86

(a) This Reſolution is founded on a Rule laid down in the Old Books, *viz.* That he who taketh by Deſcription or Purchaſe as Heir, muſt be Heir General, or compleat Heir; for Inſtance, if Lands are deviſed to the Heirs of *J. S.* and *J. S.* is living at the Death of the Teſtator, the Deviſe is void, for *Non eſt hæres viventis*; ſo if Lands are deviſed to the right Heirs Male of *J. S.* and the Heir of *J. S.* is a Female, the Deviſe is void; or if the Deviſe were to the Heirs Female, and the right Heir had been a Male, it would be void in the ſame Manner; to which Purpoſe *vide* Moor 860. Co. Lit. 24. b. 2 Leon. 70. Dyer 99. Hob. 33. 1 Co. *Archer's* Caſe. 1 Co. 103. *Shelly's* Caſe; but notwithſtanding theſe Authorities, this Doctrine has been ſhaken by the following more modern Reſolutions, in which it is held, that a ſpecial Heir may take by Purchaſe; and that a Deſcription of a Perſon by the Name of Heir, tho' not Heir General, operating with the Intention of the Teſtator, is ſufficient to aſcertain the Perſon to take. *Vide* Abr. Eq. 214, 215. *Beaumont* and *Long*, 2 Vern. 729. *Newcomen* and *Barkham*.

2 Jon. 99. adjudged between *James* and *Richardſon* in *B. R.* but reverſed in the Exchequer-Chamber;

If a Man deviſes Lands to *A.* and his Heirs, during the Life of *B.* in Truſt for *B.* and after the Deceaſe of *B.* to the Heirs Male of the Body of *B.* now living, *B.* having one Son then living; by this Deviſe a Remainder is immediately veſted in the Son, for the Words *Heirs Male now living*, in a Will, are a full Deſcription of the Son, who then was the Heir apparent of *B.* and known by the Deviſor (who was his Uncle and Godfather) to be ſo.

but the Judgment of Reverſal was reverſed in the Houſe of Lords. 2 Lev. 232. S. C. and *per Levinz*, this Point was tried again upon a new Ejectment; and like Judgment given as at firſt in *B. R.* which was confirmed in the *Exchequer-Chamber*, and likewiſe in the Houſe of Lords, *Vent.* 334. S. C. by the Name of *Burchet* and *Durdant*. 2 Vent. 311. S. C. Raym. 330. S. C. 3 Keb. 32. S. C. Pollex. 457. S. C.

Abr. Eq. 214. *Baker* and *Hall*, adjudged in *C. B.*

A. deviſed in this Manner: I give to my eldeſt Heir Male, and his Heirs Male for ever, all my Lands in ſuch a Place; and if there be a Female, ſhe to have 12 *l. per Annum*, as long as ſhe lives; the Teſtator had two Sons, the eldeſt of which died in his Life-time, leaving Iſſue; and it was adjudged, that the Lands ſhould go to the ſecond Son, and not to the Daughter of the eldeſt, though ſhe was Heir General.

2 Vern. 729. *Newcomen.* and *Barkham.* and this Matter well debated.

J. S. deviſed to Truſtees in Truſt, after Debts and Legacies paid, to convey to *A.* his Couſin, and the Heirs Male of his Body, and for Want of ſuch Heirs Male, then to the Heirs Male of the Body of *B.* his Great Grandfather, and for Want of ſuch Heirs Male, to his own Right Heirs for ever, and gave to his Siſter 2000 *l.* to be put out at Intereſt during her Life, ſhe to receive the Intereſt, and after her Death to her Children, and died; and ſoon after *A.* died without Iſſue, and *C.* being Heir Male of *B.* the Teſtator's Great-Grandfather, but not Heir General, there being a Daughter of an elder Brother; the Queſtion was between him and the Teſtator's Siſter, and the Heir at Law, who had the 2000 *l.* deviſed to her, whether the Deviſe was void, or not; and my Lord Chancellor held the Deviſe good, and that *C.* ſhould take as a Perſon ſufficiently deſcribed and intended by the Teſtator.

4. By the Deviſee's dying in the Life-time of the Deviſor.

If a Man deviſes Lands to *A.* and his Heirs, and *A.* dies in the Life-time of the Deviſor *B.* the Heir of *A.* ſhall take nothing by the Will, for the Heirs of *A.* were not named as immediate Takers, but only to expreſs the Quantity of the Eſtate that *A.* ſhould take. Plow. Com. 345. *Bret* and *Rigden*. *Vide* where a new Publication of the Will may make ſuch a Deviſe good. Title *Will*, and 2 Lev. 243.

If a Man deviſes Lands to *A.* his ſecond Son, and to the Heirs of his Body, and after his Death without Iſſue, then to *B.* his third Son in Tail, *&c.* if *A.* hath Iſſue and dies in the Life-time of the Deviſor, and then the Deviſor dies, *B.* ſhall have the Lands preſently; for the Deviſe to *A.* being void, it is as if it had never been made. Cro. Eliz. 422, 423.

If a Man deviſes to *A.* and his Heirs, to the Uſe of *C.* and his Heirs, and *C.* dies in the Life-Time of the Deviſor, his Heir can take nothing; but the Deviſe will be to the Uſe of the Deviſor and his Heirs. Leon. 253. Cro. Eliz. 243. *Hartop's* Caſe.

* But if there be a Deviſe to *A.* for Life, Remainder to *B.* in Fee; though *A.* dies in the Life-Time of the Deviſor, *B.* ſhall take; or if *A.* refuſes, he ſhall take. * Page 87 Plow. 344. Cro. Eliz. 423. Co. 101. a.

If a Man deviſes his Lands to his Wife for Life, and after to his four Daughters and Heirs, equally to be divided between them, Share and Share alike, to hold to them and their Heirs for ever; and one of the Daughters dies, having Iſſue a Son, and then the Deviſor dies, the Will is void for a fourth Part. 2 Sid. 53, 78. *Packman* and *Cole*.

So if *A.* has Iſſue two Daughters *B.* and *C.* and he deviſes ſome Tithes and Money to *B.* and gives Legacies to her Children; but declares that ſhe having married without his Conſent, ſhe ſhould have no Part of his real Eſtate, and deviſes his real Eſtate to *C.* in Tail, Remainder to *B.* for Life, and to her firſt, *&c.* and *C.* dies in the Life-Time of the Teſtator, leaving Iſſue; though afterwards *A.* makes a Codicil to his Will, and deviſes ſome particular Legacies out of his perſonal Eſtate; yet as that does not amount to a Republication of his Will, *B.* muſt have the Lands immediately after the Death of the Deviſor, though contrary to the Intention of the Deviſor, the Authorities being ſo. 2 Ven. 722. *Hutton* and *Simpſon*.

If a Man deviſes Lands to *A.* and *B.* and their Heirs, and *A.* dies in the Life of the Deviſor, *B.* ſhall take the whole Lands. *Carter* 4, 5. *Davis* and *Kemp*.

[§ What Circumſtances are neceſſary by the 32 *H.* 8. *c.* 1. and 34 *&* 35 *H.* 8. *c.* 5. and 29 *Car.* 2. *c.* 3. and what ſhall be a Revocation and a new Publication, *vide* Tit. *Will*, Vol. 5.

Diſclaimer, *vide* Tit. *Pleadings*.]

Diſcontinuance.

For Diſcontinuance of Proceſs, *vide* Heads of *Proceſs* and *Error*. Co.

DIſcontinuance of an Eſtate in Lands, ſignifies *(a)* ſuch an Alienation of the Poſſeſſion, whereby he, who has a Right to the Inheritance, cannot (*b*) enter, but is driven to his Action.

Lit. 325. (*a*) To every Diſcountenance it is neceſſary there ſhould be a Deveſting or Diſplacing of the Eſtate, and turning the ſame to a Right; for if it be not turned to a Right, they that have the Eſtate cannot be driven to an Action. Co. Lit. 327. b. and 332. ſame Rule. (*b*) But he, who claims by Title Paramount above the Diſcontinuance, may enter. Co. Lit. 327.

Under this Head we ſhall conſider,

(A) Of Diſcontinuances made by Eccleſiaſtical Perſons. 88.

(B) Made by Tenants in Tail. 88.

(C) By Husbands ſeiſed in Right of their Wives. 91.

(D) Of Diſcontinuances by Women of Lands of the Gift of their Husband, or his Anceſtor. 92.

(E) What Eſtate or Intereſt may be diſcontinued. 94.

(F) By what Act or Conveyance a Diſcontinuance may be made, and the Effect thereof. 96.

* Page 88 * (A) Of Diſcontinuances made by Eccleſiaſtical Perſons.

Co. Lit. 325. b. Comp. Incumb. 484.

IN ancient Days, Abbots and Prelates were ſuppoſed to be married to the Church; and as Huſbands and Repreſentatives of the Church were allowed to have a Fee in Right of the Church, that they might maintain Actions, and hold Courts within their Manors and Precincts; therefore at Common Law, a Biſhop, Abbot, or any other Perſon, ſeiſed in Fee in Right of his Houſe or Church, might have diſcontinued, and thereby put his Succeſſor to his Action to recover the Right of Poſſeſſion.

Co. Lit. 325.

But as the Right of Property was in the Church, the Biſhop could not alien without the Conſent of the Chapter, who repreſented the Clergy of the Dioceſe; nor could the Abbot alien without the Conſent of his Houſe.

Co. Lit. 325. b. 342. Rol. Abr. 633.

And at this Day, by the 1 *Eliz. c.* 19. & 13 *Eliz. c.* 10. and 1 *Jac. c.* 3. neither a Biſhop, Dean, Maſter of an Hoſpital, *&c.* can diſcontinue any of their Poſſeſſions, or bar their Succeſſors of their Right of Entry.

As to Parſons, Vicars, Prebends, and others who were Preſentative, they were conſidered only as having a qualified Right, and their Eſtate by the Common Law only an Eſtate for Life, the Fee being in Abeyance; and therefore could not diſcontinue, or do any other Act to the Prejudice of their Succeſſors, though they could alien with the Conſent of the Patron and Ordinary.† Co. Lit. 341. a. Dyer 239. pl. 41. Hetl. 88.

† By 13 Eliz. *c.* 20. Charges made upon Benefices with Cure are declared void.

If a Biſhop leaſes Parcel of the Demeſnes of a Manor for Life, not warranted by the Statute of 1 *Eliz. c.* 19. and after leaſes the Manor to another for Life; the Parcel ſo leaſed ſhall paſs with Attornment of the firſt Leſſee; for the ſaid Leaſe did not make any Diſcontinuance, but the Reverſion thereof continued Parcel of the Manor. 2 Rol. Abr. 58. but for this *vide* under Head of *Leaſes and Terms for Years, Leaſes made by Eccleſiaſtical Perſons.*

(B) Of Diſcontinuances made by Tenant in Tail.

IF Tenant in Tail makes a *Feoffment* in Fee; this is a Diſcontinuance, for he has the Right of Poſſeſſion inheritable in him; for although the Statute *de donis* preſerves the Right of the Inheritance to the Iſſue; yet it does not preſerve the Right of Poſſeſſion, and (*a*) therefore the Iſſue is put to his Action. Lit. Sect. 598.

(*a*) Alſo the Entry of the Iſſue is taken away, becauſe the Feoffment had anciently a Warranty annexed unto it, which defended ſuch Right of Poſſeſſion; and when a Man had a Warranty to cover his Poſſeſſion, it was not fit he ſhould be put out of Poſſeſſion by any Act in *Pais*, without bringing in his Warrantor by Voucher; and therefore the Entry was diſallowed in ſuch Caſes, that a Man might not be obliged to the Expence of getting his Judgment in the Writs of *Warrantia Chartæ*. Co. Lit. 327.

So if Tenant in Tail, Remainder to his right Heirs, makes a *Feoffment* in Fee; this is a Diſcontinuance. 13 *H.* 7. 22 b. Rol. Abr. 633. Cro Car. 387, 405, 406. Jon. 358. Hut. 126. S. C. and S. P. admitted.

If Tenant in Tail be diſſeiſed, and *releaſes* to the Diſſeiſor all his Right; this works no Diſcontinuance; for a *Releaſe* being a Conveyance in ſecret cannot paſs the Poſſeſſion; and therefore a Conveyance, that cannot paſs the Poſſeſſion, cannot paſs the Right of Poſſeſſion. Lit. Sect. 598, 599. 3 Co. 85. S. P. but *Q.* after ſuch Releaſe, what Eſtate or Intereſt the Diſſeiſor has; and Saund. 261.

* But if Tenant in Tail being diſſeiſed releaſes all his Right to the Diſſeiſor, and binds himſelf and his Heirs to Warranty, and dies; and the Warranty deſcends (*b*) upon the Iſſue in Tail, this is a Diſcontinuance, (*c*) by Reaſon of the Warranty. * Page 89 Lit. Sect. 601. 3 Co. 85. S P.

(*b*) So that it is not the Warranty only that makes the Diſcontinuance, but the Warranty and Deſcent upon him that hath Right to the Lands Co. Lit. 328. a. (*c*) *viz.* That if Aſſets deſcend, he to whom the Releaſe is made may plead the ſame, and bar the Demandant. Co. Lit. 328. a. b.

Co. Lit. 332. a. Bulſt. 162. 2 Rol. Rep. 484. If Tenant in Tail leaſes for Years, and after levies a Fine, this is a Diſcontinuance, for a Fine is a Feoffment upon (*a*) Record, and the Freehold paſſes.

(*a*) But if Tenant in Tail levies a Fine *ſur Conuzance de droit tantum*, this is not any Diſcontinuance till Execution; for if he dies before Execution, the Tenant may enter. 36 Aſſ. 8. Rol. Abr. 632. S. C. So if a Fine be levied to Tenant in Tail, and he grants, and renders the Land to the Conuzor and his Heirs, and dies before Execution, this is no Diſcontinuance; otherwiſe if executed in the Life of Tenant in Tail. Co. Lit. 333. b.

Co. Lit. 332. But if Tenant in Tail leaſes for his own Life, and after levies a Fine, this is no Diſcontinuance, becauſe the Reverſion expectant upon an Eſtate of Freehold, which lies only in Grant, paſſed thereby.

Lit. Sect. 620. If Tenant in Tail leaſes for the Life of the Leſſee, by this the Tail and Reverſion thereupon is diſcontinued; and if the Tenant in Tail by Deed grants his Reverſion in Fee to another, and the Tenant for Life attorns; and (*b*) after the Tenant for Life dies, (*c*) living the Tenant in Tail, *&c.* (*d*) this is a Diſcontinuance in Fee.

(*b*) So if Tenant for Life ſurrenders to the Grantee, or the Grantee recovers in Waſte, and enters for the Forfeiture, *&c.* Co. Lit. 333. b. Lit. Sect. 621, 629. Jon. 210. Latch. 65.

(*c*) If Tenant in Tail leaſes for the Life of the Leſſee, and after levies a Fine with Warranty; tho' this is not any Diſcontinuance, ſo as to take away the Entry of him in Reverſion after the Death of the Tenant for Life, unleſs executed in the Conuſee by the Death of Tenant for Life in the Life of Tenant in Tail; yet the Grantee hath an abſolute Fee, to which the Warranty being annexed, and deſcending upon the Reverſioner, will be a Bar. Jon. 210. adjudged. Cro. Car. 156. adjudged. For by the Eſtate for Life the Tail was diſcontinued, and a new Fee gained; which Reverſion in Fee being granted with Warranty, the Warranty was annexed to the Fee, and bound thoſe that had Right. *Vide* Latch. 64, 72. Salk. 245. Lutw. 770, 782.

(*d*) Where the Reverſion is executed in the Life of Tenant in Tail, it is equvalent in Judgment of Law to a Feoffment, for the Eſtate for Life paſſed by Livery. Co. Lit. 333. b.

Co. Lit. 333. b. If Tenant in Tail leaſes for (*e*) Life, the Remainder in Fee, this is an abſolute Diſcontinuance, tho' the Remainder is not executed in the Life of Tenant in Tail, becauſe all but one Eſtate, and paſſeth by one Livery.

(*e*) So if he leaſes for Years, the Remainder in Fee, and makes *Livery of Seiſin* accordingly. Lit. Sect. 631.

Co. Lit. 333. a. But for this *vide* Head of *Leaſes*. But if Tenant in Tail leaſes for three Lives, according to 32 *H.* 8. *c.* 28. this is no Diſcontinuance of the Eſtate-Tail, or of the (*f*) Reverſion (*g*) becauſe it is authoriſed by Act of Parliament, whereunto every Man's Conſent is involved.

(*f*) But if Tenant in Tail levies a Fine, and after dies without Iſſue, the Donor is put to his Formedon. 4 Leon. 191. Co. 96. Cro. Jac. 696. Sid. 83. (*g*) Dyer 57. pl. 1. Owen 28. 2 Leon. 46.

Co. Lit. 333. b. If Tenant in Tail leaſes for Life, and after diſſeiſes Leſſee for Life, and makes a Feoffment in Fee, and the Leſſee dies, and then Tenant in Tail dies, tho' the Fee was executed, yet becauſe it was not executed by (*b*) lawful Means it is no Diſcontinuance.

(*b*) Were by Cuſtom an Infant above the Age of 15 may make a Feoffment, and being Tenant in Tail, he makes a Feoffment, it is no Diſcontinuance, becauſe the Cuſtom will not enable one to do a Tort. Cro. Jac. 80.

* Page 90

Co. 76. *a.* Co. Lit. 302. b. Cro. Eliz. 827. Moor. 634. Owen 129. *vide* 2 Lev. 254, 2 Jon. 58. * If there be Tenant for Life, Remainder in Tail, Remainder in Tail, *&c.* and Tenant for Life, and he in the firſt Remainder in Tail levy (*i*) a Fine, this is no Diſcontinuance of either of the Remainders, becauſe each of them paſſed only what he lawfully might.

(*i*) So if they made a Feoffment. Co. 76. Cro. Eliz. 135. Leon. 127. But *Q.* and *vide* Dyer 324. And. 286. Cro. Eliz. 36. 6 Co. 15. and Sid. 83. where this Opinion is denied; becauſe a Feoffment differs in its Nature from a Fine.——If ſuch Feoffment be made by Parol, it will be the Surrender of Tenant for Life, and the Feoffment of him in Remainder, *ut Res magis valeat*, and conſequently a Diſcontinuance. Co. 77.——But a naked Conſent of the Tenant for Life will not amount to a Surrender, ſo as to make it a Diſcontinuance. Carth. 110.

If

If Tenant in Tail enfeoff the Donor, this is not any Diſcontinuance, becauſe the Donor hath the (a) immediate Eſtate, and it operates as a Surrender; it paſſes no more than it lawfully may paſs. Lit. Sect. 625. Co. 140. S. P.

(a) But if there be Tenant in Tail, the Remainder in Tail; and the Tenant in Tail enfeoffs him in Reverſion in Fee, this is a Diſcontinuance. Co. 140. Co. Lit. 335. S. P. becauſe there is a meſne Eſtate. Keilw. 42. a. S. P. *per* Frowick *con.* Dyer 10. pl. 32.

If the Donee enfeoff the Donor and a Stranger, (b) this is a Diſcontinuance of the whole Land. Co. Lit. 335. a.

(b) Conditionally, *viz.* if the Stranger ſurvive. Dyer 12. pl. 53. Cro. Car. 406.

If a Man covenants to ſtand ſeiſed to the Uſe of himſelf for Life, Remainder to his Wife for Life; the Remainder to the Heirs Male which he ſhall beget on the Body of his Wife, Remainder to his eldeſt Son by a former Wife, *&c.* and after the Huſband and Wife levy a Fine with Warranty, and die without Iſſue; this is no Diſcontinuance of the Remainder, becauſe the Eſtate-Tail was not executed, by Reaſon of the intervening Eſtate limited to the Wife, which Eſtate is not drowned, but remains diſtinct. Lev. 36. *Stephens* and *Bittridge.* Raym. 36. S. C. Sid. 83. S. C. adjudged.

But it was agreed that if the Eſtate-tail had been executed, this Fine had been a Diſcontinuance of the Remainder in Tail, and ſo the Warranty deſcending upon him in Remainder, would have barred.

If a Man has the Right of Poſſeſſion, and is not poſſeſſed by Virtue of the Intail, he cannot diſcontinue otherwiſe than by (c) Warranty. Lit. Sect. 637. 641. Carth. 110.

S. P. *poſt.* Letter (E) 94, *&c.* (c) As if Tenant in Tail is diſſeiſed, and dies, and the Iſſue in Tail releaſes to the Diſſeiſor with Warranty, tho' the Iſſue was never ſeiſed by Force of the Intail, yet it hath the Effect of a Diſcontinuance by Reaſan of the Warranty. Co. Lit. 339. Dyer 55. Moor 256.

As if there be Grandfather, Father, and Son, and the Grandfather is ſeiſed in Tail, and the Father diſſeiſes the Grandfather, and makes a Feoffment in Fee, and dies, this works no Diſcontinuance, becauſe the Father was not poſſeſſed of the Intail, but of a Fee-ſimple by Diſſeiſin, which was ſubject to the Entry of the Tenant in Tail; and conſequently the Alienee is ſubject to the Entry of the Iſſue in Tail, in as much as the Father, who made the Alienation, had only the naked Poſſeſſion by Diſſeiſin, and not the Right of Poſſeſſion by Virtue of the Intail. Lit. Sect. 658. Rol. Abr. 634. Raym. 37.

So if Tenant in Tail leaſes to one for Life, and hath Iſſue and dies, and the Reverſion deſcends to the Iſſue, and the Iſſue (d) grants the Reverſion to another in Fee, and the Tenant for Life attorns, and dies, and the Grantee enters, and is ſeiſed in Fee in the Life of the Iſſue, and the Iſſue in Tail hath Iſſue a Son, and dies, this is no Diſcontinuance; but the Son may enter, *&c.* for that his Father had never any Thing in him by Force of the Intail. Lit. Sect. 638.

(d) So tho' the Grant had been with Warranty. Co. Lit. 339. yet *vide* Jon. 210. Cro. Car. 156. Latch. 62.

* So if there be Tenant for Life, the Remainder in Tail, and he in Remainder enters upon the Leſſee, and diſſeiſes him, and makes a Feoffment over, this is not any Diſcontinuance, becauſe he was never ſeiſed by Force of the Intail. * Page 91 Rol. Abr. 634. & *vide* 2 And. 110. Rol. Rep. 188. Moor 747. Styl. 158. Bulſt. 162.

But if there be Leſſee for Years, the Remainder in Tail to *J. S.* and (e) *J. S.* enters upon the Leſſee, and makes a Leaſe for Life, or Feoffment in Fee, (f) this is a Diſcontinuance, for he was ſeiſed by Force of the Intail at the Time of the Feoffment. Rol. Abr. 634.

(e) So if he makes a Deed of Feoffment with a Letter of Attorney to *J. N.* to make Livery, and he enters and ouſts the Leſſee, *&c.* Moor 91. pl. 226. Dyer 363. pl. 22. (f) Tho' the Leſſee re-enters. Moor 281. pl. 6.

(C) Of Diſcontinuances by Husbands ſeiſed in Right of their Wives.

2 Inſt. 681.

ANY Alienation made by the Huſband of the Wife's Land, whether by Feoffment, or Fine, was a Diſcontinuance, and after his Death, ſhe was put to her *Cui in Vita* to reinſtate herſelf.

But now by the 32 *H.* 8. *cap.* 28. "No Fine, Feoffment, or other Act, "made, (*c*) ſuffered, or done by the Huſband (*d*) only of any Manors, "*&c.* being (*e*) the (*f*) Inheritance or Freehold of his Wife, during the "Coverture, ſhall make a Diſcontinuance thereof, or ſhall be prejudicial to "the (*g*) Wife or her (*h*) Heirs, or to ſuch as (*i*) ſhall have Right, Title, "or Intereſt to the ſame by the Death of ſuch Wife; but that the (*k*) Wife "or her Heirs, and (*l*) ſuch other to whom ſuch Right ſhall appertain after "her Death, may enter into ſuch Manors, *&c.* according to their Rights "and Titles therein; any Fine, Feoffment, or other Act of the Huſband "notwithſtanding; Fines levied by the Huſband and Wife (whereunto the "Wife is Party and Privy) only excepted.

(*c*) The Huſband cauſes a *Præcipe* to be brought againſt him and his Wife upon a feigned Title, and ſuffers a Recovery without any Voucher and Execution to be had againſt him and his Wife, this is an Act within the Statute, ſuffered by the Huſband. Co. Lit. 326. (*d*) Tho' a Feoffment be made by the Huſband and Wife, for this in Subſtance is the Act of the Huſband only. Co. Lit. 326. a. (*e*) Where during the Coverture Lands are given to the Huſband and Wife, and the Heirs of their two Bodies, this is the Inheritance of the Wife within the Act; ſo that if the Huſband makes a Feoffment, and dies, ſhe or her Iſſue may enter. 9 Co. 138. 2 Inſt. 681. Cro. Car. 477. Co. Lit. 326. 2 Inſt. 681. 8 Co. 72. Brown. 131.——But if the Huſband levies a Fine with Proclamations, the Iſſue is barred, tho' the Wife is helped by this Statute. Keilw. 205, 213. Dyer 351. pl. 24. And. 39. 8 Co. 72.——But if the Huſband is Tenant in Tail, Remainder to the Wife in Tail, and the Huſband makes a Feoffment in Fee, if the Huſband die without Iſſue the Wife may enter. Co. Lit. 326. a. 8 Co. 72. But there ſaid, if he ſuffers a Recovery, ſhe is barred. (*f*) This extends not to the Wife's Copyhold of Inheritance. Moor 596.——But tho' the Statute does not extend to it, yet the Huſband cannot at Common Law diſcontinue the Wife's Copyhold. 4 Co. 23. Cro. Jac. 105. Poph. 138. Moor 596. Rol. Abr. 632. (*g*) If after a Feoffment made by the Huſband they are divorced *cauſa præcontractus*, ſhe may enter within this Act, and is not driven to her *Cui ante divortium*, as at Common Law; tho' by the Statute the Entry is given to the Wife, and now upon the Matter ſhe was never his lawful Wife, for at the Time of the Alienation ſhe was his Wife *de facto*; and when the Huſband dies, ſhe is not his Wife at the Time of the Entry. Co. Lit. 326. a. 8 Co. 73. a. She may enter tho' her Huſband is living, but *vide* Moor 58. pl. 164. (*h*) But her Heirs by the Common Law could have no Remedy, nor by this Act can enter during the Life of the Huſband. Co. Lit. 326. 8 Co. 72, 73. (*i*) But if the Wife before Entry dies without Heirs, the Lord by Eſcheat ſhall not enter; for though an Entry is given by the Act, yet the Feoffee, *&c.* is in by Title as before. Hob. 243, 261. (*k*) But if the Huſband makes a Feoffment and dies, and the Wife before Entry levies a Fine, this ſo ſtrengthens and fortifies the Diſcontinuance, that ſhe or thoſe in Remainder can never enter; and tho' by the Statute it is enacted that the Feoffment of the Baron ſhall not be a Diſcontinuance, but the Wife may enter, yet it is a Diſcontinuance till Entry. 2 Roll. Rep. 311. Cro. Car. 320. and *vide* Rol. Abr. 632. (*l*) By theſe Words the Entry of him in Reverſion or Remainder is preſerved. Co. Lit. 326. Hob. 261.

* Page 92
Co. Lit. 326.
Dyer 72, 162, 191.
Plow. 373.
8 Co. 72.
2 Inſt. 681.
9 Co. 140.

Although the Words of this Act are very general, and ſeem to give the Wife and her Iſſue an Entry, to avoid any Fine levied by the Huſband of her Lands, yet if the Huſband levies a Fine with Proclamations, and five Years paſs after his Death, without any Entry or Claim by the Wife, her Entry is not only taken away, but her Right is for ever extinguiſhed, becauſe the Statute was intended to provide only againſt the Diſcontinuance, which was a Grievance particular to Feme Coverts, but not to invalidate Fines duly levied, according to 4 *H.* 7. *c.* 24. as to Femes Covert; becauſe they by that Statute have a Remedy in common with others, which is by Entry or Claim to avoid the Fine; whereas before the Statute of 32 *H.* 8. *c.* 28. it was not in their Power to prevent the Diſcontinuance; and therefore the Statute relieves them in that Particular; beſides, though the Words of the Act be general, that ſuch Fine ſhall not be prejudicial to the Wife or her Heirs, yet the following Words, *viz. But that ſhe may lawfully enter according to her Right and Title therein*, are explanatory, and allow her an Entry

only in Caſes where ſhe had a Right before the Statute, and it is plain that by 4 *H.* 7. *c.* 24. ſhe had no Right after the five Years were lapſed, from the Death of the Huſband.

If Huſband and Wife are Tenants in (*a*) ſpecial Tail, and the Huſband aliens in Fee, this is a Diſcontinuance, for tho' the Words of the Statute are, *Of any Lands being the Freehold and Inheritance of the Wife*; yet as this joint Eſtate may without any Impropriety be called the Inheritance of the Wife, and being therefore in equal Miſchief, ſhall be intended to be provided againſt. Co. Lit. 326. 8 Co. 71. b.

(*a*) If Lands are given to Baron and Feme, and the Heirs of the Body of the Baron, and the Baron makes a Feoffment in Fee, this is a Diſcontinuance; for the Baron is ſeiſed by Force of the Intail. Cro. Car. 320. Jon. 324. 3 Co. 5. Rol. Abr. 632, 633. 2 Rol. Rep. 311.

If a Huſband levies a Fine of the Wife's Lands to the King, ſhe may after the Death of her Huſband enter upon the King; for tho' the Statute does not expreſsly name the King, yet being made to prevent an Injury and Wrong, he ſhall be bound by it, the rather becauſe it is his moſt immediate Concern to relieve his Subjects from any Grievance or Wrong. 2 Inſt. 681.

(D) Of Diſcontinuances by Women of Lands of the Gift of their Husband, or his Anceſtor.

THE Learning hereof depends upon the Statute 11 *H.* 7. *c.* 20. which provides againſt Diſcontinuances and Diſheriſons by the Wife, to the Prejudice of the Heir of the Huſband, and ſeems to be well explained by the following Notes and Obſervations of Mr. *Danvers*. Dan. Abr. 579.

By 11 *H.* 7. *cap.* 20. "If any Woman having an (*b*) Eſtate in "Dower, or for Life, or (*c*) Tail jointly with her Huſband, or only to "herſelf, or to her Uſe in any Manors, (*d*) &c. Of the (*e*) Inheritance

(*b*) So if a Woman, having only Title of Dower, enters before ſhe is endowed, and levies a Fine. 2 Leon. 168. 3 Leon. 78. cited by *Rhodes* to have been adjudged. (*c*) But this extends not to Eſtates in Fee. Dyer 248. pl. 78. 4 Co. 3. Moor 716. pl. 1000. Bridg. 136. Cro. Eliz. 524. adjudged. For it may go to a collateral Heir. (*d*) Extends not to Copyholds. 2 Sid. 41, 73. adjudged. (*e*) If one ſeiſed in the Right of his Wife levies a Fine, and the Conuzee grants and renders the Land to the Huſband and Wife in ſpecial Tail, the Remainder to the Heirs of the Wife, and they have Iſſue, and the Huſband dies, and the Wife takes another Huſband, and they levy a Fine, this is directly within the Words, but out of the Meaning of the Act, becauſe the State of the Land moved from the Wife. Co. Lit 366. a. *Eaſton* and *Stud.* Plow. 459. adjudged. Keilw. 214. adjudged. N. Bendl. 230. pl. 266. and with this agrees Cro. Eliz. 524. Moor 715. pl. 1000. Nay Cro. Eliz. 2. it is ſaid to have been adjudged, if Baron and Feme levy a Fine of ſuch Land, and the Conuzee grants a Rent to them in Tail, it is out of the Act, for the Rent is in Lieu of the Land.——So if the Anceſtor of the Baron makes a Feoffment in Fee, upon Condition that the Feoffee ſhall give it to the Baron and Feme in Tail, &c. this is within the Meaning of the Act, though out of the Words, for they are in by the Feoffment, and not by the Anceſtor of the Baron. Moor 93. pl. 231. *Per* Plowden ſaid to have been ſo adjudged, *Linch* and *Spencer*, Cro. Eliz. 514. 2 And. 44. Moor 455. 3 Co. 50.———It is within the Act, though the Gift by the Huſband or his Anceſtors, by which the Feme takes, was made as well in Conſideration of Money paid by the Feme, or her Father, as of the Marriage. Dyer 146. a. b. Keilw. 208. Moor 93. pl. 231. Cro. Jac. 474.——Otherwiſe if the Lands had moved from the Anceſtor of the Feme, as if ſettled by the Father of the Feme in Conſideration of the Marriage, and of Money paid by the Baron for the Lands moving from her Father, it ſhall be intended that her Advancement was the principal Cauſe of the Gift, and not the Money. *Kynaſton* and *Loyd*, Cro Jac. 624. adjudged. Jon. 13. adjudged. Palm. 213, 218. adjudged, *Copland* and *Pyot*. Cro. Car. 244. adjudged, Jon. 254. adjudged, and *vide* Moor 93. pl. 231. 2 And. 45.———But where conveyed by a Stranger in Conſideration of the Wife's Fortune paid by her Father to the Vendor, and other Money paid by the Baron: This is the Purchaſe of the Huſband within the Act. Moor 250. pl. 398.——If *A.* in Conſideration of good Service done by *B.* conveys Lands to *B.* his Man, and *C.* his Couſin, and the Heirs of their Bodies, &c. This is not within the Act, not being made by the Baron or his Anceſtor, and being in Conſideration of Service done, it is not ſuch a Purchaſe as the Act intends. *Ward* and *Warthew*, Cro. Jac. 173. adjudged; and though *C.* was named Couſin by the Deed, it was ſaid that was not material,

" * tance or (*a*) Purchaſe of the Huſband, or (*b*) given to the Huſ-
" band and Wife in Tail, or for Life, by any Anceſtor of the Huſ-
" band, or other Perſon ſeiſed to the Uſe of the Huſband, or his Anceſ-
" tor, and being Sole, or with (*c*) other after taken Huſband (*d*) diſ-
" continue, (*e*) alien, releaſe, or confirm with (*f*) Warranty, or by Covin
" ſuffer (*g*) any Recovery againſt them; all ſuch Recoveries, Diſconti-
" nuances, &c. ſhall be (*h*) void, and (*i*) every (*k*) Perſon to whom the
" * Intereſt, &c. after Death of the Woman, in Manors, &c. ſhould be-
" long, may enter, &c. as if no Diſcontinuance, &c. had been; and if ſuch
" Huſband and Wife make ſuch Diſcontinuance, the (*l*) Perſon to whom
" the Manors, &c. ſhould belong after the Death of the Woman, may en-
" ter and hold, according to ſuch Title as he ſhould have had, if the Wo-
" man had been dead, and no Diſcontinuance, &c. as againſt the Huſband
" during his Life; provided the Woman after the Death of her Huſband
" may re-enter, &c. but if ſole when the Diſcontinuance, &c. ſhe ſhall be
" barred for ever, and the Perſon, to whom the Intereſt belongs, may en-
" ter, &c. *Provided* the Act ſhall not extend to any Recovery or Diſcon-
" tinuance, to be had (*m*) with the (*n*) Heir next inheritable, nor where he,
" that next after the Death of the Woman ſhould have an Eſtate of Inherit-
" ance, ſhall be aſſenting to the ſaid Recovery, where the Aſſent is of
" Record or inrolled. (E)

* Page 93 becauſe it did not appear to be any Part of the Conſideration; but however being found in Fact that ſhe was his

* Page 94 Couſin, and that a Marriage was intended; it was ſaid it ſhould be preſumed the Marriage was as well the Cauſe of the Gift as the Service.

Noy. 122. adjudged.

Yelv. 101. adjudged.

Moor 683. pl. 943. adjudged. (*a*) Baron and Feme being joint Copyholders in Fee, the Baron purchaſes the Freehold thereof to him and his Wife, and the Heirs of their Bodies, they have Iſſue, the Baron dies, and the Feme enters and ſuffers a Recovery, &c. this is a Forfeiture within the Act, for the Copyhold by the Acceptance of the new Eſtate, was extinct. Cro. Eliz. 24 agreed *per cur.* (*b*) If a Man deviſes Lands to his Wife in Tail, this is within the Words, but not within the Meaning of the Act. *Foſter* and *Pitfal*, Leon. 261. Cro. Eliz. 2. (*c*) A Man ſeiſed in Fee levied a Fine to the Uſe of himſelf for Life, and after to the Uſe of his Wife, and the Heirs Male of her Body, by him begotten, for her Jointure; and after he and his Wife levied a Fine, and ſuffered a Recovery, and the Huſband and Wife died; and it was held the Iſſue upon this Act might enter, for tho' it was not within the Words, yet it was held within the Remedy intended to prevent the Diſheriſon of Heirs. Co. Lit. 365. But in the Caſe of *Kirkman* and *Thompſon*, Cro. Jac. 474. this Point is adjudged *con* and that ſuch Alienation was neither within the Words nor Intention of the Act, which ſeems clearly to be Law. (*d*) *Vide Jones* and *Philpot*, Lev. 49. Sid. 63. (*e*) If ſuch Feme Tenant in Tail accepts a Fine *ſur Conuzance de droit*, and thereby renders the Land for 1000 Years, &c. this is an Alienation within the Act, elſe it would be to little Purpoſe. 3 Co. 51. ſaid to have been ſo reſolved. Moor 250. pl. 398. adjudged. 2 Leon. 168. adjudged. 3 Leon. 78 adjudged, & *vide* Cro. Eliz. 514. 2 And. 58.——Diverſity where ſuch Leaſe made by Fine, where by Deed only. Cro. Jac. 629. Bridg. 28. 1 Jon. 60, & *vide* 2 Rol. Rep. 490. Where it is ſaid by two Judges, that though ſuch Leaſe be made by Fine, yet it not being any Diſcontinuance, or prejudicial to the Iſſue, he cannot enter till after her Death. (*f*) This relates only to Releaſes and Confirmations, which are no Diſcontinuance without, ſo that a Leaſe by ſuch Feme Tenant in Tail made for three Lives without Warranty, if not purſuant to 32 *H.* 8. *c.* 28 is a Forfeiture within the Act. Sir *George Brown*'s Caſe, 3 Co. 50. b. Cro. Eliz. 514. (*g*) Extends to ſuch, where ſhe comes in only as Vouchee. Moor 716. pl. 1000. (*h*) Yet it continues as to the Parties, and all others, except him to whom the Intereſt, &c. by whoſe Entry it is to be avoided. 3 Co. 59. b. 60. Hob. 166. (*i*) Unleſs he hath diſabled himſelf by levying a Fine, ſuffering a Recovery, &c. *Ward* and *Walthoe*, Cro. Jac. 175. adjudged. Yelv. 101. adjudged. Noy 122. adjudged.——And where he hath concluded himſelf by ſuffering a Recovery, &c. his Iſſue whom he had Power to bar ſhall not enter. *Lincoln* College, 3 Co. 61. 2 And. 31——But if after ſuch Feme Tenant in Tail ſuffers a Recovery, the Iſſue in Tail releaſes to the Recoveror, yet the Iſſue of that Iſſue is not barred thereby. 3 Co. 59. cited from Doctor and Student, and 3 Co. 61. agreed to be Law.—But, if the Iſſue in ſpecial Tail, the Remainder being to him in Fee, levies a Fine, (with Proclamations tho' not found,) and after his Mother (being Tenant in Tail within this Act) leaſes for three Lives, (not warranted by 32 *H.* 8. *c.* 28.) living the Iſſue, the Conuzee may enter; for the Tail was extinct by the Fine, and the Conuzee was the Perſon to whom the Intereſt, &c. belonged after the Death of the Woman. Sir *Geo. Brown*'s Caſe, 3 Co. 51. adjudged. Cro. Eliz. 514. adjudged. Moor 455. adjudged. 2 And. 44. adjudged. And there ſaid that the Record of the Fine being in the ſame Court, they might inſpect it to ſee the Proclamations. Rol. Abr. 878. pl. 7. 3 Co. 61. But if the Reverſion in Fee had been in another, then the Conuzee taking nothing by the Fine, but by Eſtoppel, could not enter; nor could the Heir, becauſe concluded by the Fine. *Ward* and *Walthoe*, Cro. Jac. 175. adjudged. Yelv. 101. adjudged. Noy 122. adjudged. But in this laſt Book the Caſe is not fully ſtated, for there is no Notice taken of the laſt Fine levied by the Woman alone after the Death of her ſecond Huſband, which made the Forfeiture. (*k*) The Statute intended only to prevent ſuch Prejudice as might ariſe to the Heirs of the Baron, by whom advanced, and not where the immediate Intereſt upon the Death of the Wife was ſo limited, as to belong to a Stranger. *Foſter* and *Pitfal*. Cro. Eliz. 2. Leon. 261. (*l*) But if ſuch Woman be Tenant for Life, Remainder for Life, Remainder in Fee; and two Tenants for Life join in a Feoffment, the Entry of him in Remainder in Fee is lawful by this Act, *per* Leon. 262. But this ſeems to be ſuch a Forfeiture, for which the Remainder

(E) What Eſtate or Intereſt may be diſcontinued.

THERE can be no Diſcontinuance of Things which lie in Grant; and therefore if Tenant in Tail of a Rent, (*a*) Advowſon, Common, or Remainder, or Reverſion expectant on a Freehold, make a Grant by Deed or Fine, or diſſeiſe the Tenant of the Land out of which the Rent is iſſuing, whereof he is ſeiſed in Tail, and make a Feoffment with (*b*) Warranty; this is no Diſcontinuance of the Intail, for nothing paſſes but during the Life of Tenant in Tail, which is lawful, but every Diſcontinuance works a Wrong.

Lit. Sect. 627, 628. Co. Lit. 327. 3 Co. 85.

(*a*) Tenant in Tail of an Advowſon in Groſs grants the ſame in Fee, and after a collateral Anceſtor releaſes to the Grantee with Warranty, and dies, this is a good Bar for ever. 1 Leon. 111. ſaid by *Anderſon* to have been adjudged, but *vide* 2 And. 110. (*b*) But where the Iſſue by bringing a Formedon admits himſelf out of Poſſeſſion, and ſhall be barred by the Warrranty and Aſſets, *vide* Co. Lit 332. b.

A Copyhold Eſtate cannot be diſcontinued by Surrender, for the Tenant gives up no more than he had, and the Surrendree is in by the Lord's Admittance; and this is not (*c*) like a Feoffment at Common Law, which being ſo notorious a Way of conveying Eſtates, takes away the Entry for the Benefit of Strangers, who otherwiſe would be at a Loſs to know againſt whom to bring their *Præcipe*.

Rol. Abr. 632. Co. Coph. 141 4 Co. 23. a.

(*c*) For a Warranty is uſually annexed to it; and if the rightful Owner might enter, the Benefit of the Warranty would be loſt, but Warranty cannot be annexed to Copyhold Eſtates. Leon. 95, 352.

* But by Cuſtom a Copyhold Eſtate may be diſcontinued by Surrender, and by ſuch Surrender an Eſtate-Tail in Copyhold Lands for ever.

* Page 95 For this *vide* Cro. Eliz. 484, 717. Moor 358. 753. Leon. 95. Cro. Eliz. 90, 148. 4 Co. 25. Rol. Abr. 632. Brownl. 44, 79.

Alſo if there hath been a Cuſtom in a Manor, that Plaints ſhould be proſecuted there in the Nature of real Actions; if a Recovery be had upon ſuch Plaint againſt Tenant in Tail, it is a Diſcontinuance; for ſince the Cuſtom warrants the Recovery, it is an Incident to ſuch a Recovery by the Common Law, that it ſhould be a Diſcontinuance, which it ſeems is drawn from the Nature of the Thing, that a Judgment given in a Court of Judicature ought not to be avoided, but by Matter of as high Nature, *viz.* a Recovery by a Court of Juſtice, and not by the Entry of the Party that hath Right.

4 Co. 23. a. Cro. Eliz. 372. 380, 392.

If the Reverſion or Remainder be in the King, the Tenant in Tail cannot diſcontinue the Eſtate-tail.

Co Lit. 335. 2 And. 156. 2 Leon. 157. 3 Leon. 75. for this *vide* Heads of *Fines* and *Recoveries*.

But

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mainder Man in Fee might by the Common Law enter. Co. Lit. 251. b. (*m*) If the Baron, being ſeiſed to him and his Feme, and the Heirs of the Body of the Feme, dies, and in the Life of the Wife his Iſſue (then being Tenant of the Freehold, as pleaded, which muſt be intended by Diſſeiſin, no Surrender or Forfeiture being alledged) ſuffers a Recovery, (which binds not the Tail, he being in of another Eſtate) by Agreement that the Recoverors ſhould infeoff *J. S.* and that the Wife ſhould releaſe to him with Warranty, which ſhe does accordingly, and dies, and the Warranty deſcends, *&c.* this ſhall bind; for not being prejudicial, but intended to perfect the Aſſurance of the Heirs, it is not reſtrained by this Act; for the Woman, joining with the Heir by Fine or Recovery, might have barred the Tail; and it was never intended to prevent a Warranty being made to him that had the Land, by the Conveyance of the Heir himſelf. *Lincoln* College's Caſe, 60. a. b. adjudged. (*n*) But if ſuch Heir being a Daughter joins, and after a Son is born, he may enter. 3 Co. 61. b.

But if there had been Tenant in Tail, the Reverſion in the King, before 34 & 35 *H.* 8. *c.* 20. he might have (*a*) barred the Tail by a common Recovery, but that common Recovery neither barred nor diſcontinued the King's Reverſion.

Co. Lit. 335.

(*a*) And where ſuch Tail may now be barred by Fine, without diſcontinuing the King's Remainder, *vide* Moor 115. pl. 258. 2 Leon. 57. 4 Leon. 40. And. 64. Keilw. 213.

Co. Lit. 327. If *A.* being Tenant in Tail makes a Gift in Tail to *B.* and *B.* makes a Feoffment in Fee, and dies without Iſſue, and *A.* hath Iſſue and dies, the Iſſue of *A.* may enter; for though the Feoffment of *B.* did diſcontinue the Reverſion of the Fee-ſimple, which *A.* had gained upon the Eſtate-Tail made to *B.* yet it could not diſcontinue the Right of Intail which *A.* had, which was diſcontinued before; and therefore when *B.* dies without Iſſue, the Diſcontinuance of the Eſtate-Tail of *B.* which paſſed by his Livery ceaſes, and conſequently the Entry of the Iſſue of *A.* is lawful.

Carth. 109. *Swift* and *Heath*, adjudged. If Huſband and Wife are ſeiſed of Lands, Remainder to the Heirs of the Body of the Huſband, with Remainder over, they make a Leaſe for Years, not warranted by the Statute, the Huſband dies, leaving Iſſue *J. S.* who at the Age of 16, with the Conſent of the Wife and ſecond Huſband, with his own Hands makes a Feoffment to the Leſſee; this is no Diſcontinuance of the Remainder over, for *J. S.* had (*b*) only a Reverſion expectant upon an Eſtate for Life, and ſo (*c*) no Freehold in him at the Time of making the Feoffment.

(*b*) And it is a Maxim in Law, that he who hath no Freehold in the Land cannot by any Means diſcontinue the Eſtates therein. Carth. 110. *per Curiam*, *vide ſupra* Letter (B) 88, &c.

(*c*) For though the Tenant for Life conſented, yet ſuch a naked Aſſent will not amount to a Surrender. Carth. 140. *per Curiam.*

* Page 96 * (F) By what Act or Conveyance a Diſcontinuance may be made, and the Effect thereof.

Co. Lit. 325. a. A Man may diſcontinue by five Sorts of Conveyances, *viz.* (*d*) Fine, Recovery, (*e*) Feoffment, Releaſe, or Confirmation with Warranty.

(*d*) But if he dies before Execution, it is no Diſcontinuance. Rol. Abr. 632. Co. Lit. 333. b. (*e*) But a Feoffment with Livery in Law works no Diſcontinuance. Rol. Abr. 632.

Co. Lit. 328. b. A Feoffment made by Tenant in Tail is a Diſcontinuance, with or without Warranty; but a Releaſe or Confirmation is not, for a Man can paſs no more thereby than he may lawfully paſs; but a Warranty added to a Releaſe, or Confirmation to a Diſſeiſor, works a Diſcontinuance, if it deſcend on him that hath the Right.

Co. Lit. 328. b. But if one having a Son marry a ſecond Wife, and Land be given to the Huſband in ſpecial Tail, and he have Iſſue by his ſecond Wife, and be diſſeiſed, and releaſe with Warranty, and die; or if Tenant in Tail of *Borough-Engliſh* Land have Iſſue two Sons, and be diſſeiſed, and releaſe with Warranty to the Diſſeiſor, and die; yet is not the Intail diſcontinued in either Caſe; becauſe the Warranty always deſcends to the Heir at Law.

Perk. Sect. 294. 9 Eq. 22. If Tenant in Tail exchanges with another, (*f*) this is not a Diſcontinuance.

Co. Lit. 332. b. S. P. Rol. Abr. 632. S. P. (*f*) Becauſe no Livery of Seiſin is requiſite thereupon. Co. Lit. 332. b. Co. 44. b.———So of Partition between Parceners. Co. Lit. 173. a.

If Tenant in Tail bargains and ſells his Lands in Fee, this is no Diſcontinuance, for only a Freehold which determines within the Compaſs of a Life, paſſes. 2 Inſt. 644. Moor 42.

So if Tenant in Tail by Indenture inrolled bargains and ſells to *J. S.* and his Heirs, and after levies a Fine with Proclamations to the Bargainee and his Heirs, and dies without Iſſue; this is no Diſcontinuance of the Remainder, becauſe the Remainder is not touched or *(d)* diſplaced thereby; for no Freehold paſſes by the Fine; but the Fine only corroborates the Eſtate of the Bargainee by the Statute.* 9 Co. 96. b. *Seymour's* Caſe. Bulſt. 162. S. C.

(*d*) For every Diſcontinuance it is neceſſary there ſhould be a Deveſting or Diſplacing of the Eſtate, and turning the ſame to a Right; for if it be not turned to a Right, they that have the Eſtate cannot be driven to an Action. Co. Lit. 327. b.—— But there may be a Diſcontinuance, which turns the Eſtate to a Right, and yet does not take away the Right of Entry; and a Warranty may bar where the Reverſion is only diſplaced, and turned to a Right, though the Right of Entry is not taken away. *Vide* Salk. 245. *per Powel* J.

* With reſpect to *Seymour's* Caſe, ſee 2 *Burr.* 704 to 715, where it is obſerved that in *Seymour's* Caſe the Bargainee was found to have *entered by Force* of the Indenture of Bargain and Sale, and to have been *ſeiſed according* to it, before *Henry Cheney* levied the Fine to him: And the Judges were *obliged* to take the Fact to be as it was found by the Verdict; they were not at Liberty to look upon it as one and the ſame Conveyance or Aſſurance: They were bound down by the *expreſs and particular Finding*. 714. And *ibidem*, folio 713. Lord *Manſfield* ſays, as to *Seymour's* Caſe, "The Bargain and Sale in that Caſe was totally *unconnected* with the Fine: And *Higham* is expreſsly found to have *entered*, and been *ſeiſed, by Force of the Indenture* of Bargain and Sale."

In the Caſe of *Doe ex Dm. Odiarne* v. *Whitehead*, 2 *Burr.* 704, *&c.* it is clearly ſettled, "That a "*Fine with Proclamations* levied by Tenant in Tail in Poſſeſſion, will *diſcontinue the Reverſion* in Fee, as "well as *deveſt the Remainder* in Tail, ſo as to put the Remainder-Man to his Formedon.

Some Diſcontinuances are for Life only; as when Tenant in Tail makes a Leaſe for the Leſſee's (*e*) Life; ſome are during the Limitation of an Eſtate-Tail; as when Tenant in Tail makes a Gift in Tail; alſo if he makes a Leaſe for Years, or for his own Life, Remainder in Fee, with Livery; this is a Diſcontinuance in Fee, becauſe the Eſtate in Fee paſſes by the Livery. Co. Lit 335. b. 336. a. Salk. 244. S. P.

(*e*) If a Feme Tenant in Tail within the Statute 11 *H.* 7. *c.* 20. (*ante* 92.) accepts a Fine *come ceo, &c.* and grants and renders it for 500 or 1000 Years, rendering the antient Rent, this is within the Act; for though ſtrictly a Term for Years can work no Diſcontinuance, yet they are in equal Miſchief, and the Statute would be uſeleſs if ſuch Leaſes were not within the Remedy thereof, Moor 25. *Piggot* and *Palmer*. 3 Co. 51. b. Cro. Car. 689. 2 Leon. 168. *Barker* and *Taylor*. 3 Leon. 78. Dyer 148.

* And none can make a Diſcontinuance larger than the Alienation of the Tenant in Tail, who made it; therefore if *A.* Tenant in Tail make a Gift in Tail to *B.* and *B.* infeoff *C.* and die without Iſſue, *A.*'s Iſſue may enter. * Page 97 Co. Lit. 327.

If the Eſtate that cauſed the Diſcontinuance is (*a*) defeated, the Diſtinuance is (*b*) defeated alſo. Co. Lit. 336, 337.

(*a*) As by Entry for a Condition broken, or otherwiſe. 8 Co. 44. a. (*b*) But the Reverſion might be reveſted, and yet the Diſcontinuance remain; as if a Feme Covert had been Tenant for Life, and the Huſband had made a Feoffment in Fee, and the Leſſor had entered for the Forfeiture, the Reverſion was reveſted, and yet the Diſcontinuance remained at the common Law. Co. Lit. 335. a.

Diſſeiſin.

(A) What Acts amount to a Diſſeiſin. 97.
(B) What Perſons are capable of committing ſuch Diſſeiſins. 104.

(A) What Acts amount to a Diſſeiſin.

Lit. Sect. 279. Co. Lit. 181. 277. and *Note*, that by a Diſſeiſin nothing more is acquired againſt the Diſſeiſee but a bare Poſſeſſion, but againſt all others a Fee-Simple.

A *Diſſeiſin* is where a Man enters into any Lands or Tenements, where his Entry is not congeable, and *ouſts* him who hath the Freehold; ſo that it differs from an *Abatement*, which is the Entrance of a Stranger into Lands, of which an Anceſtor died ſeiſed before the Heir has entered; ſo that there is not properly an actual Ouſter committed of the Perſon that was ſeiſed of the Freehold, as there is in caſe of a Diſſeiſin; but the Entry of the Perſon who has the Title to the Freehold is prevented; in like Manner a Diſſeiſin differs from an *Intruſion*, which is when an Anceſtor dies ſeiſed of any Eſtate of Inheritance expectant on an Eſtate for Life, and then Tenant for Life dies; and between the Death of the Tenant and Entry of the Heir a Stranger interpoſes and intrudes, and ſo gets Poſſeſſion of the Freehold; ſo that it is rather a Prevention of the Heir's Entry, than an actual Ouſter of him of his Freehold.

Rol. Abr. 658.

If Huſband and Wife purchaſe Lands in Fee, and then the Huſband is attainted of Felony, and the King ſeiſes the Land, and afterwards the Lord of whom it is held hath it, upon his Suggeſtion, delivered to him out of the Hands of the King, as his proper Eſcheat; this is a Diſſeiſin of the Wife who was Jointenant with the Huſband, for the Lord got Poſſeſſion of the Freehold by his Miſrepreſentation of the Nature of the Eſtate to the King, which being a manifeſt Act of Injuſtice and Falſhood, the Poſſeſſion acquired by it muſt be looked upon as an Acquiſition of the ſame Nature with a Poſſeſſion gained by open and avowed Violence, and ſo a Diſſeiſin.

* Page 98 Rol. Abr. 659.

* A Man has a Houſe, and locks it, and departs, and another comes to the Houſe, and takes the Ring of the Houſe in hisHand, and ſays, that he claims the Houſe to himſelf in Fee, without making any Entry into it, this is a Diſſeiſin of the Houſe; for the Claim he made upon taking the Ring into his Hand, ſhews his Intention in doing it to be a plain Seiſin of the intire Freehold, and conſequently a Diſſeiſin of the true Proprietor; and his Non-entry into the Houſe, upon his ſeiſing of it, will not qualify the Intention of what he has done, ſince his Seiſin of Part, in the Name of the Whole, gives him whatſoever an Entry could have done, and therefore ſuch an Entry was not neceſſary.

Diſſeiſin.

A Man has a Mill, and *A.* turns the Water that uſed to ſerve the Mill, ſo that it cannot grind; this is a Diſſeiſin of the Mill, for which an Aſſiſe lies againſt *A.* for to deprive a Man of the Means he has of obtaining the Profits of his Freehold is in Effect to diſſeiſe him of his Freehold. * Bro. Diſſeiſin 25.

* The uſual Method now is to ſue by ſpecial Action on the Caſe for Damages.—If the Diverſion is continued, a Jury on a ſecond Action would give ſuch Damages as would render it highly the Intereſt of the Defendant to turn the Water back into its ancient Channel, as a Series of Actions might be brought, for ſubſequent Continuances of the Diverſion: but ſhould the Defendant be obſtinate and perſiſt, an Aſſize may be neceſſary, or the Plaintiff might lawfully enter, and turn the Current into its ancient Courſe.

If *A.* cuts Trees in his Soil, and *B.* who has Common there, ſays that the Soil is his, and commands him not to cut there, whereupon *A.* departs out of the Land, this is no Diſſeiſin in *B.* for he who has no Right to a Freehold cannot be ſeiſed of it by bare Words only, which are fleeting and tranſitory, and do not amount to ſuch an Act of Notoriety and Solemnity, as is required in gaining Poſſeſſion of a Freehold, whereof Strangers are to take Notice. Rol.Abr.659. Bro. Diſſeiſin 42.

If a Man, who has Right of Entry into Lands, in coming thither is diſturbed and hindred from entering, this is a Diſſeiſin, ſuch Hindrance of Entry being equivalent to an actual Ouſter of the Freehold. Rol.Abr.659.

Where a Man enters into my Houſe by my Sufferance without making any Claim, this is no Diſſeiſin, being rather an Act of Friendſhip and Hoſpitality than of Violence and Intruſion. Rol.Abr.659.

A Man grants all his Lands in *D.* to *A.* beſides the Chamber he lies ſick in; and after Livery made purſuant to the Grant, by the Sufferance of *A.* the Grantor removes into the Hall without claiming any Thing to his own Uſe, and dies; this coming into the Hall is no Diſſeiſin, being by the Permiſſion of the Grantee, and ſo not unlawful. Bro. Title Diſſeiſin 28.

If the King be ſeiſed in Fee of the Manor of *B.* and a Stranger erects a Shop in a vacant Plat of it, and takes the Profit of it without paying any Rent to the King, and after the King grants over the Manor in Fee, and the Stranger continues in the Shop, and occupies it as before, this is no Diſſeiſin; for the firſt Entry of the Stranger was no Diſſeiſin, but an Intruſion on the King's Poſſeſſion; for that the King's Title appearing of Record, the Entry in *Pais*, which is not an Act of equal Notoriety, will not deveſt it out of him; if then the King is not diſſeiſed, his Conveyance of the Freehold is good, and the Grantee is ſeiſed by Virtue of it, and conſequently cannot be ſaid to be diſſeiſed by the Stranger who has made no Entry upon him after the King's Conveyance, but only continued the old Intereſt which he had before the Grant, and ſo remains an Intruder ſtill, and liable to an Action of Treſpaſs or Ejectment for it. Rol.Abr.659. Hob. 322. Bro. Diſſeiſin. 4.

So if a Man enters into certain Lands, Parcel of a Manor which is in Ward to the King, by Reaſon of the Nonage of *J. S.* and takes the Profits as Owner thereof, and *J. S.* after ſues Livery, and the Intruder ſtill continues in Poſſeſſion, and takes the Profits as formerly, this Continuance after the Livery is no Diſſeiſin, but only an Intruſion to be remedied by Treſpaſs or Ejectment; and the Manor being in the King only as Guardian makes no Difference; becauſe, till it is relieved out of his Hands, he is in actual Poſſeſſion of it as much as if it were his own. Bro. Title Diſſeiſin 6. Rol.Abr.659.

Baron and Feme ſeiſed in Tail, the Baron goes out of the Country, and in his Abſence the Feme infeoffs *A.* in Fee, [who enters,] this is a Diſſeiſin of the Huſband by *A.* becauſe the Feoffment by the Feme Covert was void, and ſo his Entry under it tortious. Bro. Title Diſſeiſin 24.

* If a Diſſeiſor makes a Leaſe for Years, or at Will, and the Diſſeiſee enters upon him, and then the Leſſee re-enters, claiming by Virtue of his Leaſe, though that was only a Term for Years, yet he is a Diſſeiſor, becauſe he enters upon the Proprietor of the Soil, and ouſts him of his Poſſeſſion, and that by Virtue of a former Diſſeiſin, ſo that the Poſſeſſion of the Freehold * Page 99 Rol Abr.662.

hold cannot be ſuppoſed to be left in the Diſſeiſee; and therefore ſuch an Entry muſt be equivalent to an avowed Diſſeiſin.

Rol. Abr. 662. Co. Lit. 271. a. Dyer 134. pl. 11. Bro. Title Diſſeiſin 7. 1 Rol. Abr. 662.

If a Man enters into my Land, claiming a Leaſe for Years, or enters as Tenant by Statute Merchant, when he has no Right, he is a Diſſeiſor, the Entry being unlawful, and the Pretence of Title unjuſt.

So if a Guardian in Chivalry aſſigns Dower to a Woman, as Wife of the deceaſed Tenant, who in Fact is not his Wife, and ſhe enters thereupon, ſhe is a Diſſeiſoreſs, for her falſe Title being an Act of Fraud and Injuſtice, and the Poſſeſſion acquired by it tortious, and the Pretence of Title, when it appears that ſhe has none, will not avail her, and Q. whether the Guardian in this Caſe is not a Diſſeiſor likewiſe?

Rol. Abr. 662.

A Man makes a Leaſe for Years to another and his Heirs, and the Leſſee dies, and the Heir claiming the Term enters, tho' the Term being a Chattel muſt go to the Executors, and not to the Heir; yet the Heir is no Diſſeiſor, becauſe he claimed only a Term and no Freehold, and ſuch a Term too as was in Being, and actually limited to him; and therefore the Heir in this Caſe, that is named in the Words of Limitation, ſhall be only preſumed to enter on Behalf of the Executor, to continue the Term that was in Being, and not to commit a Diſſeiſin on the Freehold.

Rol. Abr. 659. *Prenſon* and *Sone.*

If there be Tenant by Sufferance, and a Stranger, who has no Right to the Land, makes a Leaſe thereof for Years by Indenture to the Tenant, without making any Entry upon ſuch Tenant, previous to the Demiſe, and the Tenant thereupon pays the Rent reſerved on this Leaſe to the Stranger, this is no Diſſeiſin of the rightful Proprietor, for the Tenant at Sufferance was no Diſſeiſor before the Demiſe; and after the Demiſe, or by Virtue of it, he can be no Diſſeiſor, becauſe he ſtill continued his old Poſſeſſion, without committing any actual Ouſter of him who had the Freehold; for the Acceptance of the Deed of Demiſe, and Payment of Rent thereupon, are not Acts of ſufficient Solemnity and Notoriety, ſince they may be tranſacted in Private, to change the Poſſeſſion of a Freehold.

Co Lit. 57. b. 271. a.

If a Guardian after the full Age of the Heir continues in Poſſeſſion, he is no Diſſeiſor, but an Abator, and an Aſſiſe of Mortdanceſtor lies againſt him by the Heir, for he does not actually ouſt the Heir of his Freehold, which is required in a Diſſeiſin, but holds him out by an *intermediate Entry* between him and his Anceſtor, which makes the Diſtinction between an Abatement and Diſſeiſin.

Rol. Abr. 661. Cro. Car. 221. *Blunden* and *Baugh.*

If a Man enters as Guardian into the Lands of an Infant, who has no Title to be Guardian, 'tis at the Election of the Infant to make him a Diſſeiſor, on Account of his wrongful Entry upon an actual Ouſter of ſuch Infant, or elſe to diſſemble the Wrong, and call him to an Account as Guardian.

Bro. Title Diſſeiſin 34, 71.

An abſolute Feoffment is made by Deed, and a Letter of Attorney therein to deliver Seiſin; accordingly the Attorney makes Livery upon Condition, he is a Diſſeiſor of the Feoffor, becauſe not purſuing his Commiſſion 'tis all one as if he had none at all, and then his Livery is tortious, and amounts to a Diſſeiſin.

Jon. 315. Cro. Car 303, 304. Bro. Title Diſſeiſin 68. Dalſ. 46.

A. ſeiſed of Lands in Fee permits his Son to enter into them by his Conſent, and to occupy as Tenant at Will; the Son after by Indenture leaſes them for 21 Years, rendering Rent; this was held no Diſſeiſin, but at the Election of the Father, who may if he pleaſes call it ſuch, becauſe the Leaſe for Years was more than he could juſtify; but a Diſſeiſin being an actual Ouſter of another's Freehold, the Poſſeſſion of the

* Page 100

* Son, being in Poſſeſſion as Tenant at Will, gives Room to the Father to conſtrue his Demiſe no Diſſeiſin, if he thinks fit; and therefore the Son in this Caſe ſhall be preſumed to act in Behalf of the Father, and to demiſe the Land as Attorney to him, eſpecially if the Father afterwards demand and receive the Rent, for the Rule is, *Ratihabitio retrotrahitur et mandate æquiparatur*; however the firſt Leſſor, before he hath received any Rent, may take

take the Demiſe to be a Diſſeiſin at his Election; for when the Tenant at Will takes upon him to make a greater Eſtate than he has himſelf, this may be conſtrued a Diſſeiſin, becauſe it is an Uſurpation upon the Right of the Leſſor, and in Effect a Seizure of his Freehold; and the great Reaſon why the Leſſor is allowed to make the other Conſtruction, is to avoid the Inconveniences which otherwiſe would follow; for if a Leſſor was obliged to look upon Leaſes for Years of his Tenant at Will to be Diſſeiſins; then if a Tenant at Will ſhould make a Leaſe for a ſmall Time, and the Leſſor not knowing thereof ſhould levy a Fine of ſuch Lands for his Wife's Jointure, or other Uſes, the Leſſee of Tenant at Will would be neceſſitated to become a Wrong-doer, perhaps contrary to his Intent, and the Diſſeiſee would be deprived by his Fine of all Remedy for recovering his Right, as well as the Perſon to whom he levied it; for he himſelf could not ſet up a Title to ſuch Lands, becauſe he had transferred it to another in a Court of Record, and the other could not claim, becauſe a naked Right cannot be transferred.

In this Caſe, if the Leſſor takes ſuch a Diſpoſition by his Tenant at Will to be a Diſſeiſin, then both the Tenant at Will and his Leſſee are Diſſeiſors, ſince they both concur to the Act that is the Diſſeiſin; but in Reſpect of all Strangers the Tenant at Will only is to be eſteemed Tenant of the Freehold, and the Perſon who as ſuch is Diſſeiſor; for as for the Leſſee of Tenant at Will, he in Reſpect of all Strangers, and likewiſe of Tenant at Will, has a fair and legal Intereſt derived out of the Inheritance of his Leſſor, and ſo cannot be Tenant of the Freehold jointly with his Leſſor, but muſt claim under him. Cro El'z. 830. *Shaw* and *Barber* cont. Jon. 317. Cro Car. 222.

If a Leſſee for Years, or at Will, makes a Leaſe for Life, or a Gift in Tail, that creates a good Leaſe, or a good Gift in Tail among themſelves and all others, beſides the firſt Leſſor, and as to him they are both Diſſeiſors, for they both clearly concurred in ouſting him of his Freehold, one by giving, and the other by receiving the Livery, which paſſed the Freehold. Jon. 317. Cro. Car. 222. Bro. Title Diſſeiſin 3, 64, 66.

Tenant at Will, or for Years, makes a Feoffment in Fee, and dies; his Wife brings Dower, the Feoffee cannot plead that her Huſband was never ſeiſed; for ſince the Feoffee received his Eſtate from him, he is eſtopped to ſay that the Huſband was never ſeiſed; beſides in Reſpect of the Feoffee the Feoffor had an Eſtate, tho' in Regard to the Diſſeiſee he is to be conſidered as a Wrong-doer. Jon. 317. *Mat. Taylor's* Caſe.

If a Man enters into the Land of an Infant by his Aſſent, the Infant may proceed againſt him at full Age as a Diſſeiſor; for the Contract made between them during the Nonage of the Infant may be conſidered by the Infant as void, and conſequently the Entry by Virtue of it may be eſteemed illegal, or the Infant, if he thinks it more for his Advantage, may at full Age ratify the Contract between them, and ſo allow him as his Tenant. Rol. Abr. 661. Cro. Car. 223. Bro. Title Diſſeiſin 30.

If *A.* be ſeiſed of Lands in Fee, and a Stranger enters upon him by Virtue of a Leaſe for Years, which is void, and pays Rent to him, *A.* can never proceed againſt him as a Diſſeiſor, for his Acceptance of Rent at his Hands is a full and unconteſtable Allowance of the Leaſe he claims, and conſequently the Entry by Virtue of it purged and made rightful. Dyer 173 *in Margine.* Rol. Abr. 661. *Molineux's* Caſe. Dyer 62. pl. 33. cont.' Palm. 201. Jon. 316. Cro. Car. 222. Rol. Abr 661.

A. bargains and ſells Lands by Indenture inrolled to *B.* upon Condition that on the Payment of 300*l.* at the End of three Years it ſhall be void, and that in the mean Time the Bargainee ſhould not meddle with the Profits of the Land; the Bargainor occupies, and makes a Leaſe for five Years, and at the Day does not pay the 300*l.* the Bargainee does not enter, but (the Bargainor occupying it) deviſes the Land; and it was adjudged a good Deviſe, for the Bargainor in this Caſe was Tenant at Will; and therefore his Leaſe does not put the Bargainee under the Neceſſity of being a Diſſeiſee. * Page 101

Rol.Abr.659. If a Guardian by Nurture makes a Leaſe by Indenture to one who is already in under the Title of the Infant, rendring Rent to the Guardian, which is paid accordingly; this is no Diſſeiſin, for there is no actual Ouſter conſequent on ſuch Demiſe; and the Rent paid to the Guardian muſt be accounted for to the Infant.

Lit. Sect. 278. If two or more diſſeiſe another of any Lands to their own Uſe, they are all Jointenants, and all Diſſeiſors; but if they diſſeiſe another to the Uſe of one of them only, he to whoſe Uſe the Diſſeiſin is made is ſole Tenant, and the others have nothing in the Tenancy, but are called Coadjutors to the Diſſeiſin.

Co Lit. 180. Rol Abr.663. Bro. Tit. Diſſeiſin, 12, 40, 45. There are others who are called Counſellors and Commanders in a Diſſeiſin, *viz.* when any Perſon counſels or commands another to diſſeiſe a third Perſon; here we are to take Notice, that though the Perſons that concur in a Diſſeiſin have theſe ſeveral Names given them from the Nature of that Part of the Diſſeiſin that they commit, yet Co-adjutors, Counſellors and Commanders, are Diſſeiſors in Reſpect of the Perſon diſſeiſed, as well as the Perſon to whoſe Uſe the Diſſeiſin is made, and all equally liable to the Aſſiſe of the Diſſeiſee; nay, though the Diſſeiſor, who is Tenant of the Land, dies, yet the Aſſiſe lies againſt the Co-adjutors, Counſellors, *&c.* and Tenant of the Land, although he be no Diſſeiſor; and this is a moſt equitable Proceeding; for ſince they all concur in committing the Injury, it is but reaſonable they ſhould all anſwer for it; and though the Perſon, that ſucceeds the Diſſeiſor that was Tenant in the Tenancy, had no Hand in the Diſſeiſin, yet, claiming under it, he muſt be liable to the Remedy the Law gives the Diſſeiſſee for recovering his Right.

Bro. Tit. Diſſeiſin 37. A Man makes a Leaſe for Life, rendring Rent, and goes into foreign Parts, Tenant for Life dies, and *A.* counſels *B.* who is not Heir to the Leſſor, to enter, who does it accordingly, and enfeoffs *A.* the Counſellor; the Leſſor returns, and is hindred to enter by *A.* whereupon he brings his Aſſiſe againſt *A.* without naming *B.* and well; for *A.* by his Counſel is a Diſſeiſor, and being Tenant of the Land, and the Perſon who diſturbed the Leſſor of his Entry, the Leſſor who was abſent when the Diſſeiſin was committed, and ſo unacquainted with the Manner of it, is not obliged to bring his Remedy againſt any other but the Perſon who is actually in Poſſeſſion, and defends that Poſſeſſion with Force and Violence.

Co.Lit. 180.b. Bro. Tit. Diſſeiſin 59. * See *infra* 102. *A.* diſſeiſes one to the Uſe of *B.* who knows not of it, and *B.* afterwards aſſents to it; in this Caſe, till the Agreement, *A.* was Tenant of the Land, and after Agreement *B.* is Tenant of the Land, but both of them are Diſſeiſors.

Co. Lit. 180. 181. A Man diſſeiſes Tenant for Life, to the Uſe of him in Reverſion; and after he in the Reverſion agrees to the Diſſeiſin; by the better Opinion, he in the Reverſion is a Diſſeiſor in Fee; for by the Diſſeiſin made by the Stranger, the Reverſion was deveſted, which cannot be reveſted by the Agreement of him in Reverſion, for his Agreement to the Diſſeiſin makes him a Party to it; and therefore if he gets any Thing by ſuch Agreement, he muſt get it as a Diſſeiſor; and ſo in this he is not ſeiſed of his old Eſtate, but of an Eſtate by Diſſeiſin.

Co. Lit. 180. The Demandant and others, in a *Præcipe*, diſſeiſed the Tenant to the Uſe of others, and the Writ did not thereupon abate; for though the Demandant was a Diſſeiſor, yet he gained no Tenancy in the Land, being * Page 102 * only a Co-adjutor, and ſo his Remedy to gain the Freehold ſtill continues; for the Deſign of ſuch Remedy being to recover the Freehold, till that be obtained there is no Reaſon to abate it; and that is not obtained by the Diſſeiſin, for he gains no Freehold by it, ſo that the Writ muſt ſtill continue.

If

If a Man commands *J. S.* to enter into certain Lands in his Name, provided he has a Right to them; if *J. S.* enters accordingly, yet if the Commander has no Right to the Lands, he is not the Diſſeiſor, but *J. S.* only, for *J. S.* was not abſolutely commanded to enter, but only conditionally, if the Commander had Right; ſo that it was incumbent on *J. S.* to inquire into the Commander's Title before he entred; and the Commander having no Title, the Entry of *J. S.* was his own Act, and not the Execution of the Command. Rol. Abr. 663. Bro. Tit. Diſſeiſin 57.

For the ſame Reaſon, if a Man ſays to *J. S.* that his Anceſtor died ſeiſed of certain Lands, and thereupon commands him to enter into thoſe Lands in his Name, if his Anceſtor died ſeiſed in Fee, otherwiſe not; and thereupon *J. S.* enters, and yet the Anceſtor did not die ſeiſed in Fee; *J.* is the ſole Diſſeiſor, and the Commander has no Share in it. Rol. Abr. 663.

If a Man ſays to me, that he will diſſeiſe *J. S.* to my Uſe, and I tell him that I am content; this does not amount to a Command, but is only a Sufferance of what is to be done, and ſo does not make me a Diſſeiſor, without an actual Command; but he that ouſts *J. S.* is only the Diſſeiſor.* Bro. Tit. Diſſeiſin 15. * See *ante* 101.

A Diſſeiſor makes a Leaſe for Years, and the Termor enters, the Diſſeiſor after leaves the Kingdom, and at his Departure commands his Termor, that if the Diſſeiſee entered upon him, not to ſuffer him to continue in Poſſeſſion, but to maintain the Poſſeſſion againſt him as Termor of the Diſſeiſor; the Diſſeiſee enters on the Termor in the Abſence of the Diſſeiſor, and the Termor re-enters, ouſts him, and pays his Rent after to the Uſe of the Diſſeiſor, being abſent; it ſeems the Leſſor is Party to this ſecond Diſſeiſin, though he did not expreſly agree to it after it was done, for the precedent Command and Inſtructions ſufficiently ſhew his Intent and Concurrence to it. Dyer 141. pl. 47.

A Man recovers ſeveral Houſes in an Aſſize, and after the Tenant reverſes the Judgment in a Writ of Error, and a Writ iſſues thereupon to the Sheriff to put him in Poſſeſſion of thoſe Houſes; in this Caſe, though the Tertenants are Strangers to the Recovery, and therefore ought not to be ouſted without a *Sci. fa.* yet if the Sheriff executes the Writ, and ſo puts them out of Poſſeſſion by Virtue of it, he is no Diſſeiſor; for he acts under the Authority of the Court, which he is ſworn to obey, under the Penalty of being fined, if he does not. Rol. Abr. 663. *Floyd* and *Bethell.*

The ſame Law in all Caſes where Execution is of a Judgment wherein the Demand is made of a Thing certain; but if an Execution is to be executed without mentioning any Thing in particular, there the Sheriff, at his Peril, ought to make Execution of the Thing in Demand, otherwiſe he will be a Diſſeiſor; for he is obliged to take Notice of the Thing in Demand, and has no Authority from the Court to make Execution of any Thing elſe. Rol. Abr. 664.

Leaſe for Life, Remainder for Life, Remainder in Fee; the Remainder-man for Life diſſeiſes the Tenant for Life, and then Tenant for Life dies, the Diſſeiſin is purged; for then the Remainder-man for Life is ſeiſed of his own rightful Eſtate for Life, which was to take Place upon the Death of Tenant for Life, and the Fee reveſts in the Remainder-man in Fee. Co. Lit. 276. Palm. 202. Bro. Tit. Diſſeiſin 74.

Two Co-heirs, one an Infant, and the other of full Age, ſhe of full Age enters upon the Feoffee of their Father, claiming the Land to her and her Siſter; her Entry being unlawful, the Land veſts intirely in her of full Age, and nothing in the Infant; and ſo ſhe of full Age muſt be * the Diſſeiſor, for an Infant can never be made a Wrong-doer by the Act of another, or injure himſelf by any Contract entered into during his Minority. Bro. Tit. Diſſeiſin 43, 76. * Page 103

If my Tenant at Will enters into another's Land contiguous to his own, claiming it to my Uſe, and feeds his Cattle there, and fells the Trees, upon which the Tenant of the Freehold is obliged to quit his Poſſeſſion, Bro. Tit. Diſſeiſin 59.

ſeſſion, and ſo brings his Aſſiſe; and it is found that I never commanded my Tenant to commit this Diſſeiſin, nor ever ſhared in any of the Profits of it, I ſhall be acquitted of the Diſſeiſin, ſince it would be apparent Injuſtice to charge me with the Guilt of an Act I never concurred in.

Bro. Title Diſſeiſin 77. *A.* demiſes the Land of *B.* to *C.* for Years, rendring Rent, *C.* enters and pays the Rent to *A.* it ſeems *A.* by this Tranſaction is a Diſſeiſor, for his Demiſe to *C.* is tantamount to a Command to enter into the Lands of *B.* and he that commands the Diſſeiſin is the Diſſeiſor.

Bro. Title Diſſeiſin 79. *A.* has Common in the Land of *B.* and *B.* comes with his Family and incloſes the Land, ſo that *A.* cannot have the Uſe of his Common, *B.* and his Family are Diſſeiſors, for they ouſt *A.* of his Common by the Incloſure, which is plainly a Diſſeiſin.

Bro. Title Diſſeiſin 81. A Man leaſes for Life, rendring Rent, with a Clauſe of Re-entry for Non-payment, and for Arrears of Rent diſtrains, and being poſſeſſed of the Diſtreſs, re-enters, and adjudged a Diſſeiſor; for though he had an Election upon Non-payment of the Rent to re-enter or diſtrain, yet by diſtraining he had determined his Election, and ſo put it out of his Power to re-enter; therefore when afterwards he re-enters, it is unlawful, and conſequently ſuch an Ouſter of him who has the Freehold, as amounts to a Diſſeiſin.

Bro. Title Diſſeiſin 85. Lands deſcend to an Infant, and *A.* enters as Guardian only, and deviſes it to *B.* and dies, *B.* enters, and the Infant brings an Aſſiſe againſt him, and he was adjudged a Diſſeiſor; for though *A.* was the firſt that entred, yet he entred as Guardian, ſo that it was in the Election of the Infant to charge him as a Diſſeiſor, or call him to an Account as a Guardian; and therefore when the Infant charges the Deviſee as a Diſſeiſor, it ſhall be preſumed that he looked upon *A.* as his Guardian, otherwiſe *B.* could not be charged as the Diſſeiſor, but as the Deviſee of the Diſſeiſor; for if he had reckoned *A.* as his Diſſeiſor, then *B.* muſt have been eſteemed a Perſon who claimed under the Diſſeiſor by legal Conveyance, and ſo not to be charged as the actual Diſſeſor of the Infant; but if the Infant is ſuppoſed to look upon *A.* as his Guardian, then he may charge *B.* as a Perſon who ouſted him by Wrong of his Freehold, ſince he, and not the Guardian, was the Perſon who ſeiſed the Poſſeſſion without Title.

Bro. Title Diſſeiſin 94. 2 Inſt. 409, 413. The Father enfeoffs his Son within Age, and after enters as his Guardian, and enfeoffs *J. S.* and dies; the Infant brings his Aſſiſe againſt the Feoffee, who was adjudged a Diſſeiſor for the Reaſons before-mentioned; and likewiſe, becauſe it is provided by *Weſtm.* 2. *cap.* 25. that if Leſſee for Years, or Guardian, alien in Fee, the Remedy for recovering the Freehold ſhall be by an Aſſiſe of *Novel Diſſeiſin*, and both the Feoffor and Feoffee ſhall be eſteemed Diſſeiſors, and the Survivor of them ſhall be liable to this Remedy; ſo, if either happens to die, he that ſurvives may be conſtrued a Diſſeiſor, and as ſuch liable to this Action.

2 Inſt. 413. Not only Guardians in Chivalry, but in Socage, and by Nurture, come within this Law of *Weſtm.* 2. So alſo their Alienations not only in Fee, but in Tail, or for Life, are within this Act; for wherever a Freehold is tranſferred by the Solemnity of Livery, by a Perſon who has no Right to make ſuch a Conveyance, there is an actual Ouſter of him that has the Freehold, and ſo a Diſſeiſin.

2 Inſt. 413. Here it will be proper to obſerve, that though the ſaid Statute mentions only Tenant for Years, yet Tenant by Elegit, Statute-Merchant or Staple, as

* Page 104 * alſo Tenant at Will or at Sufferance, are by an equitable Conſtruction brought within it, as being all equally capable, by the Poſſeſſion which they enjoy, of committing Diſſeiſins, by transferring the Freehold by Livery; but a Bailiff is not within the Act, becauſe it mentions and intends only thoſe Perſons who have ſome Intereſt, and thereby a Poſſeſſion in the Lands, which a Bailiff has not.

If Tenant for Years, or a Guardian, make a Leaſe for Life, Remainder for Life, Remainder in Fee, and Tenant for Life enters, he is a Diſſeiſor, for he accepts of the Livery, which transfers the Freehold, and ſo produces the Diſſeiſin, and therefore makes himſelf a Party to the Wrong; the ſame Law of him in Remainder, if he in Remainder for Life or in Fee enters, for ſuch Entry is an Agreement to that Act which makes the Diſſeiſin. 2 Inſt. 413. Bro. Title Diſſeiſin 86.

If a Guardian accepts of a Feoffment from his Ward, the Ward may bring an Aſſiſe againſt him as a Diſſeiſor; for the Guardian acts contrary to his Duty when he aſſents to any Alienation made by his Infant; for it is his Duty to protect the Inheritance of his Ward, and to deliver it up to him at full Age, and not to bring it into his own Family. Bro. Title Diſſeiſin 95.

A. lets Lands for 21 Years, from *Michaelmas* next enſuing, rendering Rent, and the Leſſee enters 29 *September*, and occupies for one Year, the Leſſor brings Debt for the Rent reſerved; and adjudged, that though his Entry, which was without Title, made him a Diſſeiſor, and that this Diſſeiſin was not purged by the Accruing of the Term after, yet Debt lay upon the Contract; for though his Entry, being made the Day before the Leaſe commenced, cannot be ſuppoſed to be made by Virtue of the Contract, yet it does not diſannul the Contract, for that muſt remain till defeated by an After-agreement of equal Notoriety with it; and therefore the Action in this Caſe may well be formed upon it; and the Reaſon why in this Caſe the Accruer of the Term after Entry did not purge the Diſſeiſin, is becauſe when the Leſſee enters before his Title accrued, he is preſumed to diſclaim the Title of a Termor, and ſet up another; and therefore ſuch Title ſhall not protect him from the Notice of the Law; for that would be to conſider him under a Title which by an expreſs Overt-act he diſowns. Cro. Eliz. 169. *Alexander* and *Dyer*.

(B) What Perſons are capable of committing ſuch Diſſeiſins.

AS to Femes Covert, if a Huſband diſſeiſe another to the Uſe of his Wife, this does not make her a Diſſeiſoreſs, ſhe having no Will of her own, nor will any Agreement of hers to the Diſſeiſin, during the Coverture, make her guilty of the Diſſeiſin, for the ſame Reaſon; but her Agreement after her Huſband's Death will make her a Diſſeiſoreſs, becauſe then ſhe is capable of giving her Conſent, and that makes her Tenant of the Freehold, and ſo ſubject to the Remedy of the Diſſeiſee. Rol. Abr. 660. Bro. Title Diſſeiſin 67.

So if a Man diſſeiſes another to the Uſe of a Feme Covert, her Agreement to it ſignifies nothing; and though the Huſband's Agreement to it ſettles the Eſtate in the Wife, yet it makes her no Sharer in the Guilt of the Diſſeiſin. Rol. Abr. 660. Bro. Title Diſſeiſin 67.

But if a Feme Covert actually enter and commit a Diſſeiſin, either ſolely or together with her Huſband, then ſhe is a Diſſeiſoreſs, becauſe ſhe gains thereby a wrongful Poſſeſſion; but yet ſuch actual Entry cannot be to the Uſe of her Huſband or a Stranger, ſo as to make them Diſ- * ſeiſors; becauſe tho' by ſuch Entry ſhe gains an Eſtate, yet ſhe has no Power of Transferring it to another. Co. Lit. 357. b. Lit. Sect 678. Rol. Abr. 660, 661. * Page 105 Bro. Title Diſſeiſin 15, 67. 8 *H.* 6. 14. cont.

As to Infants, they are under the ſame Reſtrictions with Feme Coverts; ſo that their *Agreement* during Minority to a Diſſeiſin committed to their Uſe does not bind or make them Diſſeiſors, no more than if an Infant *commands* a Diſſeiſin to be made; becauſe no Acts, during their Minority, are ſo binding, but that they may at full Age revoke and cancel them; but an Bro. Title Diſſeiſin 5, 16. 35. Rol. Abr. 660.

actual Entry by an Infant into another's Freehold gains the Poſſeſſion, and makes him a Diſſeiſor as well as it does a Feme Covert.

Bro. Title Diſſeiſin 19. Two Infants Jointenants, one releaſes to the other, by which the other holds the Whole; this ſeems a Diſſeiſin, becauſe the Releaſe, being in no Manner for the Advantage of the Infant, is utterly void, and then the Entry of the other being without Title is tortious and a Diſſeiſin; but if there had been Livery made upon it, tho' between Jointenants, this is void, yet it ſeems no Diſſeiſin, for the Regard the Law has for the Solemnity of Livery, which ſhall continue till defeated by Act of equal Notoriety.

Rol. Abr. 661. If a Man carries an Infant into the Lands of *J. S.* and there claims the Lands to the Uſe of himſelf and the Infant; yet the Infant ſeems no Diſſeiſor, becauſe he made no claim of it himſelf, and then ſhall not be charged with the Tort of another Perſon.

Bro. Title Diſſeiſin 65. If the King enters without Title, or ſeiſes Lands by a void or inſufficient Office, he is no Diſſeiſor; for being the Fountain of Juſtice, and engaged in Multiplicity of Affairs, his Acts are not to be charged with Injuſtice; but this Privilege does not extend to any of his Subjects; and therefore if the King by Letters Patent grants Land ſo ſeiſed, and the Patentee enters, he is a Diſſeiſor, becauſe he has Time and Leiſure to inquire into the Legality of his Title, which the Prince is ſuppoſed to want Leiſure for.

Vide Head of Corporations. If a Corporation Aggregate diſſeiſe to the Uſe of another, they are Diſſeiſors in their natural Capacity, and the Perſons who committed the Wrong ſhall be charged therewith, and not the Corporation, which conſiſts of a conſtant Succeſſion of various Perſons, and as a Corporation can do no Act without Writing.

Diſtreſs.

Bacon of Government 77. Vigellius 257, 271, 326. Gilb. Diſt. and Replev. 2. His Rents. 3. THE Remedy for Recovery of Rent, by Way of Diſtreſs, ſeems to have come over to us from the Civil Law; for antiently, in the Feudal Law, the not paying Attendance on the Lords Courts, or not doing the Feudal Service, was a Forfeiture of the Eſtate; but theſe Feudal Forfeitures were afterwards turned into Diſtreſſes, according to the Pignorary Method of the Civil Law, that is, the Land that is let out to the Tenant is hypothecated, or as a Pledge in his Hands to anſwer the Rent agreed to be paid to the Landlord, and the whole Profits ariſing from the Land are liable to the Lord's Seizure, for the Payment and Satisfaction of it.

*Page 106 Under this Head I ſhall conſider,

(A) Who, in Reſpect of his Eſtate or Intereſt, may diſtrain for Rent. 106.

(B) What

(B) What Things may be diſtrained. 108.
(C) Of the Manner of diſtraining as to Time and Place. 110.
(D) Of the Diſtreſs when ſeiſed, and herein of the Diſtrainer's Intereſt therein, and what he is to do therewith. 111.
(E) Where a Diſtreſs ſhall be ſaid to be Wrongful and Exceſſive; and herein of the Remedy which the Party injured hath. 115.
(F) Of diſtraining Things Damage-feaſant. 116.
(G) Of Diſtreſſes for Amercements. 117.

(A) Who, in Reſpect of his Eſtate or Intereſt, may diſtrain for Rent.

IF a Man ſeiſed in Fee makes a Gift in Tail, or a Leaſe for Life, Years, or at Will, ſaving the Reverſion to himſelf, with a Reſervation of Rent, or other Services; the Law gives the Donor or Leſſor, without any expreſs Proviſion, Remedy for ſuch Rent or Services by Diſtreſs.

For this *vide* Head of Rent, Lit. Sect. 214. Bro. Tit. Diſtreſs, 5, 15.

and this my Lord *Coke* calls a Rent diſtrainable of common Right. Co. Lit. 142. a. 8 H. 4. 15. Mo. 36. Cro. Eliz. 636. The Bailiff that diſtrains muſt ſhew in whoſe Right he does it. Bro. Diſtreſs 78.

But if the Donor or Leſſor reſerve not the Reverſion, he cannot diſtrain of common Right, but he may reſerve to himſelf a Power of Diſtraining, or the Reſervation may be good to bind the Leſſee by Way of Contract, for the Performance whereof the Leſſor ſhall have an Action of Debt.

Co. Lit. 47. a. 5 Co. 3. *Jewell's* Caſe. 2 Saund. 303.

A Rent diſtrainable of common Right, or by the Common Law, cannot iſſue out of an incorporeal Inheritance: as if I have a Right of Common in another Man's Soil, and I grant it to *A.* reſerving Rent, if the Rent be behind, I cannot diſtrain the Beaſts of *A.* becauſe that the Right of Common which every Man has, runs thro' the whole Common.

Co. Lit. 47. a. 142. a. 2 Rol. Abr. 446. So of Tithes, becauſe there is no Place

where the Diſtreſs can be taken. Cro. Jac. 111, 173. 2 Rol. Abr. 446, 451. Co. Lit. 47, 142. Bro. Tit. Diſtreſs, 67, 80. 11 H. 4, 40. 5 Co. 5. *vide* Chan. Ca. 79.

A Rent granted for Equality of Partition by one Coparcener to another, is good; ſo is a Rent granted to a Widow out of Lands whereof ſhe is dowable, in Lieu of her Dower; the like Law of a Rent granted in Lieu of Lands upon an Exchange; and for theſe the Law gives a Remedy by Diſtreſs, without any Proviſion of the Parties, tho' they have no Reverſion.

Co. Lit. 169. b. 3 Co. 22. b. Keilw. 104, 126.

If a Termor grants all his Term, rendering Rent, he cannot diſtrain for it.

Bro. Diſtreſs 7. 2 Lev. 80. Latch 211.

Bro. Debt. pl. 39. Freem. 228. pl. 226. Cro. Jac. 487. Moor. 126. Stra. 405. Al. 57. Co. Lit. 292 b.

* If a Man ſeiſed of Land in Fee, and poſſeſſed of other Land for Years, grants a Rent-charge for Life out of both, with a Power to diſtrain in both, if the Rent be in Arrear, the Leaſehold as well as the Lands of Inheritance are ſubject to the Diſtreſs, becauſe a Man may oblige his Chattels to the Diſcharge

* Page 107 7 Co. 23-4. *Butt's* Caſe. Co. Lit 147. b. Cro. Jac. 390.

Rol. Rep. 330. Cro. Eliz. 607, 622.

Diſcharge of the Rent; but the Rent being a Freehold, ſhall iſſue only out of the Inheritance, becauſe the Leaſehold, being only a temporary and periſhing Intereſt, is not a Fund commenſurate to the Charge, and therefore the Rent ſhall iſſue out of the Inheritance, which for its Duration is a more competent Eſtate to ſupport the Charge, and render the Grant effectual; and hence it was adjudged, that though the Grantee might diſtrain in the Leaſehold Lands, yet he muſt avow for a Rent iſſuing only out of the Inheritance.

27 Aſſ. 24. Bro. Heriot 6. Fitz Avowry 177.

For an Heriot Service due after the Death of the Tenant, the Lord may either diſtrain or ſeize the beſt Beaſt of the Tenant.

Cro. Eliz. 32, 590. Cro. Car. 260. Jon. 300. Co. Lit. 83. a. 162. b. Rol. Abr. 665. So may the Lord diſtrain for Relief; for this *vide* Lat. 37, 95, 130. 3 Bulſt. 323. Jon. 132 but if he dies, his Executors cannot, but may have an Action of Debt for it. 4 Co. 37. *Ognel's* Caſe, 2 Inſt. 234. Where a Diſtreſs might have been taken for Aid to marry his Daughter, or make his Son a Knight. *vide* Rol. Abr. 665.

Co. Lit. 96. a.

The Services or Rent, for which the Lord or Leſſor may diſtrain, muſt be certain, or ſuch as may be reduced to a Certainty; for otherwiſe the Lord cannot, in his Avowry, recover Damages for the Non-performance or Non-payment, when the Jury cannot determine what Injury he has ſuſtained; but if the Tenant holds of his Lord to ſheer all his Sheep feeding in ſuch a Manor; this is certain enough, becauſe it is eaſy to compute the Number within the Precincts of the Manor; and conſequently what Expence the Lord is at in employing other Hands to that Work, and what Damages he ſuſtained by the Omiſſion of his Tenant.

4 Co. 50. b. *Ognell's* Caſe, Vaugh. 40, 41. S. C. cited; the ſame Law of a Rent Service. Rol. Abr. 672.

If a Man ſeiſed in Fee, or for Life, of a Rent-charge, after Arrearages incur, grants over the Rent to another, he cannot diſtrain for theſe Arrearages, becauſe they are by the Grant divided from the Freehold of the Rent.

For this *vide* 14 *H.* 4. 31. 23 *H.* 7. 96. 6 Co. 64. Co. Lit. 47. Cro. Jac. 442. (*a*) But might diſtrain the Cattle Damage-feaſant. Keilw. 96. a.

If Tenant *pur auter vie*, or Tenant for Years, held over, yet the Leſſor could not diſtrain them for (*a*) Rent that became due before the Determination of their reſpective Leaſes, tho' they continued in Poſſeſſion of the Land afterwards; for when the Leaſe was determined, the Leſſor could not avow on them as his Tenants, claiming under a Leaſe, which was determined.

Vide alſo 4 Geo. 2. c. 28. 11 Geo. 2. c. 19.

To remedy this, it is provided by the 8 *Ann. cap.* 14. "That whereas "Tenants *pur auter vie*, and Leſſees for Years, or at Will, frequently "hold over the Tenements to them demiſed, after the Determination of "ſuch Leaſes; and whereas after the Determination of ſuch, or any other "Leaſes, no Diſtreſs can by Law be made for any Arrears of Rent that "grew due on ſuch reſpective Leaſes, before the Determination thereof; "it is enacted, That it ſhall and may be lawful for any Perſon or Perſons, "having any Rent in Arrear, or due upon any Leaſe for Life or Lives, or "for Years, or at Will, ended or determined, to diſtrain for ſuch Arrears "after the Determination of the ſaid reſpective Leaſes, in the ſame "Manner as they might have done, if ſuch Leaſe or Leaſes had not been "ended or determined; provided that ſuch Diſtreſs be made within the "Space of ſix Kalendar Months, after the Determination of ſuch Leaſe, "and during the Continuance of ſuch Landlord's Title or Intereſt, and * Page 108 * "during the Poſſeſſion of the Tenant from whom ſuch Arrears became "due."

What

(B) What Things may be diſtrained.

THERE muſt be a valuable Property in ſome Body in the Things diſtrained, therefore no Diſtreſs can be of Dogs, Deer, Coneys, &c. which are *feræ naturæ*. Co. Lit. 47.

Things fixed to the Freehold, or Part of the Freehold, as Furnaces, Cauldrons, Doors, Windows, fixed to the Freehold, or Corn* growing, cannot be diſtrained. 18 *E.* 3. 4. Co. Lit. 47. 2 Inſt. 82 S.P. 2 Mod. 61.

* Cattle on the Common, and Corn growing, may be diſtrained for *Rent*, by 11 *Geo.* 2. *c.* 19. § 8.

No Man can be diſtrained by the Utenſils of his Trade for (*a*) Rent, as the Ax of a Carpenter, the Books of a Scholar, the Materials for making Cloth in a Weaver's Shop; for theſe the Law protects under a Preſumption, that without them the Tenant could neither be uſeful to others, nor gain a Livelihood for himſelf. Co. Lit. 47.

(*a*) But where by Preſcription a Toll is due for repairing a Key or Harbour, which is to be levied by Diſtreſs, ſuch Diſtreſs may be of thoſe Implements, by which the Party gets his Livelihood, for the maintaining of thoſe is for the Public Good; and therefore the taking Part of the Loading has been adiudged good. Mod. 104. Lev. 96, 97. S. C. Raym. 232. Ld. Raym. 385 2 Stra. 1228. So has the diſtraining Part of the Tackle of the Ship, as where the Anchor, Cable, and Sails were taken. Carth. 357. Ld. Raym. 384. 12 Mod. 216. 5 Mod. 359. Salk. 248. pl. 4. for this *vide plus*, 2 *H.* 7. 16. 2 Rol. Abr. 202. 3 Co. 710. Dyer 352. The Cart of a Huſbandman may be diſtrained, tho' an Implement of his Occupation. Carth. 359. admitted *per cur.*

Alſo for the Benefit of Trade and Commerce, ſome Things are privileged from being diſtrained, as a Horſe in a Smith's Shop, a Horſe in an Inn, Sacks of Corn or Meal in a Mill, Cloth or Garments in a Taylor's Shop, or Sacks of Corn or Meal in a Market. 10 *H.* 7. 21. Bro. Diſtreſs 99 Co. Lit. 47. 3 Bulſt. 270. Rol. Abr. 668. Cro. Eliz. 569.

So if an Horſe carries Corn to a Mill, and is tied to the Mill Door, during the Grinding of the Corn, he ſhall not be diſtrained; (*b*) but Cattle driving to a Market, and by the Way put into a Paſture, may be diſtrained. Cro. Eliz. 52 *per Curiam arguendo.* (*b*) 2 Vent. 50. But *vide* 2 Vern. 130. †

† If, by Colluſion of the Landlord, Cattle are taken in, for the Purpoſe of getting a Diſtreſs, Equity will give Relief. See *infra*, 110. the Note on the laſt Caſe under this Head.

And theſe Things are privileged, tho' they continue there three or four Days, or are retained never ſo long by the Tenant for his Satisfaction in ſome Thing he has done about them. Rol. Abr. 668.

If a Man rides to a Place, and is there taken ſick, by Means whereof he is obliged to tarry there two or three Days, his Horſe cannot be diſtrained for Rent. Rol. Abr. 668. *Equus, Palfridus*, or a Horſe which a Man keeps for Journies cannot, as is ſaid, be diſtrained. 2 Inſt. 133. 2 Rol. Abr. 160. Rol. Abr. 668. *Sed qu?* Nor an Horſe upon which another rides. Co. Lit. 47. Cro. Eliz. 552. But an Horſe upon which a Man is riding, may be diſtrained Damage-feaſant, and led to the Pound with the Rider on him. Vent. 36. Sid. 440.

Things diſtrained Damage-feaſant cannot be diſtrained for Rent, becauſe they are in the Cuſtody of the Law. Co Lit. 47. In Debt againſt an Executor he pleads *Riens in ſes mains*, but certain Goods diſtrained and impounded, adjudged no Aſſets to charge him. Cro. Eliz. 23.

* Page 109

* If a Clothier having put his Wool to ſpin comes with an Horſe to carry it back, but becauſe there is no Beam or Weights at the Spinner's Houſe to weigh it, the Clothier and Spinner, with the Leave of a Neighbour, who had a Beam and Weights in his Houſe, bring the Horſe thither, and enter the Houſe to weigh the Yarn, the Lord of the Houſe, whilſt they are there, cannot diſtrain the Horſe for Services.

Cro. Eliz. 549, 596. adjudged. 3 Lev. 261. S. C. cited. A private Perſon, who undertakes to carry all Perſons Goods, thereby becomes a common Carrier, and the Goods in his Poſſeſſion are privileged. Salk. 249, 250.

Things for which a Replevin will not lie, ſo as to be known again, as Money out of a Bag, cannot be diſtrained, for this Reaſon, and alſo for the Damages, that Shocks of Corn,* Hay, *&c.* might ſuſtain, it was held that they could not be diſtrained.

Rol. Abr. 667. Keilw. 145. 2 Inſt. 82. * But for this *vide* 2 W. & M. c. 5. ſet forth at large, Letter (D). *poſt* 113.

Co. Lit. 47. 2 Inſt. 133.

Averia Carucæ, or Beaſts of the Plough, or any Thing belonging to it cannot by Common Law be diſtrained while there are other Goods or Beaſts (which *Bracton* calls *Animalia otioſa*) which may be diſtrained; alſo a covenable Diſtreſs is not of Armour or Veſſel, or Apparel, or Jewels, ſo long as there are other ſufficient or covenable, nor of Sheep, Saddle-Horſe,† Poultry,† or Fiſh.†

† *Sed Qu.* This Statute extends not only to Diſtreſſes between Lord and Tenant,

By the Statute *De Diſtrictione Scaccarii* made 51 *H.* 3. *ſt.* 4. "No Man "ſhall be diſtrained by the Beaſts that gain his Land, nor by his Sheep, "but until another Diſtreſs or Chattels ſufficient be found, except for "Damage-feaſant."

but to all other Diſtreſſes, as well at the Suit of the King, as at the Suit of a Subject. 2 Inſt. 133. Dal. 84. In an Action on this Statute, it is not neceſſary to ſhew that there was a ſufficient Diſtreſs, *præter*, *&c.* but it muſt come on the other Part, *ſſ.* to plead that there was a ſufficient Diſtreſs, *præter*, *&c.* Dyer 312. pl. 86. Sid. 348. It muſt be intended there was Cattle ſufficient at the Time of the Diſtreſs, and it is not material what was before or after. 2 Inſt. 133.

27 E. 38. 2 Inſt. 296. Palm. 43. Dyer 317, 318. 2 Leon. 7, 8. Co. Lit. 47.

It is agreed that the Cattle of a Stranger eſcaping into his Neighbours Grounds, and there being *Levant* and *Couchant*, may be diſtrained by the Lord or Leſſor of thoſe Grounds for Rent or Services due to him; for it ſhall be imputed the Owner's Folly † that he did not provide againſt this Miſchief by proper Bounds and Fences.

2 Brownl. 170. But ſuch Cattle ſhall not be liable to a Diſtreſs for an Amercement. Noy 20. Nor to a Rent-Charge iſſuing out of thoſe Lands, unleſs they were *Levant* and *Couchant*. Rol. Abr. 668. 1 Mod. 63. And by the better Opinion of the Books it ſeems not to be material whether they were *Levant* or *Couchant* or not. *Vide* Co. Lit. 47. 2 Sand. 290. 2 Brownl. 170. Palm. 43. Hob. 265.

† If the Fence was not his, and the Eſcape owing to the Fault of the Tenant, and in that Caſe they are diſtrainable, an Action would lie againſt the Tenant, at the Suit of the Owner, for not keeping up the Fence, whereby the Plaintiff was thus damnified. See *infra* 110, the Note on the laſt Caſe, under this Head.

Rol. Abr. 669. Cattle which are in certain Land by Way of Agiſtment may be diſtrained for Rent.

22 E. 4. 49. 15 H. 7. 17. b. Rol. Abr. 668. But for this *vide* 2 Leon. 7. Dyer 317.

If the Tenant ought to incloſe againſt the Highway by Preſcription, and in driving my Cattle by the Way, by Default of the Incloſure they eſcape into the Land of the Tenant, the Lord cannot diſtrain them; ſo if he ought to incloſe by Preſcription againſt my Land, and my Cattle eſcape.

2 Sand. 289, 290. *Pool* and *Longueville*.

If *A.* and *B.* have two Cloſes lying contiguous, and *A.* by Preſcription is bound to repair the Fences between both the ſaid Cloſes, and *A.* leaſes his Cloſe to *C.* for Years, rendering Rent; and the Fences between the two Cloſes

Cloſes being out of Repair, the Cattle of *B.* eſcape into the Cloſe of *A.* he may diſtrain them for Rent Arrear, and it is not material whether they are Levant and Couchant or not; adjudged, and the Judgment affirmed upon a Writ of Error, though objected that they eſcaped there through the Default of *A.* who ought to have taken Care that the Hedges were repaired: And by *Sanders*; *Nota*; This was a hard Caſe to maintain, there being a vaſt Difference between the Lord's taking a Diſtreſs within his Seignory, and the Leſſor's diſtraining for Rent reſerved upon his own Leaſe, for the Lord had nothing to do with the Land or Fences, and ſo it concerns not him whether they are in Repair or not; otherwiſe of the Leſſor, for he ought to repair them, elſe he will have Advantage of his own Wrong. * Page 110

If a Man, that is driving his Cattle to *London* to ſell, aſks Leave of the Leſſor to put his Cattle into the Ground for a Night, and he gives him Leave ſo to do, with the Conſent of the Leſſee, and the Cattle are put in accordingly, the Leſſor is not concluded by this Licence, but that he may diſtrain them for Rent; adjudged upon Demurrer; and it not appearing by the Pleading that the Ground belonged to a common Inn, it came not in Queſtion whether in that Caſe they might have been diſtrained. 2 Vent. 50. *Fowkes* and *Joice*. 3 Lev. 260, 261. S. C. But *vide* 2 Vern. 129. Where in this very Caſe the Party had Relief in Equity, the Conſent of the Head Landlord being looked upon as a Fraud and Contrivance to ſubject the Cattle to a Diſtreſs, and there cited the Caſe of *Bredon* and *Pierce*, where there being two Years Arrear of a Rent-Charge, and Cattle came by Eſcape out of the next Ground, and were diſtrained, *&c.* The Lord *Nottingham* relieved againſt it. Preced. in Chan. 7. S. C. decreed for the Plaintiff with Coſts, at Law, and in Equity.

(C) Of the Manner of diſtraining, as to Time and Place.

A Diſtreſs for a Rent-Service, or a Rent-Charge cannot be in the Night, but one may diſtrain Cattle Damage-feaſant in the Night, otherwiſe they may be gone before Morning. Co. Lit. 142. 7 Co. 7. a. 9 Co. 66. a. Latch. 211. 4 Leon. 218. But if before the Stat 8. Ann. c. 14. and 11 Geo. 2. c. 19. for other lawful Reaſon, even after View, had chaſed them away, or if after View the Cattle go out of themſelves, the Lord could not diſtrain them. 44 E. 3. 20. Co. Lit. 161. a. 268. a. 2 Inſt. 131. †

If the Tenant when the Lord is in View of the Cattle, to avoid the Diſtreſs, chaſes them into a Place not within the Lord's Diſtreſs, yet the Lord may take them freſhly, for he ſhall not have Advantage of his own Wrong.

The Tenant, before the Lord had View of them, had chaſed them away, or if the Tenant

† Now by 11 Geo. 2. *c.* 19. Goods, *&c.* may be diſtrained in thirty Days, after Removal.

By the Statute of *Marlbrige* made (*a*) 52 *H.* 3. *cap.* 2. "None ſhall "diſtrain any to come to his Court, (*b*) which is out of his Fee, or upon "whom he has no Juriſdiction, by Reaſon of a Hundred or Bailiwick, nor "take Diſtreſſes out of the Fee or Place where he hath (*c*) Juriſdiction. (*a*) This is declarative of the Common Law. 2 Inſt. 104. (*b*) This is intended of Suit-Service in Reſpect of a Seignory, and not of Suit-real in Reſpect of Reſiance. 2 Inſt. 104. (*c*) But no Diſtreſs is prohibited by this Act in any Place where he hath Power, by Cuſtom or otherwiſe, to diſtrain. 2 And. 71, 72.

By

(e) But this is only in Affirmance of the Common Law. 2 Inſt. 131.

By the ſame Statute, *cap.* 15. it is enacted, "That from (e) thence-"forth (f) it ſhall be lawful for no Man (g) for any Manner of Cauſe to "take Diſtreſſes out of his Fee, or in the King's Highway, or in the "common Street, but only to the King and his Officers, having ſpecial "Authority ſo to do.

* Page 111

(f) This muſt not be taken *ſimpliciter*, ſo as to take Advantage thereof in Bar of an Avowry, but *ſecundum quid*, *viz.* that the Tenant may have an Action againſt the Lord upon this Statute, in which he ſhall be fined. 2 Inſt. 132. And if it may be pleaded in Bar of the Avowry, the King ſhould loſe his Fine. (g) This muſt be intended only of Diſtreſſes by Reaſon of a Seignory, and not of Diſtreſſes for Rent-Charges, *&c.* or by Reaſon of a Leet. 2 Inſt. 131. And. 72. Nor of ſuch Things for which no Diſtreſs can be taken but in the Highway, as for Toll-thorough due by Cuſtom. Cro. Eliz. 710. But an Heriot Cuſtom may be ſeiſed in the Highway, for that is not a Diſtreſs but a Seiſure; but a Diſtreſs cannot be taken there for an Heriot-Service. 2 Inſt. 132. Goulſ. 97.

2 Inſt. 132. If the Lord coming to diſtrain hath a View of the Beaſts within his Fee, and before he can diſtrain them the Tenant chaſes them into the Highway, the Lord, notwithſtanding the Statute of *Marlbridge*, *cap.* 15. may diſtrain them there.

46 *E.* 3. 26. b. Rol. Abr. 671. 5 Co. 92. A Diſtreſs for Rent may be taken in a Houſe, if the Door be open; ſo may it be taken out of a Window.

One cannot break open the outer Door to diſtrain, and Lord Ch. Juſt. *Hardwicke* held, that a Padlock put on a Barn Door could not be opened by Force, to diſtrain the Corn. 9 Vin. Abr. 128. pl. 6. If the outer Door be open, one may break open the inner Door to diſtrain. Comb. 17.

(D) Of the Diſtreſs when ſeiſed: And herein of the Diſtrainer's Intereſt therein, and what he is to do therewith.

2 Inſt. 106. BY the Common Law, a Man might have driven a Diſtreſs whither he pleaſed, which was very miſchievous. *1ſt*, Becauſe the Tenant was bound to give the Beaſts Suſtenance, if impounded in an open Pound, and being driven into another County, he could not by Intendment of Law know where they were. 2dly, He could not tell where to have a Replevy; but now,

This Statute is confirmed by *Weſtminſter* the *1ſt*, made 3 *E.* 1.

By the Statute of *Marlbridge*, made 52 *Hen.* 3. *cap.* 4. "None ſhall "cauſe a Diſtreſs to be driven out of the County where taken, on Pain of "Fine, *&c.*

2 Inſt. 191. Yet if the Tenancy is in one County, and the Manor in another, the Lord may drive the Diſtreſs taken in the Tenancy unto the Manor in the other County; for the Tenant doing Suit to the Manor, by common Intendment knows what is done there. 2 Inſt. 106. Keilw. 50. Bro. Diſtreſs 33. Where he who will take Advantage of this Act muſt do it by Way of Action, ſo as to intitle the King to a Fine, *vide* 3 Lev. 48.

(a) Not into the County of the City of *Litchfield*, though till 1 Mar. Part of the Hundred in which, *&c.* Goulſ. 100.

Alſo by the Statute of the 1 & 2 of *Ph. & Mary*, *cap.* 12. "No "Diſtreſs ſhall be driven out of the (a) Hundred, Rape, Wapentake, or "Lathe, where taken, except to a Pound overt within the ſame Shire, "not above (b) three Miles diſtant from the Place where taken, and no "Diſtreſs ſhall be impounded in ſeveral Places (c) whereby the Owner "ſhall be conſtrained to ſue ſeveral Replevies, upon Pain that (d) every "Perſon offending ſhall forfeit to the Party grieved 5 *l.* and treble Da-"mages.

If

(b) Godb. 11. Goulſ. 101. (c) As if impounded in ſeveral Liberties, *&c.* elſe it is no Offence within the Statute. Noy 52. Dyer 177. *in Margine.* (d) But where three Perſons diſtrain a Flock of Sheep, and ſeverally impounded

Diſtreſs.

If a Man diſtrains dead Goods, as Utenſils of a Houſe, or ſuch like, which may take Damage by Wet or Weather, and the like, he ought to impound them in an Houſe or other Pound covert within three Miles in the ſame County; for if he impounds them in a Pound covert he ought to anſwer for them. *Page 112 Co. Lit. 47. A Pound covert is a Pinfold made for ſuch Purpoſes, or the Cloſe of him that diſtrains, or the Cloſe of a Stranger with his Conſent, where the Diſtreſs is taken; a Pound covert or cloſe is when the Diſtreſs is impounded in a Houſe. Co. Lit. 47.

If a Man diſtrains Cattle, and puts them in a Pound covert, the Owner ought to keep them at his Peril, for it is lawful for him to come there for this Purpoſe; but if put in a Pound covert or cloſe, there the Diſtrainer ought to keep them at his Peril, and yet he ſhall not have any Satisfaction for it, Co. Lit. 47. 2 Inſt. 106. S. P.

He who diſtrains cannot make Uſe of the Diſtreſs, ſo as to work a Horſe, *&c.* for he hath no Property therein, but a bare Power by Act of Law to take it: So if a Man hath a Return irrepleviſable, yet he cannot work it, for the Judgment is to remit it to the Pound *ibidem remanſur' &c.* Owen 124. Dyer 280 pl. 14. But Cattle taken in *Withernam* may be uſed.

If a Man takes a Cow for a Diſtreſs, he cannot milk her; for though the Cow be the better for this, yet he ought not to do good to the Owner without his Conſent, and perhaps the Owner would have come before any Damage came by this to the Cow; and if it periſh by this, yet he who took the Diſtreſs may diſtrain again. Owen 46. Rol. Abr. 648, 879. Noy 911. Cro. Jac. 147. Yel. 96. Where a Man diſtrained a Trunk for Rent, and being informed that there were Things of Value in it, he cauſed it to be corded to prevent Damage; he was for this adjudged a Treſpaſſor *ab initio*; cited by *Twiſden* to have been adjudged before *Roll* C. Juſtice, Vern 37.‡ A Hide diſtrained cannot be tanned, for the Property is thereby *quaſi* altered; the Marks whereby the Owner might know it, being thereby taken away. Cro. Eliz 783. If a Man diſtrains for ſeveral Barrels of Beer, and draws Beer out of one of them, he is a Treſpaſſor *ab initio* as to that Barrel only. 6 Mod. 216. *per Holt* C. J.

‡ *Qu.* If the Determination was Law, or if a Jury would now give a Plaintiff a Verdict for ſuch an Act?

If a Man diſtrains a Horſe, and impounds him, and the Horſe leaps three Times over the Pound, which is as high as it uſed to be, and thereupon he who diſtrained ties the Horſe to a Poſt in the Pound, by Reaſon whereof he ſtrangles himſelf, the Owner may have an Action of Treſpaſs. 27 Aſſ. 64. Rol. Abr. 673. Where one diſtrained a Hog, Damage feaſant which afterwards eſcaped, but it did not appear, that it was by the Diſtrainer's Fault; in an Action of Treſpaſs brought by him for the Treſpaſs done by the Hog, it was adjudged that the Action would not lie, for he might chuſe what Pound he pleaſed, and it was his Folly not to chuſe one that would hold him; which is not like a Diſtreſs dying in Pound, that being the Act of God; and his Default muſt not intitle him to another Action, nor ſubject the Defendant to a double Puniſhment for the ſame Cauſe, *viz.* the Loſs of his Pig, and the Damages and Coſts in this Action. Salk. 248. pl. 3. Ld. Raym. 719.

Diſtreſſes for Rent being in Nature of Pledges, and no Power to ſell or diſpoſe of them, in the Perſon diſtraining, they oftentimes proved of little or no Benefit towards haſtening the Payment of the Rent; for Remedy whereof it has been enacted,

" That where any Goods or Chattels ſhall be diſtrained for any Rent 2 *W. & M.*
" reſerved and due upon any Demiſe, Leaſe, or Contract whatſoever, *ſeſſ.* 2. *cap.* 5.
" and the Tenant or Owner of the Goods ſo diſtrained ſhall not, within

impounded them in three ſeveral Pounds, whereby, *&c.* Yet they ſhall forfeit but one five Pounds and one Treble Damage. Cro. Eliz. 480. Moor 453. pl. 620. Noy 52, 62. Goulſ. 45. Dyer 177. *in Margine.* But Noy 62. by Fenner, if the Plaintiff brings his Action againſt them ſeverally, every one ſhall pay 5*l.* Is not this Law, each being guilty of a particular Offence againſt the Statute?

" five Days next after ſuch Diſtreſs taken, and Notice thereof (with the " Cauſe of ſuch taking) left at the chief Manſion-houſe, or other moſt " notorious Place on the Premiſſes charged with the Rent diſtrained for, " Replevy the ſame, with ſufficient Security to be given to the Sheriff " according to Law; that then after ſuch Diſtreſs and Notice as afore- " ſaid, and Expiration of the ſaid five Days, the Perſon diſtraining ſhall " and may with the Sheriff, or Under-Sheriff of the County, or with the " Conſtable of the Hundred, Pariſh, or Place where ſuch Diſtreſs ſhall " be taken (who are hereby required to be aiding and aſſiſting therein) " cauſe the Goods and Chattels ſo diſtrained to be appraiſed by two
*Page 113 * " ſworn Appraiſers (whom the Sheriff, Under-Sheriff, or Conſtable, are " thereby impowered to ſwear) to appraiſe the ſame truly, according to " the beſt of their Underſtanding; and after ſuch Appraiſement ſhall and " may lawfully ſell the Goods and Chattels ſo diſtrained, for the beſt " Price that can be gotten for the ſame, towards Satisfaction of the Rent " for which the ſaid Goods and Chattels ſhall be diſtrained, and of the " Charges of ſuch Diſtreſs, Appraiſement and Sale, leaving the Overplus " (if any) in the Hands of the Sheriff, Under-Sheriff, or Conſtable, for " the Owner's Uſe.

" And that upon any Pound-breach or Reſcous of Goods or Chattels " diſtrained for Rent, the Perſon or Perſons grieved thereby, ſhall, in " a ſpecial Action upon the Caſe, for the Wrong thereby ſuſtained, re- " cover treble Damages and Coſts of Suit againſt the Offender or Offend- " ers in any ſuch Reſcous or Pound-breach, any or either of them, or " againſt the Owners of the Goods diſtrained, in caſe the ſame be after- " wards found to have come to his Uſe or Poſſeſſion.

" Provided, that in caſe any ſuch Diſtreſs and Sale be made by Virtue " or Colour of this Act, for Rent pretended to be arrear, and due, where " in Truth no Rent is arrear, or due to the Perſon or Perſons diſtraining, " or to him or them in whoſe Name or Names, or Right, ſuch Diſtreſs " ſhall be taken, that then the Owner of ſuch Goods or Chattels diſtrained, " and ſold as aforeſaid, his Executors or Adminiſtrators ſhall and may, by " Action of Treſpaſs, or upon the Caſe, to be brought againſt the Perſon " or Perſons ſo diſtraining, any or either of them, his, or their Executors " or Adminiſtrators, recover double the Value of the Goods or Chattels ſo " diſtrained and ſold, together with full Coſts of Suit.

" Alſo the ſame Act impowers any Perſon, having Rent arrear, to ſeiſe " and ſecure any Sheaves or Cocks of Corn, or Corn looſe, or in the Straw, " or Hay in any Barn or Granary, or upon an Hovel, Stack or Rick, or " upon any Part of the Land charged with ſuch Rent, or to lock up or de- " tain the ſame in the Place where the ſame ſhall be found, in the Nature of " a Diſtreſs, till the ſame ſhall be replevied, upon ſuch Security to be " given as aforeſaid; and in Default of replevying the ſame within the " Time aforeſaid, to ſell the ſame after ſuch Appraiſement thereof to be " made; ſo as ſuch Corn, Grain, or Hay, be not removed by the Perſon " diſtraining, to the Damage of the Owner thereof, out of the Place " where the ſame ſhall be found and ſeiſed; but be kept there *as impound-* " *ed*, till the ſame ſhall be replevied or ſold, as aforeſaid.

4 Mod. 231, 232. *Salter* and *Brundſen.*

An Action was brought, wherein the Plaintiff declared againſt *A.* and *B.* *in Cuſtod' Mar'*, *&c. de eo quod ipſi*, ſuch a Day and Year, *apud*, *&c. in Com' prædict' vi & armis*, *&c. bona & catalla*, *viz. Quadraginta quarteria Hordei ipſius* C. (*Pl.*) *ad valentiam* 40 *Librarum adtunc & ibidem invent' nomine Diſtrictionis pro Redditu per ipſum* C. *præfat'* A. *ſuper dimiſſion' Meſſuag' & quarundem Terrar' eidem* C. *per ipſium* A. *ante tunc' fact' debit' & in arretro fore ſuppoſit' & prætenſ. colore cujuſdam Actus Parliamenti in hujuſmodi caſu nuper edit' & proviſ. ceper' & diſtrixer' & bona & catalla illa ſic diſtrict' adtunc & ibidem detinuer' quoſq; Poſtea ff. 23. die*, *&c. præd' bona & catalla colore actus illius vendider' & diſpoſuer' ubi revera & in facto tempore captionis bonorum*

rum & catallor' prad' aut tempore venditionis eorundem nullus redditus per ipſum C. *eidem* A. *debit' aut in Arretro fuit, & alia enormia, &c.* B. One Defendant pleads Not guilty, and Iſſue thereupon, and Judgment is given againſt the other Defendant by Default, *&c.* and it was now moved in Arreſt, *&c.* that there muſt be a Leſſor and Leſſee to bring this Caſe within the Act, and that if there be no Demiſe, this Act gives no Remedy; and here no Demiſe is ſufficiently ſet forth in the Declaration; nor is it ſaid that the Goods were diſtrained for Rent arrear, but that they were taken *nomine diſtrictionis*, which is not a good Averment that they were diſtrained; but *per Cur'*, the Declaration is good.

* In Trover, on Not guilty pleaded, it was found, that *A.* was ſeiſed in Fee of certain Lands lying in two Hundreds, and demiſed them to the Plaintiff's Father for two Years at 40*l. per Annum* Rent, and that for 50*l.* arrear of Rent, the Defendant, by Order of the Bailiff or Steward of *A.* who was beyond Sea, diſtrained the Goods in the Declaration, being *Levant* and *Couchant* upon the Lands, and gave Notice thereof to the Plaintiff, ‡ who did not replevy them; and that after five Days after ſuch Notice, the Defendant, with the Conſtable of one Hundred, in the Preſence of the Conſtable of the other Hundred, cauſed the ſaid Goods to be appraiſed by two Perſons, ſworn for that Purpoſe, by the Conſtable of one Hundred, in the Preſence of the Conſtable of the other Hundred; and that he after ſold ſome Part, but not to the Value of the Rent arrear, and carried away the other Goods in order to ſell, when he ſhould have an Opportunity, *& Si, &c.* The firſt Exception taken to the Verdict was, that it was not found, that the Goods were ſold with the Concurrence of the Sheriff or Conſtable, who ought to be preſent as well at the Sale as at the Appraiſement; becauſe if any Overplus, it is to be left in their Hands. 2*dly*, That it was not found the Goods were ſold for the beſt Price that could be gotten; and if ſold at an Under-rate, the Party ſhall not be concluded. 3*dly*, That it was not found that the Defendant had any Direction to ſell the Goods, but only to take them, and it may be the Landlord would have kept them ſtill as a Diſtreſs; but principally it was inſiſted, that Notice to the Plaintiff himſelf, who was Owner of the Goods, was not ſufficient, but it ought to have been left at the moſt notorious Place, by the expreſs Words of the Act; and ſo the Authority given by this Act not purſued; and then he is a Treſpaſſer *ab initio*, as he who works a Diſtreſs; and the Notice ought to have been given to the Tenant of the Land, becauſe he might have paid the Rent and ſaved the Goods; or if not, he might have replevied them, which he might have done, though he were not the Owner thereof; alſo the Goods are not duly appraiſed, for they were appraiſed by two Perſons, ſworn by the Conſtable of one Hundred only; and though it were in the Preſence of the Conſtable, yet that was not ſufficient, becauſe this Diſtreſs was in the Nature of an Execution; and being taken in ſeveral Hundreds, the Conſtables of both Hundreds ought to have cauſed the Appraiſement to be made; this Act being an Authority to them both for that Purpoſe, where the Diſtreſs happens to be in two Hundreds, the Conſtable of one Hundred having no Power over the Goods taken in another Hundred, out of his own; but *per Cur'*, This Statute was made for the Benefit of the Landlord, not of the Tenant; and therefore Notice to the Owner of the Goods was ſufficient; for the only Reaſon of directing the Notice to be left at the Manſion-houſe was, that the Owner might have Notice by the Tenant to replevy them, and no Need of Notice to both, becauſe either of them might replevy them; and as the Owner of the Goods is principally concerned, Notice to him is much the beſt; and though the Diſtreſs be taken in two Hundreds, yet it is but one Diſtreſs taken at one Time, and for one intire Rent; and both Conſtables being preſent, there is a ſufficient Concurrence of both, though one only adminiſter the Oath, for two Oaths were not to be adminiſtred; and the chief Deſign of directing the Preſence of the Conſtable, was for the Sake of the Landlord, to prevent

* Page 114 4 Mod. 385. to 395. *Walter* and *Rumball.* Comb. 336. S. C. Ld Raym 53, 55. Salk. 247. pl. 1. 12 Mod. 76.

‡ Who was the Owner of the Goods diſtrained, tho' not the Tenant of the Land.

vent any Breach of the Peace; and the Preſence of the other Conſtable made it his Act, though he were out of his own Hundred; for the Statute to this Purpoſe gives him Power to act in any Place; and adjudged for the Defendant.

If a Landlord comes into a Houſe, and ſeiſes upon ſome Goods as a Diſtreſs, in the Name of all the Goods in the Houſe, that is a ſufficient
* Page 115 * Seiſure of all; and though by the Common Law the Landlord was to remove them in a convenient Time; yet ſince the Statute 2 *W.* & *M. cap.* 5. they are to be removed immediately, except Corn or Hay, though the Things in their own Nature are not eaſily, or without Damage removeable,
6 Mod. 214. *per Holt* C. J. Ld Raym. 54. as Barrels of Beer, *&c.* (*a*)

2 Ld. Raym. 1424. Barnard. K. B. 34. 2 Stra. 717, 851. Fitzgib. 85. 2 Stra. 1040, 1272. 10 Mod. 265, 266.

(*a*) By 11 *Geo.* 2. c. 19. ſ. 10. they may be ſecured and ſold on the Premiſſes chargeable with the Rent.

(E) Where a Diſtreſs ſhall be ſaid to be wrongful and exceſſive; and herein of the Remedy which the Party injured hath.

This Statute made 52 H. 3. c. 4 *vide* BY the Statute of *Marlbridge*, Diſtreſſes muſt be reaſonable, and not too great.

alſo 51 H. 3. St. 4. the Statute *De Diſtrictione Scaccarii*; and if the Landlord takes an unreaſonable Diſtreſs, an Action lies upon this Statute, but not an Indictment or Information, becauſe a private Offence. Mod. 71, 288. Lev. 299. Raym. 205. Vent. 104. Fitzgib. 85, 86. No Diſtreſs for Homage or Fealty ſhall be ſaid to be exceſſive, for the High Eſteem theſe are of in the Law; but *Q. & vide* 42 *E.* 3. 26. 4 Co. 8. b. *Bevil*'s Caſe, 2 Inſt. 107. where, notwithſtanding it is ſaid, that the Statute of *Marlbridge* is general, *vide* 13 H. 4. Fitz. Tit. Avowry 239 where it was held, that a Diſtreſs of more than the Value ſhall not be ſaid exceſſive, for the Expences of Knights of Parliament; becauſe the King is in a Manner Party.

41 E. 3. 26. 1 Rol. Abr. 674. If forty Sheep are taken for 2 *d.* and ſixteen Oxen for 9 *d.* this is exceſſive.

29 E. 3, 24. Rol Abr. 674. So if two Oxen are diſtrained for four Pair of Gloves, ten Sheep for one Pair, and ten for another, it is an exceſſive Diſtreſs.

8 H. 4. 15. Vent. 183. S. P. But if a Man takes five Horſes joined in a Cart for 3 *d.* Rent, this is not exceſſive for the Intirety.

2 Inſt. 107. So if the Lord diſtrain an Ox or an Horſe for a Penny, if there were no other Diſtreſs upon the Land holden, the Diſtreſs is not exceſſive; but if there were Sheep or Swine, *&c.* then the taking of the Ox or Horſe is exceſſive, becauſe he might have taken a Beaſt of leſs Value.

Moor 7. pl. 26. Cro. Eliz. 13. S. C. Bro. Diſtreſs 98. but now *vide* 17 Car 2. c. 7. by which it is If for 10 *l.* Rent due at one Day, a Man diſtrains Goods of the Value of 40 *s.* only, and at the Time of taking the Diſtreſs there are Goods of a ſufficient Value upon the Premiſſes, he cannot, for the ſame Rent, diſtrain again; for it was his Folly, that at the firſt he diſtrained no more; but if there be Rent in arrear at ſeveral Days, a Diſtreſs may be taken for what was due at the other Days.

enacted, that where the Value of the Cattle diſtrained ſhall not be found to be to the full of the Arrears diſtrained for, the Party, to whom the Arrears were due, his Executors or Adminiſtrators, may from Time to Time diſtrain again for the Reſidue of the ſaid Arrears.

If

If a Diſtreſs be taken of Goods without Cauſe, the Owner may reſcue them. Co. Lit. 47. b. but a Stranger cannot.

39 E. 3. 35. b. 1 Rol. Abr. 673. If a Man diſtrains my Cattle, together with the Cattle of *J. S.* without Cauſe, *J. S.* or I may juſtify the Reſcue of all. 39 E. 3. 35. b. *per Thorpe,*

But if a Diſtreſs be taken without Cauſe, and put into a Pound, the Owner cannot break the Pound and take them out, becauſe they are in the Cuſtody of the Law. Co. Lit. 47. b. And. 31. S. P. N. Bendl. 30.

pl. 48. S. P. *vide* Stat. 2 W. & M. Seſſ. 1. c. 5. and Co. Lit. 47. where the Writ *de parco fracto* will lie. F. N. B. 100. Winch 80, 81.

* If the Lord, or another that has a Rent, diſtrains ſeveral Times for his Service or Rent, where none is in arrear, the Tenant may by the Common Law have an *Aſſize de Sovent Diſtreſs.* * Page 116 F. N. B. 178. But if the Lord diſtrains for

Homage or Fealty ſo often, that the Tenant cannot manure his Land, yet the Tenant ſhall not have an *Aſſize de, &c.* 4. Co. 8. b.†

† But may he not in each Caſe bring Treſpaſs?

This Action lay at Common Law, in which the Writ is General and Count Special, that the Lord diſtrained, *&c.* and Judgment, not that the Demandant *recuperet Seiſinam,* for he hath that, but *quod Teneat abſque multiplici diſtrictione.* 8 Co. 50. a. b.

(F) Of diſtraining Things Damage-feaſant.

SHocks of Corn may, by the Common Law, be taken Damage-feaſant. 21 H. 7. 39. b. Lat. 8. S. P. admitted *per Cur'* Fitz. Avowry 363. S. C. Bro. Diſtreſs 30. S. C.

A Greyhound may be taken Damage-feaſant running after Conies in a Warren; ſo may a Ferret brought into a Warren. 2 E. 3. Fitz. Avowry 182. Rol. Abr. 664.

But if a Man brings Nets and Gins through my Warren, I cannot take them out of his Hands. 7 E. 3. Rol. Abr. 664. Cro. Eliz. 552. S. P.

If Men are rowing upon my Water, and endeavouring with their Nets to catch Fiſh in my ſeveral Piſcary, I may take their Oars and Nets, and detain them as Damage-feaſant, to ſtop their further Fiſhing. Cro. Car. 228. but adjudged he could not cut their Nets.

If a Man rides upon my Corn, I cannot take his Horſe Damage-feaſant. 7 E. 3. Avowry. Rol. Abr. 664. but *per* Sid. 440. it was ſaid by the Chief Juſtice, that the Horſe upon which one is riding may be diſtrained Damage-feaſant; and it ſeems he ſhall be led to the Pound with the Rider upon him. See Vent. 36.

Rol. Abr. 665. *Robinſon* and *Waller, per totam Curiam*, Rol. Rep. 449. S. C. and S. P. *per* two Juſtices.

If a Man takes my Cattle, and puts them into the Land of another Man, the Tenant of the Land may take theſe Cattle Damage-feaſant, though I who was the Owner was not privy to the Cattle's being Damage-feaſant, and he may keep them againſt me till Satisfaction of the Damages.

Co. Lit. 161. 9 Co. 22. a. S. P. that the Owner of the Soil is not obliged to take the Cattle Damage-feaſant, but may chaſe them out with a little Dog *Vide* 4 Co. 38. b. 2 Rol. Abr. 566. pl. 15.

If a Man coming to diſtrain Damage-feaſant, ſees the Beaſts on his Soil, and the Owner, on Purpoſe, chaſes them out before they are taken, he cannot diſtrain them.

30 E. 3. 27. *vide* Head of *Common*.

A Commoner may juſtify the Taking of the Cattle of a Stranger upon the Land Damage-feaſant.

* Page 117.

* So if a Man hath Common for ten Cattle, and he puts in more, the Surpluſage above the Ten may be taken Damage-feaſant.

46 E. 3. 12. b. Bro. Avowry 29. S. C.

Co. Lit. 142. 7 Co. 7. a. S. P. 9 Co. 66. a. S. P.

A Man may diſtrain Cattle Damage-feaſant in the Night, for otherways, perhaps, the Cattle will be gone before he can take them.

2 Jon. 193.

If Turfs lie upon a Common Damage-feaſant; though for this a Commoner may diſtrain them, yet he cannot burn them.

(G) Of Diſtreſſes for Amerceme--s.

Rol. Abr. 665, 6. Rol. Rep. 201. 11 Co. 45. a. 1 Co. 41. a. Cro. Jac. 382. 8 H. 7. 15. pl. 12. 10 H. 6. 7. *cont.* 11 H. 7. 14. a. 21 H. 7. 40. b. Doct. & Stud. 74.

OF common Right, a Diſtreſs is incident to every Fine and Amercement in a Sheriff's Torn or Court-Leet, whether the ſame belong to the King or to a Subject; if the Offence, for which they were impoſed, be of common Right incident to the Juriſdiction of ſuch Courts.

Vent. 105. Raym. 204. 2 Keb. 701, 739, 745. By the Report of the Caſe in *Vent.* it is ſaid the Court inclined, that where a Cuſtom only enabled to ſet a Fine, it cannot be diſtrained for without a Cuſtom; alſo in Raym. it is ſaid by *Twiſden*, that when a Duty is raiſed by Cuſtom, a Diſtreſs for that Duty muſt be maintained by the like Cuſtom.

But if ſuch Offences were only the Neglect of a Duty created by Cuſtom, it is queſtionable whether it doth not require the like Cuſtom for a Diſtreſs, though the Duty be of a publick Nature; as if there be a Leet belonging to the Manor of *A.* and by Cuſtom, Time out of Mind, the Inhabitants of *B.* have uſed to ſend a Conſtable to the ſaid Leet, and they make Default, upon which they are fined by the Steward; and whether a Diſtreſs could be taken for this Fine, without a ſpecial Cuſtom to diſtrain, was doubted; and the Caſe adjourned, no ſpecial Cuſtom to diſtrain being alledged.

Rol Rep 76. 11 Co. 44 b. 2 Hawk P. C. 60.

But if it be for the private Benefit of a Subject, no Diſtreſs is incident to it without a ſpecial Cuſtom.

The

Diſtreſs.

The Sheriff or Lord of a Leet may, for ſuch Fines or Amercements, diſtrain the Goods of the Offender in (*a*) any Lands within the County or Precinct of the Leet, of whomſoever they ſhall be holden, except (*b*) only in ſuch Lands which ſhall be in the King's Hands; theſe being wholly out of the Juriſdiction of ſuch Courts.

(*a*) 2 H. 4. 24. b. 47 E. 3. 13. a. Bro. Leet, 28, 41. Fitz. Avowry, 194.

Rol. Abr. 670. 2 Inſt. 104. (*b*) 47 E. 3, 12, 13. Fitz. Diſtreſs 15. Rol. Abr. 670.

And ſuch a Diſtreſs may be taken in the Highway, for the Statute of *Marlbridge*, *cap.* 15. which prohibits the Taking of a Diſtreſs there, is to be intended only of Diſtreſſes taken for Services due by way of Tenure of Lands.

2 Inſt. 131. 47 E. 3. 13. And. 72.

Such Fines and Amercements being for a perſonal Offence, no Stranger's Beaſt can lawfully be diſtrained for them, though they have been *Levant* and *Couchant* on the Lands of the Offender.

47 E. 3. 13. a. 41 E. 3. 26. b. Bro. Diſtreſs 3 F. N. B. 100.

Owen 146. Noy 20. *contra.* Rol. Abr. 669. pl. 20.

It ſeems to be agreed, that where any ſuch Court is in the King's Hands, the Goods diſtrained for ſuch Fines and Amercements may lawfully be ſold, after they have been kept a reaſonable Time, as the Space of ſixteen Days; and it ſeems the better Opinion, that where any ſuch Court is in the Hands of a common Perſon, if the Goods were diſtrained for an Offence of a publick Nature, they may be ſold of common Right, without any ſpecial Cuſtom for that Purpoſe.

Hetley 62. Finch 476. 3 H. 7. 46. b. * Page 118 8 Co. 41 b. 1 Rol. Rep. 76. Noy 17. 1 Bull. 53.

No Bailiff can lawfully diſtrain for any ſuch Fine or Amercement, without a ſpecial Warrant for ſo doing; which muſt be ſet forth by him in an Avowry or Juſtification of ſuch a Diſtreſs.

3 Mod. 138. Cro. Eliz. 698. 748. Moor 574. 2 Keb. 745. Salk. 107. pl. 2.

Dower.

DOWER is the Part of the Huſband's Eſtate that comes to the Wife upon the Death of the Huſband.

Dower by the Civil Law, was the Portion the Wife brought to her Huſband, either in Land or Money, whereof the *Naturale Dominium* belonged to the Wife, and the *Dominium Civile* to the Huſband; ſo that the Huſband had only the *Uſus fructus* during his Life in Things immoveable, but could not alien them; in Things moveable he might alien them, but muſt reſtore to the Value: Theſe, upon the Diſſolution of the Marriage, by the Death of the Huſband, or Divorce came back to the Wife. *Vide* Vin. 249. Corvin. *lib.* 23. *tit.* 3. Honorius 114, 115. Donations *inter ſponſum & ſponſam propter Nuptias* began about the Time of *Conſtantine*, and were made before Marriage; but by the *Juſtinian* Conſtitution they were good after Marriage, and were Gifts from the Huſband to the Wife, which, upon the Diſſolution of the Marriage, came back to the Huſband, as the Dower did to the Wife. Vin. 245. Inſt. of Imperial Law 43, 117, 118, 119. Among the Feudiſts, the Rule was, *Non Uxor Marito ſed Uxori Maritus affert*; and the Reaſon was, that the Huſband and eldeſt Son of the Family being brought up in Military Exerciſe, the Wife and youngeſt Sons tilled and improved the Land, and in their Expeditions found Proviſions for the Army; and having the third Part in Labour, ſhe had the third Part of the Feud for the Maintenance of her and her younger Children during her Life. *Spelm.* Tit. *Dearium*, 175.

Dower.

Co. Lit. 33. b. 39 b.

Dower is of five Sorts: 1. At Common Law. 2. By Cuſtom. 3. *Ad oſtium Eccleſiæ.* 4. *Ex aſſenſu Patris.* 5. *De la pluis Beal.* We ſhall begin with the firſt and chief.

Co. Lit. 30. b. Perk. 301.

Dower, at Common Law is the third Part of all the Lands whereof the Huſband has been ſeiſed during the Coverture, of ſuch an Eſtate as the Children by ſuch Wife might, by Poſſibility, have inherited, and to which by the Death of the Huſband, the Wife is intitled for her Life. For the better Underſtanding thereof, I ſhall conſider it under the following Heads:

(A) Who may have Dower, and who not; and herein of the Age, and other Diſabilities of the Husband or Wife. 120.

(B) Of what Eſtate a Woman may have Dower. 122.

1. Of the Quarentine. 122.
2. Of the different Kinds of Inheritances. 123.
3. Of the Nature and Quality of ſuch Eſtate, whether ſole, joint, or in common. 125.

*Page 119 * 4. Of its Continuance; wherein of Eſtates conditional, ſuſpended, determined or extinguiſhed; and herein of Remitter to the Heir, and Recoveries by Title Paramount. 127.

5. Of the Value and Improvement of the Huſband's Eſtate, either in his Life-time, or after his Death. 120.

(C) Of the Things requiſite to the Conſummation of Dower, viz. Marriage, Seiſin, and the Death of the Husband. 129.

1. Of the Marriage, how long it muſt continue; and herein of the ſeveral Sorts of Divorces. 129.
2. Of the Seiſin, either in Fact or in Law; and herein of the Seiſin in Fact, as it is continuing, or not continuing, as inſtantaneous. 131.
3. Of the Death of the Huſband. 132.

(D) Of the Aſſignment of Dower. 133.

1. By what Perſons. 133.
2. Of the Manner; and herein of aſſigning of it by Metes and Bounds, &c. 134.
3. By what Court. 135.

(E) Where the Wife ſhall have her Election to be endowed of one Thing or another, and where of both; and herein of Endowment de novo, and the Dos de Dote. 137.

(F) What ſhall be a Bar of Dower, and what not; and herein of Acts done or ſuffered by the Husband ſolely,

or by the Husband and Wife jointly, or by the Wife solely, either during the Coverture, or after; and herein of Elopement, and Detinue of Charters, or Heir. 139.

(G) Where the Wife shall hold her Dower, subject to the Charges of her Husband, and where not; and herein of the Privileges of Tenant in Dower, and the Nature of her Estate as to Alienations made, or Actions brought by or against her. 144.

(H) To whom the Tenant in Dower shall be attendant, and by what Services. 145.

(I) Of the Proceedings and Damages in Dower unde nihil habet. 146.

(K) Of the Admeasurement of Dower. 151.

* (A) Who may have Dower, and who not; and herein of the Age, and other Disabilities of the Husband or Wife.

* Page 120

AS to the Age of the Husband it is not material, but only the Age of the Wife; and if she be of the Age of nine Years or more at the Death of her Husband, she shall have Dower, though her Husband be then but four Years old; the Reason they would not allow Women before this Age to demand Dower seems from their Incapacity of having Issue sooner.

Lit. Sect. 36. Co. Lit. 33. a. *Dott. & Stud. lib.* 1. *cap.* 7. *F. N. B.* 149. 1 Rol. Abr. 675. 2 Inst. 234. Leon. 53. Brook, Tit. Dower, 36, 45.

As also the Support of her Children is Part of the Consideration whereon this Allowance of Dower is founded; for, as on the one Hand it would be unreasonable to extend it to such Women who are incapable of performing the Conditions; so on the other Hand it would not be reasonable to exclude Women of that Age, by Reason of the Incapacity of their Husbands; since it was the Act of God interposed to prevent their Attaining a Capacity, which ought in no Sort to prejudice the Wife; much less can the Husband by his own Act prevent his Wife of Dower, if she attains the Age of nine Years during the Coverture; and therefore though he aliens his Land before, yet if she after arrives to nine Years of Age, her Title is now consummate *ab initio*, and over-reaches his Alienation; for Dower being intended a Provision for the Wife and Children, whenever she attains such an Age, as the Law adjudges her capable of Children, nothing farther is required; and therefore though the Husband die before he or his Wife are of Age of Consent, yet if she be nine Years old, this is a sufficient Marriage to intitle her to Dower, and so ought to be certified by the Bishop.

13 Co. 22. Co. Lit. 33. a. Dyer 313. pl. 92, 369. pl. 48. Co. Lit. 33. a.

If a Man marries a Woman of 100 Years old, and dies, she shall be endowed; for the Law cannot determine the precise Time of the Failure of her Capacity to have Issue, which may vary according to the Strength and other Circumstances of the Woman.

Co. Lit. 40. Rol. Abr. 675. S. P.

If a Woman Alien, be she Friend or Enemy, marry a Subject, she shall not be endowed, because by the Policy of the Law all Aliens are disabled

7 Co. 7. Co. Lit. 31. a.

But by the Law of the Crown, if the King marry an Alien ſhe ſhall be endowed, becauſe Princes cannot marry according to their Dignity, unleſs to Perſons abroad.

abled from acquiring any Freehold amongſt us; but for this *vide* Head of *Aliens*.

If a Jew born in *England* marry a Jew born alſo here, and the Huſband is converted to the Chriſtian Faith, and after purchaſe Lands, and enfeoffeth the other, and dieth, the Wife ſhall not have Dower.

Co. Lit. 31. For R. 1. erected a Court where all the real and perſonal Eſtate of the Jews was regiſtered, and upon the Death of any Jew came to the King, though it was redeemable by their Children paying a Fine; and in this Court ſhe could not demand Dower but againſt a Jew, and ſhe could not demand it at Common Law againſt a Chriſtian; and for this Reaſon it ſhews if the Huſband had not aliened, yet ſhe could not recover againſt the Heir of a Chriſtian. *Hollingſhead*, Vol. 3. Page 15.

Women Papiſts ſeem not diſabled to demand and recover Dower within the Words of 11 & 12 *W.* 3. *cap.* 4.

* Page 121 * If a Woman be attainted of Treaſon or Felony †, ſhe ſhall not have her Dower, but if pardoned ſhe ſhall be received to demand it, tho' the Huſband has aliened in the mean Time, becauſe by the Marriage and Seiſin of her Huſband ſhe was intitled to Dower, and when the Impediment is removed, her Capacity is again reſtored.

Perk. 349. Co. Lit. 33. a. 13 Co. 23. But if ſhe be only convicted of Treaſon or Felony, this ſeems no Impediment of her Dower, for this forfeits no Freehold, nor Title to any Freehold, tho' the King ſhall have the Profits during the Conviction. † See *infra*.

At Common Law if the Huſband was attainted of Treaſon, Murder, or Felony, the Wife loſt her Dower, becauſe it was a Condition annexed to all Feuds, that the Feuditary ſhould not commit ſuch Crimes.

Perk. 308, 387. F.N.B. 150. Brook 82. Co. Lit. 40. b. Plow. 262.

But afterwards the Statute 1 *E.* 6. *cap.* 12. ordained that in all Caſes where the Huſband was attainted of Treaſon or Felony, their Wives ſhould notwithſtanding have their Dower; but 5 *E.* 6. *cap.* 11. repeals that in all Caſes of Treaſon; the Words of which Act being general, exclude the Wife as well in Caſe of Petit Treaſon as in Caſe of High Treaſon; but in Caſe of Miſpriſion of Treaſon, or Attainder of Felony only, the other Act ſtands in Force, and therefore they ſhall have Dower in all ſuch Caſes.

Stanf. 195. Co. Lit. 37. a. 392. b. 13 Co. 19. 3 Inſt. 216. Finch 71. Moor 639. Dyer 97, pl. 49. 263. pl. 36.

If the Huſband ſeiſed of Lands in Fee makes a Feoffment, and then commits Treaſon, and is attainted of it, the Wife ſhall not recover Dower againſt the Feoffee.

Bendl. 56. *Gate*'s Caſe. Dyer 140. pl. 42. S. C. Co. Lit. 111. a. S. P. And tho' the Huſband had been pardoned, yet ſhould not the Wife recover Dower. Leon. 3. *Maynie*'s Caſe; but of Land purchaſed by the Huſband after the Pardon, the Wife ſhall be endowed. Perk. 391.

The (*a*) Wife of a *Felo de ſe* ſhall have Dower.

(*a*) Plow. 261. a. 262. a. Dame *Haſe*'s Caſe.

So (*b*) if the Huſband be outlawed in Treſpaſs, or any Civil Action; for this works no Corruption of Blood, or Forfeiture of Lands.

(*b*) Brook 82. Perk. 388. Co. Lit. 31. a.

So (*c*) if the Huſband be attainted of Hereſy, yet his Wife ſhall be endowed; for this works no Corruption of Blood, or Forfeiture of Lands, being only a ſpiritual Offence.

(*c*) Co. Lit. 31.

If

If the Huſband or Wife be excommunicated, yet the Wife's Dower is not hurt, becauſe being a ſpiritual Puniſhment only, it does not affect their temporal Poſſeſſions.

If the Huſband be attainted in the *Præmunire*, my Lord *Coke* ſays that ſhe ſhall be endowed, Co. Lit. 31. a.

After the making of the Statute 1 *E.* 6. *cap.* 12. it ſeems to have been doubted whether the Wife ſhould not loſe her Dower in caſe of any new Felony made by Act of Parliament; and therefore, where ſeveral Offences have been made Felony ſince, Care has been (*d*) taken to provide for the Wife's Dower.

(*d*) As in 5 Eliz. c. 14. which makes a ſecond Forgery, Felony without Clergy. So 8 Eliz. c. 3. which makes it Felony to tranſport Sheep, *&c.* So alſo in 31 Eliz. c. 4. which makes it Felony to embezil the King's Armour to the Value of 20*s.* So in 3 Jac. 1. c. 4. which makes it Felony to ſerve Foreign Princes without firſt taking the Oath of Obedience. So alſo in 1 Jac. 1. c. 31. which makes any one's going abroad with the Plague upon him, Felony; and this Loſs of Dower being only Part of the Judgment by Implication may well be ſaved by an expreſs Proviſo, without any Repugnancy. 3 Inſt. 47, 78, 80, 81, 90.

* If a Villein marry and then the Lord enters, and then the Villein dies, his Wife ſhall be endowed, for the Lord's Title began but by his Entry, and the Wife's Title to Dower began before.

* Page 122 Perk. 313. Co. Lit. 30. But otherwiſe if he had been Villein to the King. If a Freeman marries a Nief, ſhe ſhall be endowed, but her Lord may enter on the Lands during her Life. Co. Lit. 31. a.

If a Woman being a Lunatick kill her Huſband, or any other, yet ſhe ſhall be endowed, becauſe this cannot be Felony in her who was deprived of her Underſtanding by the Act of God; ſo tho' ſhe be of ſound Mind, and refuſed to bring an Appeal of his Death, when he is killed by another, yet ſhe ſhall be endowed; for this is only a Waiver of that Privilege the Law has given her to be avenged of her Huſband's Murderer; ſo it ſeems if ſhe refuſes to viſit and aſſiſt her Huſband in his Sickneſs, yet ſhe ſhall be endowed, for this is only Undutifulneſs, which the Law does not puniſh with the Loſs of her intire Subſiſtence. Perk. 365. Perk. 364.

If an Ideot or Lunatick marry and die, his Wife ſhall be endowed, for this works no Forfeiture at all, and the King has only the Cuſtody of the Inheritance in one Caſe, and a Power of providing for him and his Family in the other; but in both Caſes the Freehold and Inheritance is in the Lunatick, and therefore the Wife dowable. Co. Lit. 31. a. And therefore if Lands deſcend to an Idiot or Lunatick after Marriage, and the King on Office found takes thoſe Lands into his Cuſtody, or grants them over to another as Committee in the uſual Manner; yet this ſeems no Reaſon why the Huſband ſhould not be Tenant by the Curteſy, or the Wife endowed, ſince their Title does not begin to any Purpoſe till the Death of the Huſband or Wife, when the King's Title is at an End; but for this *Quære, et vide Plow.* 263. b. 4 Co. 124, 125.

(B) Of what Eſtate a Woman may have Dower.

1. Of Quarentine.

THIS is a Privilege the Law allows to Women to continue in the Capital Meſſuage or Manſion-houſe, or ſome other Houſe whereof they are dowable, 40 Days after their Huſband's Death, whereof the Day of his Death is accounted one, and during this Time they are to be provided with all Co. Lit. 32. b. 34. b. 2 Inſt. 16, 17. Brook 107. Hob. 153. and

F. N. B. 161. the Writ *de Quarentina habenda.* By the old Law before the Conqueſt, the Widow was to continue in her Huſband's Houſe a whole Year after his Death, within which Time her Dower was to be aſſigned; and if ſhe married before the Year was out, ſhe forfeited her Dower, and whatever her Huſband had left her.

all Neceſſaries at the Expence of the Heir, and before the End thereof to have their Dower aſſigned to them; and this Privilege is confirmed by *Magna Charta, cap.* 7. and ſeems to be only a Compliance with that Decency and Ceremony, Cuſtom has introduced upon ſo melancholy an Occaſion, that Widows, who are ſuppoſed to be under great Affliction, may not be forced to appear abroad, and be put to their Shifts for a Maintenance; and for this Reaſon, if they marry within the 40 Days, their Quarentine ceaſes, for then they have provided for themſelves, and their ſorrowful Condition is ſuppoſed to be at an End.

* Page 123

Dyer 76. pl. 32. *Kettleby's* Caſe.

In a Writ of Dower the Demand was of three Manors, the Tenant pleads in Abatement Entry in Part *puis Darrein Continuance*, and ſhews it in certain; the Demandant replies that her Huſband in his Life-time was ſeiſed in Fee of one of the ſaid Manors, *&c. ſuper quo quidem Manerio ipſe et eadem pet. cohabitabant ut Vir et Uxor uſque Diem obitus ſui*, and * that he died, and this deſcended to the Defendant as Heir, and he entred, and that he and the Demandant continually after the Huſband's Death *hucuſque commorabant et cohabitaverant ſuper dicto Manerio*, and that ſhe claimed at the Will of the Heir, *et non aliter*; and this was held no Plea for the Quarentine, becauſe ſhe did not ſhew the Time of her Huſband's Death in certain, and the 40 Days after.

2. Of the different Kinds of Inheritances.

1. *Of a Uſea * Woman ſhall not be endowed.*

* If it be ſeiſed in *Truſt* for *B.* in Fee, *&c.* the Wife of *B.* ſhall not be endowed in Law or Equity. *Ca. Parl.* 71.

For which *vide* Titles *Curteſy* of *England* and *Uſes*, and *Truſt*.

Perk. 341. Co. Lit. 32. a. Moor 83. Pop. 87. Co. Lit. 144. b.

Of an *Annuity* to a Man and his Heirs, after a Writ of Annuity brought, a Woman ſhall not be endowed; but if a Rent-charge be granted to a Man and his Heirs, and before any Diſtreſs made the Huſband die, and the Wife brings her Writ of Dower, the Heir cannot, by claiming it to be an Annuity, defeat her of her Dower thereof; but if he brings an Annuity, and recovers Judgment before the Wife, then it is become an Annuity *in perpetuum*, and the Wife ſhall be barred.

4 Co. 22. Hob. 216. 5 Co. 116. *Vide* Title *Courteſy* of *England*, and the Reaſons there given.

Of *Copyhold Lands* a Woman ſhall not be endowed, unleſs there be a ſpecial Cuſtom for it; but if there be a Cuſtom to be endowed thereof, then ſhe ſhall have the Aſſiſtance of ſuch Laws as are made for the more ſpeedy Recovery of Dower in general, being within the ſame Miſchief, and therefore ſhall recover Damages within the Statute of *Merton.*

4 Co. 3. Cro. Eliz. 426. Moor, pl. 559. Co. Lit. 33. a. If the Wife of a Copyholder brings Dower in *C. B.* the Lord of the Manor may plead *Ne unques ſeiſie que, &c.* and give the ſpecial Matter in Evidence.

Rol. Abr. 676. Co. Lit. 30. b. 165. a. Perk. 406. 2 Inſt. 17.

Of a *Caſtle for Defence of the Realm*, or of the Homage and Services appertaining to War, a Woman ſhall not be endowed, becauſe of no Service towards her Support and Maintenance, and ſhe is ſuppoſed unable to aſſiſt in the Defence of the Realm; ſo of the Capital Meſſuage, being *caput Baroniæ* or *Comitatus*, a Woman ſhall not be endowed, becauſe this Diviſion would

would leſſen the Grandeur of the Family, and diſable the Heir to ſupport the Dignity of his Character.

Though this ſeems to be the Doctrine of the Books cited, yet it has been lately adjudged that a Woman ſhall have a Dower of the Capital Meſſuage, tho' it be *caput Baroniæ*; the Reaſons given for the Judgment are 1ſt, That the *caput Baroniæ* ſpoken of in the antient Books was held by military Tenure, which is now extinct, and were Caſtles of Defence. 2dly. That the Huſband being made a Baron after the Marriage, this could not deprive the Wife of her Dower in any Thing ſhe was before dowable of; and therefore tho ſhe had accepted 400 *l. per Annum* in Lieu of her Dower, as was pleaded; yet it not appearing to be in Lieu alſo of her Dower in the Capital Meſſuage called *Bromley Hall*, ſhe had Judgment, and this Judgment affirmed in a Writ of Error; alſo the Books before cited agree that of a private Caſtle for Habitation only a Woman may be endowed; ſo of the Capital Meſſuage of her Huſband, if it be not *caput Baroniæ*. Lady *Gerrard* v. Lord *Gerrard*. 3 Lev. 401. Salk. 54, pl. 1. 253. pl. 3. S. C. 5 Mod. 64. S. C. Comb. 352. S. C. Ld. Raym. 72. Skin. 592. pl. 6.

Of *Tithes* Women were not dowable till 32 *H.* 8. *c.* 7. for before that Statute Tithes were not a Lay Fee, but now they are dowable of them. Style's Practical Regiſter 122.

11 Co. 25. Co. Lit. 32. a. 159. a. Rol. Abr. 682. And the beſt Way to aſſign Dower of Tithes is the third Sheaf, or the third Part of the Tithes generally, becauſe it is uncertain what Part of the Land will be ſown; and therefore if the Garbs of any third Part of the Land in certain ſhould be aſſigned, the Tenant may perhaps not ſow that Part at all, and ſo defeat the Dower. How Dower of Tithes of Wool and Lambs is to be aſſigned, *vide* Brownl. 126. 2 Brownl. 143.

Of *Common of Paſture in Groſs*, which is certain, a Woman ſhall be endowed, but not of Common without Number, becauſe it cannot be divided without ſurcharging the Common by two, which before was only in the Power of one by the Grant; and when one has Power by the Grant * to put in as many Cattle as he pleaſes, he alone is made Judge of the Number, which to divide, or delegate to another, would be unjuſt. Perk. 341, 342. F. N. B. 142. Co. Lit. 30. Rol. Abr. 675. * Page 124 11 Co. 45. *Style's* Practical Regiſter 122.

Dower of ſeveral Lands, Meadow and Paſture, and Common of Paſture *cum pertinentiis* in *D.* and upon *Ne unques ſeiſie que* Dower pleaded, and Verdict for the Demandant, it was moved in Arreſt, *&c.* that of Common in Groſs without Number a Woman could not be endowed, which the Court agreed; but here it being after Verdict ſhould be intended common appendant, ſince otherwiſe the Judge could not have directed the Jury to find for the Demandant, though it be not ſaid *eiſdem ſpectans*, and tho' if appendant it was included in *cum pertinent'*, yet it is not *bis petitum*, but only an Enumeration of the ſeveral Things demanded. Cro. Car. 300. *Drake* v. *Pruet*. Jon. 315. S. C. Rol. Abr. 675. S. C.

In Dower the Demand was *de tertia parte Liberæ faldæ*, and held not good for Want of ſetting out in certain, for what Cattle, as to their Number and Kind, and ſo like Common without Number. Godb. 21.

A Woman intitled to Dower of a Manor, in which were Copyholders, demanded her Dower by the Name of certain Meſſuages, certain Acres of Land, and certain Rents, and not by the Name of the third Part of the Manor, and recovered and kept Courts, and granted Copyholds, which the whole Court held to be void, becauſe ſhe had no Manor, having made her Demand, as of a Thing in Groſs; but if the Demand had been of the third Part of the Manor, then ſhe had a Manor, and might have kept Courts and granted Copies. Godb. 135. *Bragg's* Caſe. But for this *vide* Perk. 341, 343, 344. Cro. Jac. 621. Palm. 264. Brook 102. Co. Lit. 32, 165.

Of an *Advowſon*, be it appendant or in Groſs, a Woman ſhall be endowed, for this may be divided as to the Fruit and Profit of it, *viz.* to have the third Preſentation. For which *vide* Perk. 343, 344. F. N. B. 148, 3 Leon. 155.

150. Co. Lit. 32. Cro. Jac. 621. Cro. Eliz. 360. Rol. Abr. 683. Co. Lit. 379. Cro. Jac. 691. Rol. Abr. 685.

Perk. 342. F. N. B. 148. a. Rol. Abr. 675.

Of a *Villein in Groſs* or *Regardant* a Woman ſhall be endowed; as to have the third Day, or Week, or Month's Work of ſuch Villein, and the Writ ſhall be *de Libero Tenemento.*

Co. Lit. 32. a. 164. b. 307. a. Brook 91. 2 Brownl. 143.

Co. Lit. 32. a. 11 Co. 25. Perk. 342, 415. 2 Brownl. 143. Bendl. 120. 4 Leon. 202. F. N. B. 149. Brook 39.

Of a *Mill* a Woman ſhall be endowed, tho' it cannot be divided, and therefore ſhe ſhall have the third Toll-Diſh, or *integrum Molendinum per quemlibet tertium Menſem.*

Lev. 181. *Gilpin* v. *Cookſon.* 2 Keb. 8. S.C.

Dower was brought *de tertia parte* of a Mill, a Kiln-Houſe, *&c.* and Judgment to recover the third Part *in ſeparalitate per Metas et Bundas*; and this Judgment was reverſed upon Error brought, for it ought to have been of the third Part generally, and if *per Metas & Bundas*, none of them can make any Uſe of it.

Perk. 342. *Style*'s Practical Regiſter 122. Co. Lit. 32. Rol. Abr. 676. F. N. B. 149. Plow. 379.

Of a *Bailiwick* a Woman ſhall be endowed, as to have the third Part of the Profits; ſo of a Fair or Market, the third Part of the Stallage; ſo of an Office, as of the Office of the Marſhalſea, to have the third Part of the Profits, and in ſuch Caſes ſhe ſhall be contributory to the third Part of the Charge; ſo ſhe may be endowed *de tertia parte exituum proveniens de Cuſtodia Gaolæ Abbatiæ Weſtmon.* or of the third Part of the Profits of Courts, Fines, Heriots, *&c.*

Co. Lit. 32. a. Plow. 379. b.

A Woman may be endowed of the third Part of the *Profits of a Park-keeper*, or of the third Part of the *Profits of a Dove-Houſe*, or of the third Part of the Profits of a Piſcary, as the third Fiſh, or *tertiam jactum retis.*

* Page 125 * 3. Of the Nature and Quality of ſuch Eſtate, whether ſole, joint, or in Common.

Rol. Abr. 676. Plow. 556. 10 Co. 98. *See poſt. 126, this Caſe and its Reaſons more fully explained, *&c.* and ſee *infra*, N.

The Eſtate, of which the Huſband muſt be ſeiſed, muſt be an Eſtate in Fee-ſimple, Fee-tail General, or where the Huſband is ſeiſed as Heir of the Special Tail, which neceſſarily excludes deſcendible Freeholds; therefore if a Man make a Leaſe for Life, rendring Rent to him and his Heirs, and after marry and die, his Wife ſhall not be endowed of this Rent, becauſe it is but a deſcendible Freehold; nor of the Land, becauſe not ſeiſed during the Coverture.

Saund. 261. Plow. 556. Bulſt. 165. 3 Co. 84. 10 Co. 96, 98.

But if Tenant in Tail bargains and ſells his Land to the Huſband, and his Heirs, the Wife of the Bargainee ſhall be endowed againſt his Heir, but not againſt the Iſſue in Tail; ſo if Tenant in Tail grant all his Eſtate to one and his Heirs, tho' it be of Things which lie merely in Grant, as Rent, Common, Advowſons, *&c.* yet the Wife of the Grantee ſhall be endowed till the Grant be avoided by the Iſſue in Tail; the Reaſon of which Difference between theſe deſcendible Freeholds, and theſe Eſtates made by Tenant in Tail, ſeems to be, that, in the firſt Caſe, the Eſtate in its Creation ſeems to be no greater than a Freehold; but in the other nothing appears to the contrary, but that it may be an abſolute Fee, and till the Iſſue comes in to ſhew it otherwiſe, and claim his Right, it ſhall, to all Intents, be regarded as ſuch; and by conſequence the Wife of ſuch Grantee or Bargainee is well dowable thereof till the contrary appears.

Plow. 557.

If Tenant in Tail be attainted of Treaſon, and the King grant the Land to one and his Heirs, the Wife of the Grantee ſhall be endowed; for the King had a qualified Fee, ſo long as the Tenant in Tail had Iſſue; and this qualified Fee paſſed to the Grantee.

But if Tenant in Tail covenant to ſtand ſeiſed to the Uſe of himſelf for Life, and after to the Uſe of his eldeſt Son in Tail, and after marries, and dies; yet his Wife ſhall be endowed, becauſe when he limits an Eſtate for his own Life, he hath executed all the Power he had over the Eſtate by ſuch Manner of Conveyance, and the Remainder is merely void; and he continues Tenant in Tail, as he was before; ſo if he had covenanted that the Land ſhould deſcend, remain, or come to his Son after his Death; yet his Wife ſhould be endowed; for this is only a Covenant to permit his Son to have what he ought not to hinder him of, and makes no Alteration of the Father's Eſtate.

Cro. Eliz. 279. *Blythman's* Caſe. 2 Co. 72. S. C. Moor, pl. 105. S. C. Yelv. 51. *Freſhwater* verſus *Bois*, Moor, pl. 940. S. C. but if Leſſee for Life leaſes to the Leſſor and his Heirs, or the Heir of his Body, for the Life of the Leſſee, and after the Leſſor dies, living the Leſſee, the Wife of the Leſſor ſhall be endowed, becauſe this amounts to a Surrender. Rol. Abr. 677.

If there be Tenant in Special Tail, Remainder to him in General Tail or Fee, and his Wife die without Iſſue, and he marries again, and dies, his Wife ſhall be endowed; for by the Death of his firſt Wife without Iſſue, he was become Tenant in Tail after Poſſibility, *&c.* which being but an Eſtate for Life was merged by the Acceſſion of the Remainder in Tail or Fee; and ſo his ſecond Wife dowable.

Rol. Abr 677. Brook, 25. Perk. 338.

If *A.* ſeiſed in Fee covenants to ſtand ſeiſed to the Uſe of himſelf and his Heirs, till *C.* his middle Son take Wife, and after to the Uſe of *C.* and his Heirs; and after *A.* dies, and this deſcends to *B.* his Heir, who dies, and then *C.* takes Wife; it ſeems the Wife of *B.* ſhall loſe Dower, becauſe the Eſtate of the Huſband ended by expreſs Limitation made before her Title of Dower began; and therefore her Dower, which is derived out of it, cannot continue longer than the original Eſtate.

Between *Flavil* and *Ventrice*; but Q. for the Court was divided upon it. Rol. Abr. 676. *See *infra* 128, the firſt Note.

* Of an Eſtate to a Man and his Wife, and the Heirs of their two Bodies; if ſuch Wife die, and he marry a ſecond Wife, and die, ſuch ſecond Wife ſhall not be endowed, becauſe the Iſſue by her cannot inherit *per formam doni*.

*Page 126 *Vide* Brook 19, 36. Cro. Jac. 615. Lit. Sect. 53.

8 Co. 36. Co. Lit. 19. a. 2 Inſt. 336. Co. Lit. 31. Leon. 66. 3 Leon. 80. Noy 66. Brook 9. Dyer 41. a. Perk. 302.

The Huſband muſt have the Freehold and Inheritance in him *ſimul & ſemel*, otherwiſe ſhe ſhall not be endowed; therefore if Lands are given to the Huſband for Life, Remainder to *B.* in Tail, Remainder to the Huſband in Fee or in Tail, and he dies living *B.* or any of his Iſſue, his Wife ſhall not be endowed.

Rol. Abr. 677. Perk. 335. Brook 6. *vide* Cro. Eliz. 564. *A.* Tenant for Life, Remainder to Truſtees for ninety-nine Years, Remainder to *A.* in Tail; *A.* dies, his Wife ſhall be endowed, notwithſtanding the intermediate Eſtate for Years. Salk. 254. pl. 4. *Bates's* Caſe. Ld. Raym. 326. * See the next Caſe but one.

If a Leaſe be made for Life, rendring Rent; the Leſſor marries and dies, his Wife ſhall not be endowed either of the Rent or of the Land; not of the Land, becauſe her Huſband was not ſeiſed of the Freehold thereof during the Coverture, and the Rent was but a Freehold for Life; but if a Leaſe be made for Years, rendring Rent, and the Leſſor marries, and dies, his Wife ſhall have Dower of the third Part of the Reverſion, and of the third Part of the Rent, as incident to it; becauſe he had the Freehold and Inheritance in the Land *ſimul & ſemel*, but ſhe ſhall not be endowed of the Rent *per ſe*, merely becauſe her Huſband was not ſeiſed of any Freehold or Inheritance in it; but if no Rent be reſerved on the Leaſe for Years, then *Ceſſet executio* during the Term; and therefore, if a Leaſe be made for Years, Remainder to *J. S.* and his Heirs,

Perk. 348. Brook 44, 60, 89. Co. Lit. 32. a. Perk. 335, 6. Rol. Abr. 678. Brook 6.

Heirs, the Wife of *J. S.* ſhall be endowed; but *Ceſſet executio* during the Time.

But if a Leaſe for Life or Years be made by the Huſband after the Marriage, then his Wife ſhall have her Dower diſcharged of them, as ſhe ſhall from other Charges of her Huſband. Co. Lit. 32. a.

Duncomb v. Duncomb, 3 Lev. 437.

In Dower upon *Ne unques ſeiſie que Dower pleade*, the Caſe was thus: *A.* Tenant for Life, Remainder to *B.* and his Heirs for the Life of *A.* Remainder to the Heirs Male of the Body of *A.* Remainder over; *A.* marries, and dies without Iſſue; and if the Remainder to *B.* and his Heirs, during the Life of *A.* was ſuch an interpoſing Eſtate between the Eſtate for Life to *A.* and the Remainder to him in Tail, that his Wife ſhould not be endowed, was the Queſtion. And for the Demandant it was ſaid, that all the Eſtate was really in *A.* and the Remainder to *B.* for the Life of *A.* was but a Poſſibility, that if *A.* ſhould commit a Forfeiture, then *B.* might take Advantage of it to preſerve the Remainder; and tho', by Reaſon of this Poſſibility, the Eſtate for Life of *A.* is not merged, yet the Tail is executed to ſuch Purpoſe that his Wife ſhall be endowed; but the Court, on the firſt Argument, gave Judgment againſt the Demandant; the *(a)* Reaſon ſeems to be, becauſe the Huſband was not ſeiſed of the Freehold and Inheritance *ſimul & ſemel.*

(*a*) The Books give no other Reaſon for this Diſtinction, but that it would be giving the Wife a larger Eſtate than the Husband had, whereas ſhe is in only in the *Per*, and Continuance of her Husband's Eſtate*.

* The Remainder to *B.* was an intervening veſted Eſtate, and not a Poſſibility. *Vide Fearne*, 3d Edition, 272 This Caſe allowed to be good Law, by Lord *Hardwicke*, in the Caſe of *Hooker* and *Hooker*, Rep. Temp. Hard. 13.

If the Huſband is ſeiſed of a joint Eſtate, and dies, his Wife ſhall not be endowed; as if Lands are given to two Men and their Heirs, or the Heirs of their two Bodies, and one of them dies, his Wife ſhall not be endowed, but it ſhall go to the Survivor, who is then in from the firſt Feoffor or Donor, and may plead it as an original Feoffment or Gift to *himſelf; and ſo is paramount to her Title of Dower, which is not compleat till her Huſband's Death.

* Page 127

3 Co. 27. Co. Lit. 30. a. 37. b. Brook 4, 84. Cro. Car. 191. which laſt Book ſays it was the antient Courſe in Mortgages, to make the Eſtate to Two, in order to prevent the Mortagee's Wife of Dower ‡.

‡ If the Principal and Intereſt are paid at any Time, Equity will relieve againſt the Claim of Dower, by the Widow of the Mortgagee, therefore it would be abſurd to ſet up ſuch Claim.

Perk. 334.

So if Lands are given to two Men, and the Heirs of the Body of one of them, and he who hath the Tail marries, and dies, leaving Iſſue; yet his Wife ſhall not be endowed, but the Survivor ſhall take Place; and tho' he die after, yet ſhall not the Wife be endowed, becauſe the Huſband, during the Coverture, was not ſeiſed of an Eſtate whereof ſhe was dowable.

Cro. Eliz. 503. Broughton v. Randal. Noy 64. S. C. But the Caſe, as reported, is upon another Point.

Father and Son Jointenants, to them and the Heirs of the Son, were both hanged in one Cart; (for Felony, as it muſt be) the Wife of the Son brought Dower, and upon *Ne unque ſeiſie que Dower pleaded*, this Matter was given in Evidence; and further, that the Son ſurvived,‡ as appeared by ſhaking his Leg; and adjudged ſhe would be dowable.

‡ I think there is a Caſe in the Civil Law, where Father and Son were loſt at Sea in the ſame Ship, and adjudged the Son ſurvived, as being according to the Courſe of Nature, and it was reaſonable to ſuppoſe (being of full Age) he was able longer to reſiſt the Force of the Waters, than a Father, who, being much older, might be preſumed to be weaker.

Of

Of a Tenancy in Common a Woman ſhall be endowed, for there no Survivorſhip takes Place, but each Moiety deſcends to the reſpective Heirs of the reſpective Tenant in Common; and in ſuch Caſe a Dower ſhall be aſſigned in Common too, for ſhe cannot have it otherwiſe than her Huſband himſelf had. Co. Lit. 34. b. 37. a. Lit ſ. 44, 45.

4. Of its Continuance; wherein of Eſtates conditional, ſuſpended, determined, or extinguiſhed; and therein of Remitters to the Heir, and Recoveries by Title Paramount.

As to its Continuance; in ſome Caſes this is material, and in ſome not; and therefore if Donee in Tail of Rent or Land marries, and dies without Iſſue, and the Donor enters; yet the Wife of the Donee ſhall be endowed, tho' in this Caſe the Eſtate-tail has no Continuance; for to have Dower is ſuch an Incident to an Eſtate tail, that if one make a Gift in Tail, upon Condition, that the Wife of the Donor ſhall not be endowed; this Condition is repugnant and void. Perk. 317. Brook 18, 86. Bulſt. 163. Vaugh 40. F. N. B. 149. 8 Co. 34. Co. Lit. 31. 6 Co. 41. Co. Lit. 224. a.

But if a Rent be reſerved to the Donor and his Heirs, upon ſuch Gift in Tail, the Wife of the Donor ſhall be endowed of ſuch Rent no longer than the Eſtate-tail continues. Dyer 343. pl. 58. Perk. 348. Brook 44. Co. Lit. 32. a.

241. a. Plow. 155. F. N. B. 149.

If one grant a Rent out of his Land to *J. S.* and his Heirs, upon Condition, that if the Grantee die, his Heir within Age, that then, during ſuch Nonage, the Rent ſhall ceaſe; if the Grantee die, his Heir being within Age, yet the Wife of the Grantee ſhall be endowed; but *Ceſſabit executio* during the Nonage of the Heir; for ſuch Condition is Part of the original Conſtitution and Nature of the Rent, and then the Wife can have it in no other Manner than her Huſband had it granted to him. Plow. 156. Co. 87. Brook 51. Perk. 327.

If the Huſband ſeiſed of a Rent in Fee, or Fee-tail, releaſe it to the Tertenant, the Rent is extinguiſhed by it; and yet, as to the Wife, has ſuch Continuance, that ſhe ſhall have Dower thereof; which the Huſband, by his own Act, cannot debar her of. 6 Co. 79. 7 Co. 65. S. P.

If the Husband be ſeiſed of a defeaſible Eſtate during the Coverture, yet his Wife ſhall be endowed thereof till it be actually defeated; as if the Husband and Wife, Leſſees for Life, ſurrender to him in the Re-
* verſion; this is defeaſible by the Wife, after the Husband's Death; yet in the mean time, if the Reverſioner dies, his Wife ſhall be endowed. * Page 128 Rol. Abr. 677. (14, 15.) So if a Diſ-

ſeiſor die ſeiſed, and the Diſſeiſee abate, yet the Wife of the Diſſeiſor ſhall be endowed; ſo if Tenant for Life ſurrenders, or grants his Eſtate to the Huſband in Reverſion, upon Condition, the Wife of the Reverſioner ſhall be endowed till it be broken. Rol. Abr. 677. Brook 74.

If a Feoffment be made to the Uſe of *J. S.* and his Heirs, till *J. D.* hath done ſuch a Thing, and then to the Uſe of *J. D.* and his Heirs; if *J. S.* die, his Wife ſhall be endowed till the Thing performed. Leon. 168. and *Anderſon* holds ſhe ſhall be endowed after, to which it ſeems not reaſonable, becauſe his Eſtate is then determined by expreſs Limitation, to which it was at firſt ſubject; but for this *vide* Perk. 317. Lit. ſ. 357. 2 Co. 59, 79. Rol. Abr. 678. Brook 62. ‡ See *ante* 125. the laſt Note.

Rol. Abr. 679. Perk. 392. Brook 11. Cro. Car. 191. tho' this be the expreſs Doctrine in the Common Law Courts, yet in Chancery, when the Mortgagor comes to redeem, even the Woman's Dower is avoided; for the Huſband's Eſtate was *ab initio* incumbred with Equity, and in that Court the Mortgagee is conſidered as a Truſtee for the Mortgagor. Hard. 465. Abr. in Equity. 311.

If Land be mortgaged to the Huſband in Fee, and the Condition is broken; and after, upon Agreement, the Mortgagor hath the Land by Payment of the Money; yet the Wife of the Mortgagee ſhall be endowed; for by Non-payment of the Money at the Day, the Eſtate of the Mortgagee was become abſolute, and his Wife intitled to Dower thereof; ſo if the Money was paid at the Day, yet if paid by a Stranger, who was no ways privy to the Condition, the Wife of the Mortgagee ſhall be endowed; for Conditions being in Law taken ſtrictly, if they are not complied with, according to the Terms thereof, it is as if they were not performed at all; and ſo the Wife, who is a Stranger, ſhall not be prejudiced thereby.

F. N. B. 149. Co. Lit. 331. a. 332. b.

If Tenant in Tail diſcontinue in Fee, and after take a Wife, and diſſeiſe the Diſcontinuee, and die ſeiſed, his Wife ſhall not have Dower, becauſe the Iſſue is remitted to the ancient Intail, which being a Reſtitution to an ancient Right, muſt take Place of the Dower of the Wife of a ſubſequent wrongful Eſtate, in as much as the Eſtate of which ſhe is dowable is defeated.

F. N. B. 149. In Dower the Tenant ſhews that the Land was intailed to his Father, Huſband of the Demandant, and his Wife, Mother of the Tenant in Special Tail, and that after his Father diſcontinued the Tail by Fine to a Stranger, and took back an Eſtate by Grant and Render in General Tail, and had Iſſue the Tenant; and the firſt Wife died, and his Father married the Demandant, and died, and ſo he is remitted to the firſt Intail, to which the Court clearly agreed, and gave Judgment that the Demandant ſhould be barred. 44 E. 3. 26. Brook 14. S. C. but Q. at this Day, ſince the Statutes of 4 H. 7. *c.* 24. and 32 H. 8. *c.* 28. if the Iſſue ſhall be remitted upon ſuch Fine, for theſe Statutes ſeem againſt it, and then the Wife ſhall be endowed.—See *ante* 91, *&c.*

So if a Man hath Title of Action to recover any Land, and he enters, and diſſeiſes the Tenant of the Land, and dies ſeiſed; upon which his Heir enters, now he is remitted to the ancient Right which his Anceſtor had; and by Conſequence the Wife of the Anceſtor ſhall loſe her Dower of the wrongful Eſtate her Huſband had, which is determined and gone by Act of Law.

Perk. 309.

If there are Father and Son, and the Father exchange Lands with a Stranger, and dies, and the Son marries, and enters into the Land taken in Exchange; and the Stranger, being impleaded for his Lands, vouches the Son as Heir, who enters into the Warranty, and loſeth, and thereupon Execution is had accordingly, and then the Son dies, his Wife ſhall not be endowed of the Lands taken in Exchange; becauſe the Recovery thereof againſt her Huſband hath Relation to the Time of the Exchange made, which was before her Title of Dower began.

* Page 129 Perk. 322. F. N. B. 150. If two Coparceners in Gavelkind make Partition, and one marries, and the other is impleaded for his Part, and prays in Aid of the other Coparcener, who joins in Aid with him, and the Demandant recovers, and the Tenant hath *pro rata* of that which remains in the Poſſeſſion of the other Coparcener, who after dies, his Wife ſhall not have Dower of that which was recovered *pro rata*, becauſe the Recovery hath Relation to the Death of the Anceſtor, which was paramount to her Title of Dower.

If a Diſſeiſor makes a Feoffment in Fee with Warranty, and the Feoffee marries, and the Diſſeiſee brings a Writ of Entry in the *Per* againſt the Feoffee, who vouches the Feoffor, *&c.* and each recovers in * Value againſt the other, and have Execution accordingly, and the Feoffee dies, his Wife ſhall have Dower of the Land recovered in Value, but not of the Land loſt, becauſe by Title paramount; but if one recovers in Value againſt the Huſband by Warranty of his Anceſtor, and the Huſband dies, his Wife ſhall be endowed of the Land recovered from him, becauſe this was by Force of the Warranty, and not by elder Title.

5. Of the Value and Improvement of the Husband's Estate, either in his Life-time, or after his Death.

If the Husband makes a Feoffment in Fee of Lands, and the Feoffee builds thereon, and improves the same greatly in Value; yet the Wife of the Feoffor shall have Dower only according to the Value it was of in the Husband's Time; for if such Feoffment were with Warranty, the Heir would be bound to render only the Value as it was at the Time of the Feoffment. Co. Lit. 32. a. Perk. 328.

If a Disseisor or Feoffee, upon Condition, improve the Lands of the Husband by building, &c. and the Husband enter on the Disseisor, or for the Condition broken, he shall have all the Improvements, because the Estate of the one was tortious, and the other uncertain; and it was their Folly to make such Improvements; but if the Husband had died before such Entry, and his Wife had recovered Dower; Q. if she should have the third Part of such Improvements, for her Husband was never seised.

If the Heir improve the Land by building or sowing it, the Wife shall recover her Dower with the Improvement upon it, because by her Husband's Death her Title to Dower was consummate, and the Improvements as to her Part were *quasi* upon her Land; for which Reason likewise, if the Land be impaired in Value in the Time of the Heir, she shall share in the Loss, unless it were voluntary by the Heir himself, and then she shall recompence herself in Damages against him. Co. Lit 32. a. 2 Inst. 81.

If the Husband himself, or his Feoffee, pull down Houses, &c. and then the Husband die, it seems the Wife hath no Remedy for those Houses, because, before her Title was consummate, the Thing itself was destroyed. Perk. 329.

If the Husband sows Part of the Land, and dies, and this Part is assigned to the Wife for Dower, whether the Wife or the Executor of the Husband shall have the Crop, Q. & *vide* Dyer 316. pl. 2. 2 Inst 81.

(C) Of the Things requisite to the Consummation of Dower, viz. Marriage, Seisin, and the Death of the Husband.

1. Of the Marriage, how long it must continue; and therein of the several Sorts of Divorces.

IF a Man make a Contract of Matrimony with a Woman, and die before the Marriage be solemnized between them, she shall have no Dower, because she never was his Wife. Perk. 306. It was formerly held, that a Woman married in a Chamber should not have Dower, 16 H. 3. and that the Marriage should be celebrated *in facie Ecclesiæ*; but the Law is now altered, and Marriages in private Houses, if all Circumstances are complied with, held good; and that God is not less present in such Houses than in the most sanctified Places. Perk. 306. F. N. B. 150.

* If a Woman makes a Contract of Matrimony with *J. S.* and then marrieth with *J. D.* who is seised of Lands, and dieth, she shall have Dower of the Lands of *J. D.* *Page 130 But if a Man marry a second Wife, living the first, and die, such second Wife shall have no Dower; so if a Woman marry a second Husband, living the first, and die, she shall have no Dower. Perk. 304-5. Moor 226.

Co. Lit. 33. a. Dyer 305, 313, 369.

Upon Iſſue of *Ne unques accouple en loyal Matrimony*, the Biſhop ought to certify, that they were accoupled in lawful Marriage, though the Man be under fourteen, or the Wife above Nine, and under twelve Years of Age at his Death, becauſe it was a good Marriage till avoided, which now cannot be after his Death; but if either diſagree to the Marriage at their Age of Conſent; then it is avoided *ab initio*, and the Wife ſhall have no Dower.

Cro. Car 351. *Wickham* v. *Enfield.* But for this *vide* Brook 54. Dyer 313. pl. 92. 368. pl. 48-9. 305. pl. 60. Co Lit. 33. b. 9 Co. 19.

In Dower, upon *Ne unques accouple en loyal Matrimony*, and Iſſue thereupon; a Writ was awarded to the Biſhop, who certified that ſhe was accoupled *in vero Matrimonio cum prædicto* B. *ſed Clandeſtino, & quod* B. & E. (Demandant) *thori & menſæ participatione mutuo cohabitaverunt uſq; ad mortem prædict.*' B. and Judgment thereon given for the Demandant, and Error brought and aſſigned (*inter alia*) that there was neither Day or Place of the Marriage mentioned in the Biſhop's Certificate; but the Court held it not material nor iſſuable, becauſe the Certificate from the Biſhop is concluding: 2. That the Certificate is not good, becauſe it did not anſwer to the Words of the Iſſue, *Ne unques accouple en loyal Matrimony*; for that it was a true Matrimony, and that they lived together at Bed and Board, is but argumentative, that they were *Legitimo Matrimonio Copulati*; but the Court diſallowed this Exception; for *vero Matrimonio*, tho' *Clandeſtino, Copulati fuerunt*, is as good as *Legitimo Matrimonio*, and have all one Intendment; and tho' it be *Clandeſtino*, yet it doth not vitiate the Marriage; and when it is added, that *thori & menſæ participatione cohabitaverunt, &c.* this proves they continued as Huſband and Wife during his Life, and therefore it is not to be queſtioned now; and the Judgment affirmed.

Stowell v. *Weeks*, Noy 108. adjudged. Godb. 145. Co. Lit. 32, a. 33. b.

If there be a Divorce *cauſâ Adulterii*; yet the Wife ſhall be endowed, for this does not diſſolve the Marriage, but only ſeparates the Parties *a menſa & thoro*, and the Marriage ſtill ſo continues in Force, that if either them marry any other, ſuch Marriage is void.

2 Leon. 171. Cro. Car. 463. 7 Co. 70. Rol. Abr. 680. *cont.*

Cro. Car. 492-3. *Porter's* Caſe. A Wife ſhall be endowed, notwithſtanding

So a Divorce *propter ſævitiam* or *metum*, is of the ſame Nature, and does not diſſolve the Bond of Matrimony, but is only a Proviſion for the Woman's Safety, that ſhe may avoid her Huſband's Cruelty and ill Uſage, and therefore the Wife in ſuch Caſe ſhall be endowed the rather.

a Divorce *Cauſa Profeſſionis*, for which *vide* Rol. Abr. 681. 2 Leon. 169. Moor 226. Cro. Car. 462. 2 Inſt. 687. Co. Lit. 32. but *vide* 32 *H.* 8. *cap.* 38. by which it ſeems that this and other ſcrupulous Divorces are taken away.

Rol. Abr. 681. Co. Lit. 32. a. 33. b. 7 Co. 70. 5 Co. 98. 2 Leon. 169.

But if there be a Divorce *cauſâ præcontractus cauſâ conſanguinitatis, cauſâ affinitatis*, or *cauſa frigiditatis*, the Wife ſhall not be endowed, for theſe diſſolve the *Vinculum Matrimonii*, and leave the Parties at Liberty to marry again; but if either of the Parties die before ſuch Sentence of Divorce be actually pronounced, it cannot be pronounced after; and therefore if the Huſband die before ſuch Divorce, his Wife *de facto* ſhall have Dower, for it was *legitimum matrimonium quoad Dotem*, and the Biſhop ought to certify that they were *legitimo Matrimonio Copulati*

Cro. Car. 217. *Fulliam* v. *Harris.* *Page 131

In Dower, the Writ was *Præcipe* A. *quod reddat* B. *rationabilem Dotem ſuam* of the Lands, *&c. dudum* C. *quondam viri ſui*; and for not ſaying, *Præcipe quod reddat* B. *quæ fuit Uxor* C. *&c.* that ſo ſhe might appear to * have Title of Dower as his Wife, it was held ill; and that *Quondam viri ſui* would not ſufficiently help it.

2. Of the Seiſin, either in Fact or in Law; and herein of the Seiſin in Fact, as it is continuing, or not continuing, as inſtantaneous.

The Huſband muſt be ſeiſed either in Fact or in Law, to intitle his Wife to Dower; but a Seiſin in Law is ſufficient for that Purpoſe, becauſe otherwiſe it would be in the Huſband's Power to defeat his Wife of a Subſiſtence after his Death, by his own Negligence or Malice, and ſhe cannot enter to gain a Seiſin in his Right, as he may do into Lands deſcended to her; which is the Reaſon, that of a Seiſin in Law a Man ſhall not be Tenant by the Curteſy; and therefore if the Anceſtor die ſeiſed, and before that the Huſband * enter into the Land, he dies; yet his Wife ſhall be endowed, tho' he had but a Poſſeſſion or Seiſin in Law.

Perk. 304. Co. Lit. 31, 358. Lit. Sect. 681. 8 Co. 34, 36. F. N. B 149. Stanf Prer. 41. Brook 66, 75. *Tho' a Stranger abates. Perk. 371.

So if a Leaſe be made for Life, Remainder to *J. S.* in Fee, who marries, and the Leſſee dies, and then a Stranger enters and intrudes upon the Poſſeſſion, and *J. S.* dies before any Entry made by him, yet his Wife ſhall have Dower.

Perk. 372.

If the Huſband purchaſe Rent, and die before the Day of Payment, yet his Wife ſhall be endowed, nay, though the Day of Payment be come, and the Rent is tendred to the Huſband, who will not receive it, but utterly refuſes it, and dies before any Receipt thereof by him, or any other for him, and before any Thing paid in the Name of Seiſin thereof.

Brook, 35, 66, 71. Perk. 373.

But if there be neither Seiſin in Fact nor Seiſin in Law in the Huſband, during the Coverture, but only a Right of Entry or Action, then his Wife ſhall not have Dower; and therefore if a Man be diſſeiſed, and then marries, and dies before any Entry made by him, his Wife ſhall not be endowed of that Land.

Perk. 366. So if the Father die ſeiſed, and a Stranger abates, and then after the Heir marries, and dies before Entry, his Wife ſhall not have Dower; becauſe by this Abatement the Seiſin in Law, which he had, was deveſted before his Marriage; and ſo he was neither ſeiſed in Fact nor in Law, during the Coverture. Perk. 367.

So if Exchange be of Lands between *A.* and *B.* and *A.* enters into the Lands of *B.* and then *B.* marries, and dies before any Entry into the Lands of *A.* his Wife ſhall not have Dower of thoſe Lands.

Perk. 369.

If one enfeoff a Stranger, upon Condition to be performed on the Part of the Feoffee, and after marries, and then the Condition is broken, and the Feoffor dies before any Entry made, his Wife ſhall not have Dower; becauſe there was no Seiſin at all in the Huſband, during the Coverture.

Perk. 368.

So if a Man makes a Bargain and Sale to one and his Heirs by Indenture inrolled, with a *Proviſo*, that if ſuch Act be done, that the Bargain and Sale ſhall be void; and after the Bargainor takes a Wife, and then the Condition is broken; and before Entry the Bargainor dies, his Wife ſhall not have Dower; for though the Eſtate of the Bargainee veſted by 27 *H.* 8. *c.* 10. of Uſes; yet becauſe the Huſband did not re-enter, the Eſtate of Inheritance in the Bargainee was not deveſted, nor had the Huſband any Seiſin during the Coverture,

6 Co. 34. *Fitzwilliam's* Caſe; but if the Words had been that, after the Condition broken, the Bargain and Sale ſhould be to the Uſe of the Bargainor in Fee, 2. becauſe then the Statute reveſts the Poſſeſſion in him again according to the Uſe.

* In ſome Caſes, though the Huſband be ſeiſed in Fact, yet his Wife ſhall not have Dower, as of an inſtantaneous Seiſin; and therefore if two Jointenants are, and one of them makes a Feoffment of his Part, and dies, his Wife ſhall not be endowed, becauſe he was ſole ſeiſed but for an Inſtant when he made the Livery; ſo if *Ceſtui que Uſe* after the Statute 1 *R.* 3.

* Page 132 Co. Lit. 31. F. N. B. 150. Rol. Abr. 676. Moor 56.

c. 5. and before 27 *H.* 8. *c.* 10. had made a Feoffment in Fee, and died, his Wife ſhould not be endowed, becauſe her Huſband was ſeiſed but for an Inſtant.

Rol.Abr.676. Brook 30. Cro Jac. 615. If Leſſee for Life makes a Feoffment in Fee, or a Leaſe *pur auter vie*, and die, his Wife ſhall not have Dower, becauſe he gained the Fee but for an Inſtant, and parted with it again, and this was no Diſſeiſin.

Cro. Jac. 615. *Amcotts* v. *Catherick.* Rol. Abr. 676. S. C. Co. Lit. 31. Vaugh. 41. Cro Car. 191. 3 Leon. 11. If Tenant in ſpecial Tail marries a ſecond Wife, who is not dowable of the Tail, and after makes a Feoffment in Fee, and dies, his Wife ſhall not have Dower, becauſe he gained the Fee but for an Inſtant.

So if Conuzee of a Fine grant and render the Land by the ſame Fine to the Conuzor, and die, his Wife ſhall not be endowed, becauſe he had Seiſin but for an Inſtant.

3. Of the Death of the Huſband.

F. N. B. 150. Rol Abr. 678. Perk. 307. Co Lit. 33. b. As to the Death of the Huſband, this is either a natural or a civil Death; but upon a civil Death the Wife ſhall not be endowed; as if the Huſband enter into Religion, and be profeſſed, his Wife ſhall not have Dower till he be naturally dead; for though upon ſuch Profeſſion his Heir may enter, and a Writ of *Mortdanceſtor* lies; yet becauſe he could not enter into Religion without the Aſſent of his Wife, and if ſhe had diſſented, his Profeſſion would be void; therefore if ſhe does aſſent, ſhe in a Manner vows Chaſtity as well as her Huſband, and ſhall have no Dower during his natural Life.

Bendl. pl. 31. *Thorn* v. *Rolf.* Dyer 185 S.C. Moor pl. 55. S. C. And in Dyer a Caſe is cited, where the Death of the Demandant's Huſband was proved by four Witneſſes, who agreed in all Points, and at the Day of the Eſſoign of the Tenant he produced twelve Witneſſes *de vita viri*, who alſo agreed in all Points; and this was held the ſtronger Proof, and the Demandant was barred; for in theſe Caſes the Rule is *qui melius probet melius habet.* In Dower of the Lands of *A.* her late Huſband, the Tenant pleads in Bar that *A.* the Huſband was in full Life at ſuch a Place, *et hoc paratus eſt verificare qualitercunq; Curia, &c.* the Demandant replies that her Huſband *obiit* at ſuch a Place, *&c. et eſt in Eccleſia ibidem ſepultus, et hoc parata eſt verificare qualitercunq; Curia, &c. Ideo conſiderat' eſt quod prædict'* M. (Demandant) *doceat de morte*, and *dictus* R. (Tenant) *de vita viri, et ſuper hoc Dies datus eſt, &c.* at which Day the Demandant examined two Witneſſes who did not ſpeak directly to his Death, but only of their great Intimacy with him, and his being gone beyond Sea for his Religion, and that they had not heard of him in ſeven Years, and concluded that in their Conſciences they rather think him dead, and the Tenant examining no Witneſſes to prove him living, the Demandant had Judgment.

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* Page 133

* (D) Of the Aſſignment of Dower.

1. By what Perſons.

Perk. 394, 395, 398. Co. Lit. 35. a. 2 Co. 67. 3 Co 78. IF a Diſſeiſor, Abator or Intruder aſſign Dower, this is good, and ſhall not be avoided, unleſs they be in of ſuch Eſtates by Fraud and Covin of the Woman, to the Intent ſhe may be indowed by them, or recover Dower againſt them, and then this ſhall be avoided by the Entry of him who hath Right,

Right, though the Aſſignment be indifferently made by the Sheriff after Judgment of an equal third Part. 5 Co. 30. 6 Co. 58. Plow. 54. b.

Brook 15, 59. The Reaſon why ſuch Aſſignment ſhall bind is, becauſe ſhe had a Right to be endowed thereof, and might have compelled them as Tertenants to aſſign her Dower thereof, and ought not to expect till the Heir will re-enter or ſue for Recovery of his Right; but if there were Covin in her, and yet notwithſtanding this ſhould bind the Heir, it would encourage ſuch Violence and Wrong to the Heir as would put him to great Trouble and Expence to recover his Right, without any Default in him; but an Aſſignment of a Rent out of ſuch Lands by them ſhall not bind, becauſe *de Jure* not dowable of ſuch Rent, *vide poſtea.*

If there be two or more Jointenants of Land, whereof a Woman is dowable, and one of them aſſign her Dower thereout, this is good, and ſhall bind the others, becauſe they were compellable to aſſign it in ſuch Manner; but if one of them had aſſigned her a Rent thereout in Lieu of Dower, this ſhall not bind the Reſt, becauſe they could not be compelled to it by Suit. Perk. 397. Co. Lit. 35. a Co. 67.

If the Huſband makes ſeveral Feoffments of his Land to ſeveral Perſons, and one of them endows the Wife of the Feoffor of his Part in Satisfaction of all that ſhe ought to have of the other Feoffees, and ſhe accepts it, this is good; but yet they cannot take Benefit of it, becauſe Strangers thereto, and cannot plead it, nor have any Means to bring the other into Court to plead it; but if the Heir aſſigns her Dower in Satisfaction of Dower out of his own Lands, and the Lands of the Feoffees, then if a Writ of Dower be brought againſt the Feoffees, they may vouch the Heir, who may (*a*) plead this for his own Safety, leſt they recover in Value againſt him. Co. Lit. 35. 9 Co. 18. Perk. 400, 402.

(*a*) *Per* Moor 26. the Alienee himſelf may plead this Aſſignment by the Heir. *Vide* Co. Ent. 172. and Cro. Eliz. 842.

If the Huſband ſeiſed of Lands in Right of his Wife, or jointly with his Wife, of Lands whereof a Woman is dowable, aſſigns the third Part of the ſame Lands to the Woman for her Dower; this is good, and ſhall bind the Wife, although ſhe ſurvives him, becauſe they might be compelled to it by Suit. Perk. 399. Brook 23. Rol. Abr. 681.

None can aſſign Dower but thoſe who have a Freehold, or againſt whom a Writ of Dower lies; therefore a (*b*) Guardian in Socage, Tenant by Statute Merchant, Statute Staple or *Elegit*, or Leſſee for Years, cannot aſſign Dower, for none of theſe have an Eſtate large enough to anſwer the Plaintiff's Demand. Perk. 403, 404. Co. Lit. 35. Brook 63, 94. Rol. Abr. 681. 6 Co. 57.

Co. Lit. 38. b. 39. a. 9 Co. 16. 17. F. N. B. 148. But (*b*) a Guardian in Chivalry, though he have but a Chattel, may after his Entry into the Land aſſign Dower; for which *vide* Plow. 141. Rol. Abr. 682. Co. Lit. 35, 38. Brook 20. 9 Co. 17. 2 Inſt. 262.

* 2. Of the Manner; and herein of aſſigning of it by Metes and Bounds. * Page 134.

If a Woman be dowable of Land, Meadow, Paſture, Wood, &c. and any one of theſe be aſſigned in Lieu of Dower of all the Reſt, it is good, though it be againſt common Right, which gives her but the third Part of each; for the Heir's Enjoyment of the Reſidue ſufficiently accounts for her Title to what ſhe has. Rol Abr. 683. Moor, pl. 47, 66. Which laſt Book ſays that Aſſignment by the Sheriff in ſuch Manner is good, ſo it be equal in Quantity.

If a Woman be dowable in three Manors, and accepts of the Heir one of thoſe Manors in Lieu of Dower in all the Reſt, this is good, though againſt common Right, which gives her but the third Part of each Manor. Rol. Abr. 683. But to a Writ of *Habere facias ſeiſinam* the Sheriff cannot return that he delivered the Demandant one of the Manors in Recompence of her Dower.

If

Perk. 407. Co. Lit. 34. 4 Co. 1. Co. Lit. 169. Brook. 3. But if the Rent be granted by Indenture, then it works by way of *Eſtoppel*; ſo if by Deed Poll, or by Parol, and ſhe agrees to it, and accepts the Rent, ſhe is concluded; *vide* Perk. 410. Dyer 91. pl. 12. In Dower the Tenant pleads in Bar Aſſignment to her of a Rent out of the ſame Land for her Life, *Virtute cujus* ſhe was *in Dominico ſuo ut de Libero Tenemento, &c.* But for not alledging that he was ſeiſed of the Land at the Time of the Aſſignment, ſo that he might grant ſuch Rent, it was ruled againſt him. Dyer 361. pl. 11. *Beamond* v. *Dean*. 2 Leon. 10. S. C.

If Lands whereof a Woman has no Right to be endowed, or a Rent out of ſuch Lands, be aſſigned in Lieu of her Dower, yet this is no Bar to her to demand her Dower, for ſhe having no Manner of Title to thoſe Lands, cannot without Livery and Seiſin be any more than Tenant at Will, which is no ſufficient Recompence for an Eſtate for Life, which her Dower was to be.

Moor, pl. 167. Dyer 91. in Margine.

In Dower the Tenant pleads that he hath aſſigned to her, In Recompence of her Dower, 20 Buſhels of Wheat yearly out of the ſame Land for her Life, and held a good Bar, and in the Nature of a Rent; but Sheep, Horſes, *&c.* aſſigned in Recompence of Dower are no Bar, becauſe they neither iſſue out of Land, nor are of the Nature of Land.

Moor, pl. 928.

A Woman recovers Dower, and hath a Writ to the Sheriff, who returns that he hath delivered 84 Acres to the Demandant of the Land mentioned in the Writ, and after a *Scire facias* is brought, ſuggeſting that 60 Acres of the 84 aſſigned to her by the Sheriff are a Stranger's, not mentioned in the Record, and therefore ſhe ought to have a new Diviſion; the Tenant ſays that the other 24 Acres were Parcel of the Land recovered, and that ſhe had entred and accepted the 24 Acres; and upon Demurrer it was adjudged, that ſhe was barred by her Acceptance and Entry into the 24 Acres.

Rol. Abr. 681. Dyer 343. Plow. 529.

A Woman intitled to Dower cannot enter till it be aſſigned to her, and ſet out either by the Heir Tertenant or Sheriff, in Certainty. Brook 16. Co. Lit. 34. b. 37. a. b. And the Reaſon ſeems to be from the Partiality every one is preſumed to have for themſelves and their own Intereſt; and therefore the Law will not allow her in ſuch Caſe to be her own Carver; another Reaſon may be for the better Direction of Strangers, that they might more certainly know againſt whom to bring their *Præcipe*, which they cannot be ſo well appriſed of, if ſhe might enter privately, and take what Part ſhe pleaſed; but ſhe need not ſtay for the Return of the Writ of *Habere facias ſeiſinam*, nor for the ſecond Judgment. Palm. 265, 266. *Howard* v. *Cavendiſh*. And though ſhe once refuſes to accept the Part aſſigned to her by the Sheriff, yet may ſhe afterwards enter into it. Dyer 278.

* Page 135 Rol. Abr. 682. 7 Co. 37. Plow. 25. b. 2 Inſt. 153. Hob. 153. Co. Lit. 34. b. 241. a.

The Aſſignment of Dower muſt be abſolute, and not ſubject to be defeated by any Condition, nor leſſened by any Exception or Reſervation; for ſhe comes to her Dower in the *per* by her Huſband, and is in, in Continuance of his Eſtate, which the Heir or Tertenant are but Miniſters or Officers of the Law to carve out to her; and therefore ſuch Conditions or Reſervations are either totally void, and her Eſtate abſolutely diſcharged from them, or elſe the Eſtate aſſigned with ſuch Condition or Reſervation is no Bar to her Recovery of Dower, in an Action brought for that Purpoſe; as if the Trees are excepted in an Aſſignment of Lands whereof ſhe is dowable, the Exception is void.

Cro. Eliz. 451. *Wentworth's* Caſe. Rol. Abr. 684. Co. Lit. 34. b.

In Dower the Tenant pleads that he by Indenture gained a Rent out of the ſaid Land to the Demandant in Recompence of her Dower, which ſhe accepted; the Demandant confeſſes the Grant of the Rent, and her Acceptance, but ſays that in the ſame Indenture was a Condition, that if the Rent was not paid within ſuch a Time after it became due, that the Rent ſhould ceaſe, and the Indenture be void, and ſhews a Breach; and upon Demurrer it was adjudged for the Demandant, becauſe it was pleaded as a Grant; and alſo becauſe it was upon Condition; for Rent aſſigned in Recompence of Dower, and which comes in Lieu of the Land, ought to be as abſolute as the Aſſignment of the Land itſelf; and therefore the Condi-

tion annexed is void; or if it ſhould be good, yet it is only annexed to it as a Grant, and upon Breach thereof ſhe is reſtored to her Writ of Dower.

It is a Rule, that when the Wife brings a Writ of Dower, and recovers, the Sheriff ought to aſſign it by Meets and Bounds, if the Thing recovered may be ſevered; and if the Sheriff does not return Seiſin by Meets and Bounds, it is ill, (*a*) unleſs Cloſes certain are aſſigned by Name, or ſuch a Manor which is known, and certain, in Lieu of Dower of other Manors.

Perk. 414. Rol. Abr. 682. Co. Lit. 34. Bendl. 87. But an Aſſignment, though in a different Manner, by the Conſent of the Demandant may be good. *Vide* Rol. Abr. 683. Cro. Eliz. 310.

(*a*) For this *vide* Rol. Abr. 683. Perk. 332. Brook 72. Co. Ent. 171.

Upon Recovery of Dower, and Seiſin awarded, the Sheriff returns, that he had aſſigned to the Demandant for her Dower of a Houſe the third Part of each Chamber, and had chalked it out to her; and this was held an idle and malicious Aſſignment; and he was committed for it, for he ought to have aſſigned her certain Chambers or Rooms thereout, *&c.*

Palmer 265. *Vide* Keb. 743. The Sheriff committed for refuſing to make an equal Allotment of Dower, and taking 60*l.* to execute his Writ of Execution, and an Information ordered againſt him; and Vern. 218, 219. 2 Chan. Ca. 160. That Equity will relieve againſt a partial and fraudulent Aſſignment of Dower by the Sheriff.

The Wife of a Tenant in Common ſhall not be endowed by Meets and Bounds, for ſhe being in *pro tanto* of her Huſband's Eſtate, cannot have it in other Manner than he himſelf had.

Perk. 411. F. N. B. 149. Co. Lit. 32, 34, 37. and *vide* Brownl. 127. and 3 Lev. 84. *Sutton* v. *Rolf*, in which Caſe it was adjudged that a Writ of Dower will lie againſt the Heir of a Tenant in common, before Partition made; for otherwiſe they might perhaps make no Partition at all, and ſo defeat the Wife of Dower.

3. By what Court.

An Aſſignment of Dower by Commiſſion *de dote aſſignanda* out of the Court of Wards was held no Bar of Dower at Common Law, but it ought to have been by Writ *de dote aſſignanda* ought of Chancery, the Juriſdiction of which Court is not given to the Court of Wards in ſuch Caſe by 32 *H.* 8. *c.* 46.

Cro. Eliz. 364. *Stainfield* & *Uxor* v. *Viſc. Bindon.*

* Sir *Thomas Arundell* being attainted of Felony, and his Wife's Dower ſaved by Act of Parliament, ſhe brought her Writ of Dower againſt the Earl of *Pembroke*, and he making Default after Appearance, a Termor prays to be received, and ſhews his Leaſe after the Coverture, *&c.* and the Attainder, *&c.* and that *E.* 6. granted a Commiſſion under the Seal of the Court of Augmentations, to aſſign the third Part of the Land of the ſaid Sir *Thomas Arundell* to his Wife in Dower; and ſhews further that, by Virtue of the Commiſſion, the third Part of the Rent reſerved on the ſaid Leaſe was aſſigned to her, and this Aſſignment confirmed by Letters Patent under the Great Seal, and ſhews her Agreement and Acceptance thereof, and ſaid that this Suit was by Colluſion to defraud him of his Term; and in this Caſe it was held, 1*ſt*, That the Court of Augmentations had no Power to aſſign Dower to the Demandant, or any other Woman, but it muſt be in Chancery. 2*dly*, That the Aſſignment of the Rent was not warranted by the Commiſſion, and then the Confirmation could not make that good which was merely void; and it was adjudged for the Demandant.

* Page 136 Dyer 363. Lady *Arundel*'s Caſe, *vide* Co. Ent. 173. *Le Record de cet Caſe*, and 2 Mod. 18. S. C. cited.

As to Endowments in Chancery, it appears by our Books, that in former Times the Widows of Tenants which held of the King *in capite*, whoſe Heir was in Ward to the King, were to ſue in Chancery by Petition for their Dower; and after Office found that ſhe was the Tenant's Widow, then ſhe

Stanf. Prer. 16. F. N. B 161. Brook 66, 76. 2 Inſt. 18. Keilw. 133.

Brownl. 126. Co Lit. 38. b. 9 Co. 16, 17. 7 Mod. 43.

ſhe was to make Oath in Chancery that ſhe would not marry again without the King's Licence; and upon that there went a Writ out of the Chancery *de dote aſſignanda* to the Eſcheator, to aſſign her Dower of the third Part of all the Lands whereof her Huſband was ſeiſed, *&c.* but if the Heir were of full Age at the Time of the Tenant's Death, and the King had the Lands only for his Primier Seiſin, then could ſhe not ſue in Chancery, becauſe the King was not then Guardian, but had the Lands only to ſuch ſpecial Purpoſe; and therefore to remedy this, was the Statute *de Prerogativa Regis, cap.* 4. made, which gives Power to the King to aſſign Dower to them, though the Heir were of full Age at the Time of the Tenant's Death; but this Power was not ſo abſolutely lodged in the King as to exclude them from ſuing at Common Law for their Dower, by Reaſon of the Words *ſi viduæ illæ voluerint*, which left them at Liberty in ſuch Caſe, either to ſue to the King in Chancery, or if they thought fit to ſue the Heir in the Common Pleas; but if the King had committed the Wardſhip to another *durante minore Ætate* of the Ward, then alſo at Common Law the Widow had Election to ſue either to the King in Chancery, becauſe notwithſtanding ſuch Commitment he ſtill continued Guardian; or ſhe might ſue the Committee at Common Law, and recover againſt him, without making the King a Party by *Ayde Prier*, or otherwiſe, which was ordained by the Statute of *Bigamis, cap.* 3. for avoiding of Delays in ſuch Caſes, and when ſhe recovered againſt the Committee, ſhe took no ſuch Oath as when ſhe ſued to the King in Chancery; but yet nevertheleſs ſhe could not marry without the King's Licence, it being againſt the Policy of thoſe Times to permit ſuch Widows to marry whom they pleaſed, ſince then they might have brought in Enemies or Foreigners into the King's Feud, and in the King's Caſe the Fines for Alienation ſtill continued.

Stanf. Prer. 41. Brook 66. Co. Lit. 30. b. F. N. B. 149.

Another Prerogative the King had in thoſe Times, that if the Heir of his Tenant *in capite* entred before Livery ſued, this was looked upon as an Intruſion, and his Wife loſt her Dower by it, by the expreſs Proviſion of *Prerog. Regis, cap.* 13. but this was meant only of Intruſion after Office found, which gave the King a Title; for if he entred before Office found and died, his Wife ſhould be endowed.

Page 137 (E) **Where the Wife ſhall have her Election to be endowed of one Thing or another; and where of both; and herein of Endowment** de Novo, **and the** Dos de Dote.

Perk. 318, 319. F. N. B. 149. Co. Lit. 31. b.

IF the Husband ſeiſed of Lands in Fee exchange the ſame Lands with a Stranger for other Lands, and die, the Wife hath Election to be endowed either of the Lands given or taken in Exchange, becauſe her Huſband was ſeiſed of both during the Coverture, but ſhe ſhall not have Dower of both; for that would be unreaſonable.

Leon. 285.

Husband ſeiſed of Lands in Right of his Wife, they both join in Exchange of thoſe Lands with a Stranger for other Lands, which Exchange is executed; then the Husband and Wife alien the Lands taken in Exchange by Fine; and two Judges held the Wife after the Husband's Death might well enter into her own Lands, notwithſtanding the Fine which was of the other Lands, and reſembled it to the Caſe in *Dyer* 385. where the Husband after Marriage made a Jointure to his Wife, and then they both levied a Fine *come ceo, &c.* thereof to a Stranger and his Heirs; and

and this was adjudged no Bar of her Dower, becauſe the Election to claim Jointure, or Dower, is not till after the Husband's Death; and in the principal Caſe Judgment was given for the Wife.

If Lord and Tenant are by Fealty, and 12*d.* Rent, and the Lord takes a Wife, and after purchaſes the Tenancy in Fee, and dies, his Wife hath Election to be endowed, either of the Seignory or the Tenancy, becauſe her Husband was ſeiſed of both during the Coverture; ſo for the ſame Reaſon if the Husband ſeiſed of a Rent-Charge in Fee purchaſe the Land whereout the Rent is iſſuing, and die, his Wife at her Election may be endowed either of the Land, or of the Rent, and the Husband being ſeiſed of both, during the Coverture, cannot by his own (*a*) Act alter the Wife's Dower. Perk. 320.

(*a*) But if the Tenancy eſcheat by the Act of God, as by the Death of a Tenant, ſhe ſhall have Dower of the Tenancy only. Perk. 321‡.

‡ The Reaſon is, becauſe the Seignory is determined, during the Coverture by Act of Law, and it is not any Diſadvantage to the Wife to be endowed of the Tenancy, for if ſhe be put out of Poſſeſſion of Part or all, by more antient Title, the Seignory ſhall be revived in Part or in all, *&c. Vide Perkins.*

If the Husband ſeiſed of Lands in Fee makes a Feoffment thereof to a Stranger in Fee, rendering to him and his Heirs 3*s.* Rent, with Clauſe of Diſtreſs, and dies, and the Feoffee endows the Wife of the Feoffor of the third Part of the Land for her Dower, ſhe ſhall hold it diſcharged of any Rent, and the whole Rent ſhall iſſue out of the Reſidue of the Land, becauſe the Wife ſhall be endowed of the beſt Poſſeſſion of her Husband during the Coverture; and the Husband had the Land diſcharged of the Rent after the Coverture; and yet becauſe he had alſo an Eſtate in the Rent during the Coverture, it ſeems ſhe may be endowed of that, if ſhe think fit, and waive her Dower of the Land; but the Rent reſerved on the Feoffment is no more a Bar to her to demand Dower of the Land, than if none at all had been reſerved, if ſhe chuſes the Land. Perk. 324.

In ſome Caſes a Woman ſhall be endowed a-new; as where the Lands, *&c.* aſſigned to her for Dower, are lawfully evicted by elder Title; and therefore if one be ſeiſed of two Acres by good Title, and another by Diſſeiſin, and marries, and dies, and his Wife is endowed of the Acre had by Diſſeiſin, and after the Diſſeiſee enters into the ſaid Acre, now ſhe ſhall be endowed of the third Part of the two remaining Acres; ſo if the Diſſeiſee in ſuch Caſe had recovered the Acre againſt the Wife, ſhe ſhould have been endowed of what remained, and the Entry or Recovery being by Title Paramount to her Title of Dower, it is as if her Husband had never been * ſeiſed thereof; and therefore ſhe ſhall only recover the third Part of what is left, and not a full Recompence for the Acre loſt. Perk. 419. F.N.B. 149. Rol.Abr.684. 4 Co. 122. * Page 138

If one ſeiſed of two Acres in one County marries, and enfeoffs a Stranger of one Acre with Warranty, and hath Iſſue, and dies, and the Iſſue enters into the other Acre, and the Wife brings Dower againſt the Feoffee, who vouches the Iſſue as Heir, and he loſes by Default; and thereupon the Wife hath a conditional Judgment, *viz.* againſt the Vouchee; if, *&c.* and the Demandant ſues Execution againſt the Heir, and after is evicted by elder Title, ſhe ſhall have a *Scire facias* upon the firſt Recovery againſt the Tenant, to be endowed of the two Parts left; alſo upon ſuch Eviction ſhe may be endowed *de novo* againſt the Heir; and the ſame Law, if the Endowment was in Chancery. Perk. 321. Rol.Abr.684. Brook 65. 9 Co. 17.

As to the *Dos de Dote*, if there be Grandfather, Father, and Son, and the Father, or, after his Death, the Son endows the Grandmother, the Mother ſhall not be endowed of the Grandmother's Thirds after her Deceaſe, becauſe the Grandmother's Dower defeats the Deſcent to the Father, and by Conſequence the Father was ſeiſed of no more than two Thirds of that Land; Perk. 315, 516. 4 Co. 122. *Buſtard's* Caſe. F.N.B. 149. Rol.Abr.677.

Co. Lit. 31, 42. a. Land; and therefore the Wife of the Father was intitled to a Third of theſe two Thirds only, and no more; but if the Grandfather had infeoffed the Father of the whole Land, and died, and the Grandmother had been endowed, either by Recovery or Aſſignment, there the Mother ſhould be endowed of the Grandmother's Third after her Deceaſe, becauſe by the Feoffment the Father was ſeiſed of the whole Eſtate, which gave a Title to his Wife to be endowed of that whole Eſtate; and though the Grandmother recovered one Third out of that Eſtate during her Life, yet ſuch Recovery doth not defeat the Operation of the Livery, ſince by that Conveyance the Reverſion of that Third is claimed; and by Conſequence the Mother ſhall be endowed of that Third when it falls in Poſſeſſion, ſince the Father was actually ſeiſed of it during the Coverture, by Virtue of ſuch Livery. If there be Grandfather, Father, and Son, and the two firſt die, and the Mother is endowed by the Son of a Third Part of the whole, either by Aſſignment *en Pais*, or upon a Recovery in a Writ of Dower, and the Grandmother brings a Writ of Dower againſt the Mother, and recovers, ſhe leaves the Reverſion in her; for the Dower was veſted in the Mother by the Aſſignment or Recovery, and is only defeated during the Life of the Grandmother, whoſe Eſtate as to the Mother is leſs than her own Eſtate; and therefore the Reverſion is in the Mother, and ſhe after the Grandmother's Death may enter into that Third recovered from her; and by Conſequence the Heir may re-enter into the ſecond Dower aſſigned to the Mother, upon ſuch Recovery againſt her by the Grandmother; for ſhe cannot have both.

Rol. Abr. 677. *A.* ſeiſed of Land marries *B.* and aliens to *C.* who marries *D.* and then aliens to *E.* and dies, and after *D.* is endowed, and then *B.* hath Dower aſſigned to her of the third Part of all the Lands, and brings a *Præcipe* thereof againſt *D.* who vouches to warranty *E.* who counterpleads upon the Matter, and ſays that *D.* ought not to be endowed, *quia non poteſt habere Dotem de Dote*; and adjudged accordingly.

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*Page 139 *(F) **What ſhall be a Bar of Dower, and what not; and herein of Acts done or ſuffered by the Husband ſolely, or by the Husband and Wife jointly, or by the Wife ſolely, either during the Coverture, or after; and herein of Elopement and Detinue of Charters, or Heir.**

2 Inſt. 349. Perk. 376. IF a Recovery be had againſt the Huſband by Colluſion, this ſhall not bar the Wife of Dower; as if the Recovery be by Confeſſion or Reddition, which are always underſtood to be by Colluſion, the Huſband always acting and concurring in obtaining of them; but it ſeems to have been a very great Doubt whether a Recovery by Default ſhould not be a Bar; and the better Opinion being that ſuch Recovery was a Bar at Common Law; therefore the Statute of *W.* 2. *cap.* 4. was made, which ordains that notwithſtanding ſuch Recovery by Default, *&c.* pleaded, the Tenant ſhall moreover in Bar of the Dower ſhew his Right to the Tenements recovered; and if it be found that he had no Right, then ſhall the Demand-

ant recover her Dower, notwithſtanding ſuch Recovery by Default againſt her Huſband.

By the Statute *W.* 2. *cap.* 4. it appears, That if the Recoverer had Right, then the Wife is barred; therefore if the Heir of the Diſſeiſor be in by Deſcent, and the Diſſeiſee enters upon him, and marries, and the Heir of the Diſſeiſor recovers by Default or Reddition in a Writ of Entry, in Nature of an Aſſiſe, and the Huſband dies, his Wife ſhall not have Dower, becauſe he, who recovered, had Right to the Poſſeſſion by the Deſcent; *aliter* if this Diſſeiſin, Deſcent, *&c.* were after Marriage, becauſe the Huſband was ſeiſed before of a Rightful Eſtate during the Coverture, whereof his Wife had Title of Dower, which cannot he defeated by the Diſſeiſin, Deſcent and Recovery, which all happened during the Coverture.

Perk. 379, 380. Rol. Abr. 681. So if the Huſband make a Feoffment in Fee, and diſſeiſe the Feoffee, who recovers in Aſſiſe againſt him, the Wife ſhall not falſify

this Recovery directly, but ſhe may ſay that long Time before her Husband was ſeiſed, *que lui Dower poit*, &c. Brook 22, 38.

If a Recovery be againſt the Huſband by Verdict, the Wife ſhall not falſify in the Point tried; but ſhe may ſay that he might have pleaded a better Plea, *viz.* a Releaſe of all Actions, or of all the Right of the Demandant; or ſhe may confeſs and avoid the Recovery, but cannot falſify in the Point tried againſt her Huſband.

2 Inſt. 349, Perk. 382. Brook 24. *vide* Perk. 383. which ſeems *cont'*.

If in a *Præcipe*, brought againſt the Husband, he loſes upon a dilatory Plea, as upon Non-Tenure, Jointenancy, Miſnomer of the Town, *&c.* the Wife may falſify upon a Writ of Dower brought, by ſhewing that the Demandant had no Right; but if he had Right, ſhe cannot falſify the Recovery, by ſhewing that her Husband might have pleaded Jointenancy, Miſnomer, *&c.* for theſe would have been only in Abatement of the Writ, and make nothing to the Right; but if ſhe ſhews that her Husband was Tenant of the Land recovered, and that the Demandant had no Right nor Cauſe of Action, but jointly with a Stranger, which Stranger by Deed *in Cur' prolat'* releaſed all his Right to the Husband before the Action brought; this is a good Falſification of the Recovery for one Moiety of the Land recovered.

Brook 26. Perk. 381, 385, 386. A Recovery in a *Ceſſavit* ſhall bar the Wife, Perk 389. If the Huſband aliens in Mortmain; and the Lord enters, Q. whether this be a good Bar. Perk. 393.

* If the Husband levy a Fine with Proclamations of his Lands, and dies, his Wife is bound to make her Claim within five Years after his Death; otherwiſe ſhe ſhall be barred of her Dower; for though her Title of Dower was not conſummate at the Time of the Fine levied; yet it being initiate by the Marriage and Seiſin of the Husband, the Fine begins to work upon it preſently after the Husband's Death; and if ſhe does not claim it within five Years after, ſhe ſhall be barred.

* Page 140 2 Co. 93. 10 Co. 49, 99. 3 Inſt. 216. Hob. 265. Moor, pl. 154, 879. Dyer 224. 13 Co. 20. 2 Rol. Rep.

69, 409. all againſt Plow. 373. *Vide* 3 Leon. 50. By which it appears that though ſhe brought her Writ of Dower within five Years; yet becauſe ſhe did not purſue it till ſix Years were paſt, it was adjudged that ſhe could not by a new Writ revive her antient Claim, which was barred by the five Years laſped after the Husband's Death; and it was held that Aſſignment of Dower in the Court of Wards was no ſufficient Claim of Dower, becauſe ſhe could not have a Writ of Dower there.

If the Huſband and Wife join in levying a Fine, or ſuffering a common Recovery, this ſhall bar her of her Dower totally, becauſe in both Caſes ſhe is examined upon Record by the Judges, as to her Conſent; and ſhe having nothing in the Lands in her own Right, her joining in ſuch Acts can be to no other Purpoſe, but to bar her Dower; but if the Huſband be ſeiſed in Fee, and a Stranger levies a Fine to him and his Wife *ſur Conuzance de droit come ceo, &c.* of theſe Lands, and the Huſband and Wife grant and render the ſame Land to the Stranger and his Heirs; it ſeems the

Plow. 515. Eare v. Snow. 10 Co. 49. Cro. Eliz. 29. Brook 77.

Wife ſhall not be barred of her Dower, becauſe ſhe is not examined in this Caſe, as ſhe is in the other; and therefore, if this Fine *ſur Grant & Render* be pleaded in Bar, ſhe may ſay that ſhe had nothing in the Land at the Time of the Fine levied.

Bulſt. 173. Leon. 285. Dyer 358. If a Jointure be made to the Wife during the Coverture, and after the Huſband and Wife levy a Fine thereof; yet this is no Bar to her Dower of any other Lands of her Huſband's, becauſe the Jointure being made after the Marriage, ſhe had Election after the Death of the Huſband to refuſe it, and claim Dower, and not before; and then the Fine, levied of the Jointure before her Time for Election of Dower was come, can be no Bar for electing of Dower when it is come.

Perk. 350. F. N. B. 149. Moor, pl. 103. If a Woman takes a Leaſe for Life of her Huſband's Lands after his Death, ſhe ſhall have no Dower, becauſe ſhe cannot demand it againſt herſelf; and if ſhe takes a Leaſe for Years only, yet ſhe ſhall not ſue to have Dower during theſe Years, becauſe it was her own Act to ſuſpend the Fruit and Effect of her Dower during that Time.

If Leſſor marries the Leſſee for Years, and dies, 'tis ſaid ſhe ſhall have Dower during the Term, but it ſhould ſeem ſhe can have no Fruit thereof till the Term ended, ſhe having the whole already for Years, unleſs upon Recovery of Dower the Term be merged for the third Part ſo recovered in Dower.

Perk. 352. 353. 3 Co. 27. Tho' by this Contrivance all Women may be defeated of their Dower as to Eſtates purchaſed after the Marriage. If Lands are given to the Huſband and Wife, and to the Heirs of the Huſband, who dies, the Wife may diſagree to this Eſtate made during the Coverture, and then 'twill be an Eſtate to the Huſband and his Heirs *ab Initio*, and ſo ſhe ſhall have her Dower thereof; but if the Eſtate be made to the Huſband and the Wife for the Life of the Husband, Remainder to the right Heirs of the Husband, it ſhould ſeem ſhe cannot in this Caſe diſagree, becauſe the Eſtate upon the Husband's Death is determined and gone.

By the Common Law, a Woman could not be barred of her Dower by any Aſſignment or Aſſurance to her of other Lands, or of a Rent iſſuing out of other Lands, whereof ſhe was not dowable (except in the Caſe of Dower *ad Oſtium Eccleſiæ* or *ex aſſenſu Patris*); were ſuch Aſſign- * Page 141 * ment or Aſſurance made by the Huſband before Marriage or after, or by the Heir after his Death; and they were expreſsly ſaid to be in full Bar and Recompence of her Dower; yet might ſhe recover her Dower notwithſtanding; for ſhe having a Right to be endowed of the third Part of all her Huſband's Lands veſted and fixed in her immediately upon the Marriage, and the Huſband's Seiſin thereof, this Right like all others could not be transferred or extinguiſhed, but by a Releaſe thereof; and if no ſuch Releaſe were made, it continued ſtill in being, for Want of the proper Means to deſtroy it; and if it ſtill exiſted, her Remedy was open to recover and reduce it into Poſſeſſion.

4 Co. 1. *Vernon's* Caſe Dyer 91. Co Lit. 34, 36. Brook 97. 2 Brownl 132 *Vide plus*, Title *Jointure*.

Moor, pl. 103. Co. Lit. 36. b. One deviſes Lands to his Wife during her Widowhood, and dies, ſhe marries again, and brings Dower; and this Deviſe was pleaded in Bar; and it was held no Bar. 1*ſt*, Becauſe a Will imports a Conſideration in itſelf, and cannot be averred to be in Bar of Dower, without it be ſo expreſſed. 2*dly*, Dower cannot be of leſs Eſtate than for Life; and a third Reaſon may be, becauſe her Right cannot be barred by collateral Recompence.

4 Co. 4.

Cro Eliz. 128. *Cooſling* v. *Warberton*. In Ejectment the Caſe was, that a Man deviſed his Land to his Wife till his Daughter *M.* ſhould arrive to the Age of 19 Years, and after to *M.* in Tail, Remainder over in Fee, and deviſes farther that *M.* ſhould pay, after her Age of 19 Years, to his Wife 12 *l. per Annum* in Recompence of her Dower; and if ſhe failed in Payment, that then his Wife ſhould have the Land for her Life; the Wife, before the Daughter came to the Age

Age of 19, brought a Writ of Dower, and recovered a third Part, and after the Daughter came to 19, and for Non-payment of the 12 *l.* the Mother entred; and the Queſtion was, whether her Entry was lawful; and argued that it was, and that by bringing her Writ of Dower ſhe had not waived the Benefit to have the Lands by the Deviſe, becauſe then ſhe had no Title to it, but her Title accrued after for Non-payment of the 12 *l.* But it was adjudged, that ſhe having recovered a third Part in Dower ſhe ſhould not have the Rent by the Will; for it is againſt the Intention of the Will that ſhe ſhould have both, and the Acceptance of one is a Waiver of the other.

One ſeiſed of Lands in Fee held in Socage, and of other Lands in Tail held *in capite*, deviſes by Will in Writing the third Part of all his Lands to his Wife in Recompence of her Dower, and dies; ſhe enters into the third Part of the Fee-ſimple Lands without bringing her Writ of Dower; and held that ſhe was barred from claiming any more. Dyer 226. 4 Co. 4.

A Man marries an Orphan of *London*, who had a great Portion in the Orphan's Court there; the Huſband dies before taking of it out, but makes his Will, and deviſes this Money to his Wife, provided that ſhe ſhould not claim her Dower; and yet after his Death ſhe brought her Writ of Dower; and thereupon a Bill was brought in Chancery to have her releaſe her Dower, or renounce the Deviſe, and for an Injunction in the mean Time, but could not prevail, the Money belonging to her in her own Right, by the Cuſtom, for Want of the Huſband's altering the Property thereof; and tho' he had, yet 'twas admitted it would have been no Bar of Dower, being totally collateral thereto, though it ſhould ſeem ſhe would in ſuch Caſe have (*a*) forfeited the Money by ſuing for Dower. 2 Vent. 340. *Pharſant's* Caſe. Chan. Ca. 181. S. C.

(*a*) If Lands, Money, Goods, *&c.* are deviſed to a Woman, without ſaying in Lieu or Satisfaction of Dower, *&c.* yet the Wife ſhall have both, becauſe a Deviſe implies a Conſideration; but if it be ſaid in Lieu or Recompence of Dower, there the Wife cannot have both, but may waive which ſhe pleaſes; and this has been often adjudged in Chancery. 2 Chan. Ca 24. 2 Vern. 365. Abr. Ca. in Eq. 218, 219.

A Woman had Title to Dower of Lands, whereof one is Tenant for Life, Remainder to another in Fee; the Woman releaſes to the Re-*mainder-Man all her Right of Dower; this is a good Bar in Dower brought againſt the Tenant for Life, though ſhe had no preſent Cauſe of Action againſt him in the Remainder, till after the Death of the Tenant for Life; ſo of a Releaſe to Tenant for Life, he in the Reverſion or Remainder ſhall take Advantage thereof, becauſe her Dower accrues not only out of the Eſtate for Life, but alſo out of the Reverſion or Remainder, and both as to her make but one Eſtate; ſo that if ſhe diſcharges either, ſhe diſcharges the whole. * Page 142 Co. 112. Co Lit. 265. 8 Co. 151. *Edward Altham* s Caſe.

In Dower the Tenant pleads a Releaſe from the Demandant to ſuch a one Tenant *in Poſſeſſione tenementor' prædict' exiſten'*, and becauſe not ſaid that he was *Tenens liberi tenementi*, 'twas held no Plea; and adjudged for the Demandant; for a Releaſe of Dower to Tenant for Years, or at Will, can be no Bar of Dower, becauſe ſhe cannot demand it againſt them. Cro. Jac. 151.

If a Woman pretends herſelf *enſient* by her Huſband, when in Truth ſhe is not; by which the Heir is diſturbed of his Inheritance; ſhe ſhall loſe her Dower if ſhe acknowledge it before the Juſtices. 2 Inſt. 436. But this Caſe may admit of ſo many Diſtinctions, that 'tis hard to make Law of it, as it is put, and harder yet, that it ſhould be a Bar of her juſt Right.

By the Cuſtom of ſome Places the Wife ſhall be barred of her Dower, if ſhe receives Part of the Money for which her Huſband ſold the Land, whereof Davies 30. b. Brook 53. Title *Cuſtoms*.

whereof ſhe was otherwiſe dowable; ſo by the Cuſtom of ſome Places, if a Widow marries, ſhe ſhall have no Dower of her ſecond Huſband's Lands.

2 Inſt. 435. Co. Lit. 32. F. N. B 150. Rol. Abr. 680.

As to Elopement, this was no Bar of Dower at the Common Law, tho' a Divorce were ſued and obtained for the Adultery; but now by the (*a*) Statute of *W.* 2. *c.* 34. 'tis expreſsly provided that in ſuch Caſe the Wife ſhall loſe her Dower; and tho' ſhe does not go away *ſponte*, but is taken againſt her Will, yet if after ſhe conſents and remains with the Adulterer, ſhe ſhall loſe her Dower; for the Remaining with him without Reconciliation is the Bar of Dower, not the Manner of going away.

(*a*) The Words of the Statute are *ſi Uxor ſponte reliquerit Virum ſuum, et abierit et moretur cum Adultero ſuo, amittat in perpetuum Actionem petendi Dotem ſuam, quæ ei competere poſſet de Tenementis viri ſui, ſi ſuper hoc convincatur, niſi Vir ſuus ſponte et abſq; Coertione Eccleſiæ eam reconciliet, et ſecum cohabitare permittat, in quo Caſu reſtituatur ei Actio. Vide* Dyer 107. a Precedent of ſuch Elopement pleaded, and Iſſue taken upon the Reconciliation of the Huſband, and there held that the Defendant cannot give in Evidence any other Elopement but that pleaded.

Perk. 354. Brook 12. *cont'.* Rol Abr 680. 2 Inſt. 136. Co. Lit. 32. 13 Co. 23.

If a Woman be raviſhed, and remain with the Raviſher againſt her Will, ſhe ſhall not loſe her Dower; but if after ſuch Raviſhment ſhe conſent to remain with him, ſhe ſhall loſe it; ſo if ſhe voluntarily goes away from her Huſband, tho' ſhe remain all her Life-time with the Adulterer againſt her Will, or if ſhe remains not with him, but he turns her away, yet ſhall ſhe loſe her Dower; but if ſhe be reconciled as the Statute ordains, then ſhe ſhall be endowed, tho' the Huſband aliened † the Land in the mean Time.

If ſhe Elopes, and lives in Adultery on any other the Manors or Lands of her Huſband, ſhe ſhall loſe her Dower. 2 Inſt. 436. But *vide* Perk. 355. F. N. B. 150. Rol. Abr. 680. *cont'.* For the Huſband is to take Care that none ſuch live there; if the Huſband be reconciled by Church Cenſures, yet ſhe ſhall loſe her Dower, but Cohabitation is ſufficient Evidence of a Reconciliation. Rol. Abr. 680.

† Co. Lit. does not warrant this Part of the Poſition.

2 Inſt. 435. Rol. Abr. 680 Dyer 106. *in Margine.*

If a Man grants his Wife with her Goods to another, and ſhe lives with the Grantee all the Life-time of the Huſband, yet ſhe ſhall loſe her Dower, by Reaſon of living with him in Adultery; in that Caſe where ſuch a Grant was pleaded, 'twas held, 1*ſt*, That the Grant was void. 2*dly*, That it did not amount to a Licence; or if it did, that 'twas void. 3*dly*, That after the Elopement there ſhall be no Averment admitted *quod non fuit adulterium*, tho' the Grantee and the Woman married after the Huſband's Death; and though in that Caſe they brought Sentence of Purga-

* Page 143 * tion of the Adultery from the Spiritual Court, yet it was not allowed againſt ſuch Preſumption.

Rol. Abr. 680. *Green* v. *Harvey.*

If the Huſband's Relations keep him from his Wife, ſo that ſhe does not know what is become of him, and give out that he is dead, and thereupon procure her to releaſe all Marriages and Intereſt which ſhe can have in him as her Huſband, and alſo perſuade her to marry again, which ſhe does with one who has Notice that her firſt Huſband is alive, but ſhe herſelf has no Notice of it; tho' ſhe lives in Adultery with this Man, and tho' her Huſband be not out of the Realm, nor beyond the Seas, ſo that ſhe ought to have taken Notice of his being alive, yet becauſe ſhe *non reliquit Virum ſponte*, as the Statute ſays, but by Perſuaſion of his Friends, not knowing herſelf but that he was dead, this is no ſuch Elopement as will bar her of her Dower.

9 Co. 17, 18. Plow. 85. Perk. 356, 360.

It is a good Plea in Bar of Dower, that the Demandant detains from the Heir ſuch Charters, ſhewing them in Certainty, unleſs they are in a Bag ſealed, or Box locked; and then 'tis ſufficient to ſay that ſhe detains from him

him ſuch Bag or Box of Charters; and if the Bag or Box be open, then he muſt ſhew the Charter in certain, and after ſuch Plea he muſt add, that if ſhe will deliver them to him, he is, and always hath been ready to render her Dower; and upon this if ſhe delivers them to him, ſhe ſhall have Judgment for her Dower preſently; but if ſhe denies ſuch Detainer, and it be found againſt her, ſhe ſhall be barred for ever; and it is to be obſerved, 1*ſt*, That theſe Charters ought to concern the Land, or the Reverſion of the Land whereof Dower is demanded. 2*dly*, That ſuch Detainer is no Bar of Dower for more Lands than the Charters concern. 3*dly*, That none can plead this Plea but the Heir, and not a Stranger, who is Tenant of the Land, tho' he hath the Charters conveyed to him.

5 Co. 75. Rol. Abr. 679. Brook 1, 4, 39, 41, 47, 48, 53, 57, 67. Hob. 39, 113, 199. Bendl. pl. 215. Dyer 37. pl. 42, 230. pl. 52.

The Reaſon why ſuch Detinue of Charters is a good Plea for the Heir ſeems to be, becauſe the Inheritance by Law is caſt upon him immediately after his Anceſtor's Death, without any Act of his concurring; and therefore he cannot provide againſt the Injury done him by any Precaution or Covenant whatſoever; but a Stranger, who comes to the Land by Conveyance, and his own Act, ought to take Care to have all the Deeds and Writings, neceſſary for the Defence of his Title, delivered to him at the ſame Time, or to ſecure himſelf by proper Covenants; and if he has not ſo done, it his own Folly; and he ſhall take no Advantage thereof by pleading it in Bar of the Demandant's Right, but muſt purſue his Remedy by an Action of Detinue, *&c.* In what Caſes the Heir himſelf ſhall be conſidered as a Stranger, and cannot plead Detinue of Charters, *vidi* 9 Co. 18. Perk 358. Dyer 230. pl. 52.

If two Coparceners are of Land, and after Partition made between them the Mother brings Dower againſt one of them, ſhe [the Daughter] may well plead Detinue of Charters, becauſe the Charters concern her Inheritance, though they do alſo concern her Siſter who both make but one Heir. Perk. 359.

If the Daughter enter into the Land after her Father's Death, who left his Wife *enſient*, and the Wife brings Dower againſt the Daughter as Heir, ſhe cannot plead Detinue of Charters, becauſe it may be that the Wife is *enſient* with a Son, who will be Heir, and therefore may juſtly detain the Charters for him. Perk. 360. Rol. Abr. 679. Brook 8.

Detinue of a Tranſcript of a Fine is not a ſufficient Cauſe to detain Dower, becauſe another Tranſcript may be had in the Treaſury. Perk. 360. Rol. Abr. 679. *cont.*

Detinue of Charters is no good Plea after Imparlance; reſolved upon a Demurrer to ſuch Plea in the Court of *Durham*, and confirmed on a Writ of Error in *B. R.* Salk. 252. pl. 2.

Burdon v. Burdon. Comb. 183. S. C.

The Guardian in Chivalry may plead Detinue of the Heir, becauſe the Wardſhip of him belongs to him, but he cannot plead Detinue of Charters, becauſe they belong to the Heir for Defence of his Inheritance; and the Reaſon why he is allowed to plead Detinue of the Heir in Bar of Dower ſeems, becauſe the Writ of Dower lies only againſt him during the Minority of the Heir; and ſince the Demandant does wrong in detaining from him the Wardſhip, 'tis but reaſonable ſhe ſhould be delayed * of her Right againſt him, till ſhe reſtores it; and therefore he concludes his Plea; likewiſe that if ſhe will deliver to him the Ward, he hath been, and ſtill is ready to render her Dower; ſo if the Wife takes away the Ward, and delivers him to another ſo that the Guardian cannot have him, this is a good Cauſe to bar her of her Dower; ſo if the Guardian comes in by Voucher, he may plead the ſame Plea; and this is a good Plea in Bar of Dower *ad Oſtium Eccleſiæ*, or *ex aſſenſu patris*; if the Wife does not enter, but brings her Writ, claiming it as Dower, whereof ſhe was *nominatim dotata* by her Huſband; and in theſe Caſes if ſhe cannot render the Ward unmarried ſhe ſhall loſe her Dower, becauſe ſhe hath thereby deprived the Guardian of what was moſt valuable, *viz.* the Marriage of his Ward. Dyer 230. pl. 52. Perk. 360, 363. Rol. Abr. 679. Brook 47, 67. 9 Co. 18, 19. 10 Co. 94. Co. Lit. 39. a. * Page 144

Perk. 362. If a Woman as Mother to the Heir brings him up, and one claims the Wardſhip of him as Guardian in Chivalry, and takes him from her; this is no Cauſe for the rightful Guardian to detain her Dower, becauſe ſhe was not in Fault.

Perk. 363. If the Mother takes the Heir out of the Poſſeſſion of thoſe who had the Education of him, and they retake him, ſo that ſhe cannot deliver him to the Guardian, this is a good Cauſe to detain her Dower for the Wrong done in the Eſloignment at firſt, when the Wardſhip did not belong to her. †

† See 12 Car. 2. c. 24. As to Wardſhip, &c.

(G) Where the Wife ſhall hold her Dower ſubject to the Charges of her Husband, and where not; and herein of the Privileges of Tenant in Dower, and the Nature of her Eſtate, as to Alienations made, or Actions brought by or againſt her

4 Co. 64, 66, * The Widow of a Mortgagor not barred of her Dower, if ſhe did not join in the Mortgage. 4 *W. & M.* *c.* 16. *ſ.* 5. 10 Co. 49.

THE Wife ſhall hold her Dower diſcharged of Judgments, Recognizances, Statutes, Mortgages,* or any other Incumbrances made by the Huſband after Marriage, becauſe after his Death her Title, which is now conſummate, has Relation to the Marriage and Seiſin of her Huſband, which were before the Incumbrances; but if ſhe joins in a Grant of a Rent by Fine out of ſuch Land, or makes a Leaſe for Years, rendring Rent by Fine to the Huſband and his Heirs, ſhe ſhall hold her Dower ſubject to ſuch Rent or Term, becauſe ſhe was examined upon the Fine, and by ſuch Means might bind her own Inheritance.

Co. Lit 31. a. F. N. B. 150. *per tout.*

If the Huſband die indebted to the Crown, yet his Wife's Dower is by Law privileged from any Diſtreſs; and if ſhe be diſtrained, ſhe may have a Writ to the Sheriff, commanding him not to diſtrain her, or to re-deliver the Diſtreſs, if any be taken, unleſs ſuch Debts were contracted before her Title of Dower accrued, for then it will be liable thereto; and the Reaſon ſhe ſhall not be diſtrained for Debts to the Crown, contracted after the Marriage, ſeems to be by Reaſon of her prior Title by Relation.

Perk. 330, 332. Rol. Abr. 683, 684.

If the Huſband ſeiſed of three Manors grant a Rent-Charge out of all, and die, and the Wife hath one Manor aſſigned to her by the Heir in Lieu of Dower of all the three Manors, ſhe ſhall hold it charged for a third Part of the Rent, becauſe this Endowment was againſt common Right, by which ſhe ought to have had the third Part of each Manor; but if ſhe had recovered her Dower, and ſuch Aſſignment had been made by the Sheriff, ſhe ſhould have held it diſcharged, becauſe ſhe purſued the proper Means to obtain it clear, and then it is not reaſonable the Sheriff's Act in miſexecuting the Judgment of the Court ſhould prejudice her, eſpecially when the Heir is not more hurt by the whole Charge falling upon the two Manors, than he would if it had fell upon two Parts of all the three Manors.

* Page 145

Plow. 41. a. 81. b.

A Wife may demand Dower of a Rent-charge granted to her Huſband and his Heirs, without ſhewing the Deed, becauſe the Deed belongs not to her, but her Eſtate is created by the Law.

Tenant

Tenant in Dower is allowed by the Statute of *Merton, cap.* 2. to deviſe the Corn growing upon the Land at the Time of her Death, of which before that Statute it was doubted if ſhe might; and the Word *Blada* there extends likewiſe to Hemp, Flax, and other Things, which grow by the Induſtry of Man, but not to Graſs, Trees, &c. which come *ſuapte natura.* 2 Inſt. 81. Keilw. 125.

In Dower againſt an Infant who makes Default upon the *Grand Cape* returned; it was held *per tot' Cur'* that Judgment ſhall be given upon the Default, for the Infant ſhall not have his Age in Dower, which being but for Life ſhe may be totally defeated of by his frequent Defaults; though ſome of the Books ſay, that if Judgment be given upon the *Grand Cape* before Appearance, this is Error; *ſecus* if he appears by Guardian, and after loſeth by Default; for then if any Default be in the Guardian, he ſhall recover againſt him in a Writ of Diſceit; and other Books doubt if the Infant ſhall not be allowed his Age in Dower; but the contrary ſeems the more reaſonable Opinion. Cro. Jac. 111, 192. Cro. Eliz. 309, 337, 557, 567. Moor, pl. 465, 1148, 1149. 2 Brownl. 118. Cro. Eliz. 638. 2 Leon. 59, 189.

In Error to reverſe a Fine levied by the Plaintiff and her Husband, the Heir is ſummoned as Tertenant, and appears, and pleads that he is within Age, and prays that the Parol may demur; Plaintiff counterpleads the Age, ſhewing that ſhe was intitled to have Dower before the Fine levied, and now is barred of her Dower by this Fine, which is erroneous, and ſets forth the Errors, and ſeeks to be reſtored to her Writ of Dower; but upon Demurrer and ſolemn Argument it was held in this Caſe, that the Parol ſhould demur. Cro. Jac. 392. Moor, pl. 1148. S. C. between *Herbert* and *Binion.*

(H) To whom the Tenant in Dower ſhall be attendant, and by what Services.

AND here the Rule is, that the Dowreſs is to be attendant to the Reverſion dependant upon her Eſtate, for the Services which were paid during the Life of her Huſband, unleſs the original feudal Contract increaſe ſuch feudal Services, and then ſhe ſhall be an Attendant for the Services increaſed. Perk. 424, 425. 9 Co. 135. But though in moſt Caſes ſhe ſhall be attendant to him in the Reverſion by the third Part of the Services, by which he holds over, yet may ſhe be attendant to others, and by other Services; and therefore if Lord, Meſne and Tenant are by Knights Service, and 3 *s.* Rent, and the Tenant marries, and dies, his Iſſue within Age, and the Meſne ſeiſe the Ward of the Body and Land of the Heir, and endows the Wife, ſhe ſhall be attendant to the Meſne by 1 *s.* Rent; and if he die during the Minority of the Heir, then ſhe ſhall be attendant to his Executors in the ſame Manner till the full Age of the Heir, becauſe till then the Profits belong to the Guardian and his Executors in their own Right; but for this *vide* Keilw. 124, 129. Rol. Abr. 685. Brook. 64.

If he in Reverſion grant it over to another, and the Tenant in Dower attorn, ſhe ſhall be attendant to the Grantee by her own Agreement. Perk. 427.

If one makes a Gift in Tail, rendring 20 *s.* Rent, and dies, and the Donee marries and dies without Iſſue, and his Wife is endowed by the Heir of the Donor, ſhe ſhall be attendant to him for a third Part of the Rent, though the Eſtate-tail and the Rent are both determined; for her * Eſtate being a Continuance of her Huſband's, and the Donor thereby kept out of Poſſeſſion for a third Part during her Life; it is but reaſonable ſhe ſhould pay her Proportion of the Rent reſerved; ſo though the Lord had releaſed to the Tenant Donor all his Seignory, yet the Wife of the Donee ſhould be attendant in the ſame Manner, by Reaſon of the Expreſs Reſervation; and ſhe is a Stranger to the Releaſe. Co. Lit. 46. a. 241. a. Brook 64. Perk. 431. * Page 146

If

Perk. 434. If Tenant holds by Fealty, and a Horſe of 40*s.* Price, his Wife being endowed, ſhall be attendant to the Heir by the third Part of the 40*s.* only; but if it was of a Horſe to be rendred yearly, ſhe ſhould render to the Heir a Horſe every third Year.

(I) Of the Proceedings and Damages in Dower unde Nihil habet.

2 Inſt. 124. BEfore the Statute of *Marlb. cap.* 12. in Dower *unde nihil habet*, there were Days of Common Return, as in other real Actions, which was miſchievous to the Wife, by Reaſon of the long Delay, ſhe claiming but an Eſtate for Life; but this is now remedied by that Act, and four Days of Return in the Year are given at leaſt, and that Act extends likewiſe to the Vouchee, but not to a Writ of Right of Dower, nor to Dower *ad Oſtium Eccleſiæ*, nor *ex aſſenſu Patris*, unleſs it be *unde nihil habet*, but 32 *H.* 8. *c.* 21. extends to, and gives the ſame Return in every Writ of Dower.

Brownl. 126. In Dower the Tenant at the Day of taking the Inqueſt, after the Jury had appeared, and before they were ſworn, made Default, and a *Petit Cape* was awarded, and the Tenant at the Day *in Banco* informed the Court that he was but Tenant for Life, and the Reverſion in one *A.* who at the Day in *B.* ought to be received, and the Court appointed him to plead his Plea at the Return of the *Petit Cape*, before which Time his Appearance ſeems idle.

Hob. 133. *Allen* v. *Walter*. The Proclamation by the 31 Eliz. c. 3. ought to be at the Pariſh Church Door, though it be in another County than where the Land lies. In Dower of Lands in *L. M.* and *N.* the Sheriff returns *Plegii de Proſeq. A. B. C. D.* and the Names of the Summoners *E. F. G. H.* and that after the Summons made, and 14 Days and more before the Return of it, at the moſt uſual Church Door of *L.* where Part of the Lands lay, ſuch a *Sunday* after Sermon ended, he publickly proclaimed all and ſingular the Things contained in the Writ, to be proclaimed according to the Form of the Statute in that Caſe made, and indorſes his Name to the Return; and Exception was taken to this Return, becauſe Proclamation was not made at all the Church Doors; but *per Cur'* Proclamation at any of the Church Doors is ſufficient; but the Return was held ill, becauſe he ſays he had proclaimed all and ſingular the Things in that Writ contained, without ſaying what.

Cro. Eliz. 472. Error of a Judgment in Dower, in that the Proclamation is ſaid to be at *H.* in the Spring, and it doth not appear that it is within the Pariſh of *W. H.* where the Demand is; but by *Weſton* for the Defendant, this is Cauſe why no *Grand Cape* ſhould iſſue, by 31 Eliz. cap. 3. but it is no Cauſe of Error; and the Judgment was affirmed *niſi*. Keb. 529. Upon a Writ of Summons in Dower it was returned *ad Oſtium Eccleſiæ proclamari feci juxta formam Statut' ſecundum exigen' brevis*, and held good by two Juſtices againſt one, though what the Error was does not appear. Keb. 680. On a Motion for a *ſuperſedeas*, to ſtay Proceedings on a *Grand Cape* in Dower, *quia erronice emanavit*. 1*ſt*, Becauſe the Return of the Summons was not according to the Statute of 31 *Eliz. c.* 3. for the Statute is after Summons. 2*dly*, The Land lies in a Vill called *Heroick*, and the Return is of a Proclamation of Summons at the Pariſh Church of *Halliſax*, and it does not appear that the Lands lie within the Pariſh. 3*dly*, The Return is *proclamari feci ſecundum formam Statuti*, and it is not returned to have been made upon the Land; for all which Cauſes it was held erroneous, and the *Grand Cape* was ſuperſeded. Mod. 197. Furnis v. Waterhouſe.

* Page 147

Vent. 60. *Williams* v. *Gwinn*. 2 Saund. 46. S. C. * Error to reverſe a Judgment in Dower at the Grand Seſſions in *Wales*; it appeared by the Record that the Tenant appeared at the Return of the Summons, and Day was given over, *& adtunc venit per Attornat' & nihil dicit in Barram*; whereupon *conſiderat' eſt quod tertia Pars terrar' & Tenement' capiatur in Manus D'ni Regis*; and upon Day given *ad audiend' Judicium*, Judg-

Judgment was given *quod recuperet*, and Error assigned that they ought not to have awarded a *Petit Cape*, because the Defendant appeared, and then they ought to have given Judgment upon the *Nihil dicit*; for the *Petit Cape* is always upon Default after Appearance and is only to answer the Default, as the *Grand Cape* is before Appearance to answer the Default, and Demand; but it was held no Error, being only an awarding of more Process than needs be, and it was an Advantage to the Tenant by delaying of the Demandant; and *per Twisden*, if erroneous, they might now give Judgment upon the *Nihil dicit* in this Court. 2 Keb. 450, 551, 605. S. C.

Error of a Judgment in Dower in *Newcastle-court*; because the Proceeding was by Plaint, and no special Custom certified to maintain it; and it was held Error, because Pleas of Frank Tenement cannot be held without original Writ, unless there be a special Custom for it. Vent. 267. *Lomax* v. *Armorer*. 2 Lev. 98, 123. S. C. 3 Keb. 277, 326, 421. S. C.

In Dower if Tenant makes Default, by which *Grand Cape* issues, the Demandant shall make her Demand, for no Certainty appears before the Demand made. Brook 96.

In Dower one appears upon the *Grand Cape*, who in Truth was but Lessee for Years, and so might plead Non-Tenure; and if now he might wage his Law of Non-Summons, and the Writ be abated, was the Question, because it was said that by Wager of his Law he affirms himself to be Tenant; but two Justices only in Court held that he would be at no Mischief, for being but Lessee for Years, if Judgment and Execution were against him, he might, notwithstanding, enter upon the Demandant; another Matter was, that where the Writ of Dower was, *de tertia parte Rectoriæ de D.* and the *Grand Cape* made upon it accordingly; yet the Sheriff by Colour thereof took the Tithes severed from the two Parts, and carried them away; and *per Cur'* this is not such a Seisure as is by the Writ intended, for he ought only to have seised generally, but not to carry them away; and the Court had a Mind to have committed him for a Misdemeanor. Leon. 92. *Michell* v. *Hyde*.

In Dower Tenant demands the View, Demandant counterpleads the View, because her Husband died seised, *& hoc parat' est verificare & petit Judicium & Dotem suam de Tenement' prædict sibi adjudicari*; Tenant *protestando*, that the Husband did not die seised, demurs and shews for Cause that the Counterplea *male concludit*, for it ought to have been *& petit Judicium* and *quod tenens de visu excludatur*, and the Counterplea is but dilatory, and ought not to conclude peremptorily for final Judgment; and of this Opinion was *Levinz*, but two other Justices held it not ill; also the Demand was of three Messuages, *&c.* where it ought to have been only of the third Part of them; and if this might be amended was doubted. 3 Lev. 169. *Whelpdale's* Case.

In Dower *unde Nihil, &c.* Tenant demands the View, Demandant counterpleads it, because the Husband *alienavit Tenement' prædict'* to the Tenant *& hoc, &c.* and it was demurred, because *alienavit* does not shew what Estate he aliened, for it may be a Lease for Years; but *per cur'*, Alienation implies all the Estate which he had, and the Statute *W.* 2. 48. ousts the View, where the Husband aliens to the Tenant, or any of his Ancestors; and this is in the very Words of the Statute, and a *Respondeas Ouster* awarded, but no Notice taken whether the View was allowable in Dower *unde nihil habet*. 3 Lev. 220. *Barns & Ux'* v. *Rich*.

* Page 148 *Note*; in Dower the View is ousted by *W.* 2. *cap.* 48. in these Words, *In Brevi de Dote cum Petatur Dos de Tenemento quod Vir Uxoris alienavit tenenti aut ejus antecessori, cum ignorare non debet Tenens quale Tenem' Vir Uxoris alienavit sibi vel anteces-sori suo, licet Vir non obiit seisitus, nihilominus Tenenti de cætero non erit Visus concendendus*; and my Lord *Coke* in his Exposition thereof says it extends not to a Writ of Dower *unde nihil habet*, for thereon no View lay at the Common Law, because the Demandant should not be delayed, having nothing to live on; but it extendeth to other Writs of Dower, whether for Dower at Common Law, *ad Ostium Ecclesiæ, ex assensu Patris*, or by the Custom; and where the View has been granted, it is to be intended in those Cases, for which *vide* 2 Lev. 117. 3 Keb. 360. Dyer 179. pl. 41. 2 Rol. Abr. 725. 2 Inst. 481.

2 Inſt. 261. At the Common Law, before the Statute of *W.* 1. *c.* 49. if a Woman had accepted any Part of her Dower, though never ſo ſmall, of any one Tenant in any one County or Town, ſhe had no other Remedy for the Reſidue, but by a Writ of Right of Dower; for if ſhe brought a Writ of Dower *unde nihil habet*, it was a good Plea in Abatement, that ſhe had accepted ſuch a Part of ſuch a Tenant, in ſuch a Town or County, which being a great Miſchief to the Woman is remedied by that Statute, which provides that it ſhall be no Plea in Abatement, to ſay that ſhe hath received Part of her Dower of any other Perſon before the Writ purchaſed; and this extends as well to Guardian in Chivalry as to the Tenant of the Land, becauſe ſuch Guardian is to render her Dower.

Raym. 366. *Harvey* v. *Harvey*. In Dower the Tenant pleads, that after Marriage the Huſband had ſettled other Lands on the Demandant for Life, for her Jointure, and that ſhe after his Death agreed thereto, and entered accordingly; the Demandant replies, that it was a voluntary Settlement of her Huſband, and traverſes that it was for her Jointure; and Iſſue thereupon; and at the *Niſi prius* the Tenant made Default, and a *Petit Cape* awarded, and returned, and Judgment, that the Demandant have Seiſin; and the Demandant ſuggeſts that her Huſband died ſeiſed, and prays a Writ to inquire of the Damages, returnable ſuch a Day; the Sheriff returns that he hath delivered Seiſin of the Lands particularly, and alſo an Inquiſition which finds that the Lands are worth 114*l.* 11*s.* *per Annum*, and that her Huſband had been dead ſix Years and three Quarters, and that ſhe had ſuſtained Damages *occaſione detentionis Dotis ultra Valorem præd' & ultra miſas & Cuſtag' ſua* 195 *l.* *& pro Miſis & Cuſtag.* 20*s.* and upon this the Demandant *gratis* releaſes the 195*l.* and demands Judgment only for the 20*s.* and Judgment is given that the Demandant recover *tam Valorem tertiæ Partis prædict'* from the Death of her Huſband, which came to 257 *l. quam* the 20*s.* and 11 *l. de Incremento*, *in toto* 269 *l.* and the Tenant brings Error, for that the Damages being releaſed by the Demandant, there ought to have been no Judgment againſt him for the Value of the Land. But the whole Court reſolved, that the Releaſe was only of the Damages ſuſtained *occaſione detentionis dotis*, and not of the Meſne Profits of the Lands, for they are two diſtinct Things, as appears by *Co. Lit.* 33. *a.* *Raſt. Entr.* 237. where the Writ is to inquire not only of the Value of the Land, but alſo of the Damages *ratione detentionis*; and the Judgment is always entred accordingly, and a *Fieri facias* lies for the Damages; and therefore the Judgment was affirmed.

Note; The Meſne Values and Damages are to be recovered againſt the Tenant in a Writ of Dower, and ſo it appears in the Judgment of this Caſe, and in Co. Lit. 33. a. and Bendl. 155.

Co. Lit. 32. Dyer 284. pl. 33. Yelv. 112. *Page 149 *Dr.* and *Stud. lib.* 2. *c.* 13. *f.* 166. 2 Inſt. 80. The Words of this Statute, are *Quod Viduæ quæ poſt Mortem Virorum ſuorum expellantur de Dotibus ſuis, & Dotes ſuas vel Quarentenam ſuam habere non poſſunt ſine placito quod quicunque deforciaverit eis Dotes ſuas vel Quarentenam ſuam de Tenementis de quibus Viri ſui obierint ſeiſiti, & ipſæ viduæ poſtea per placitum recuperaverint, ſi ipſi deforc' de injuſto deforciamento convicti fuerint, reddant eiſdem viduis Damna ſua, ſcilicit valorem totius Dotis eis contingentis a tempore mortis Virorum ſuorum uſque ad Diem quo ipſæ Viduæ per Judicium Curiæ Seiſinam ſuam inde recuperaverint.*

As to Damages in Dower, they are given by the Statute of *Merton*, *c.* 1. but that Statute extends only to the Poſſeſſory Action of Dower *unde nihil habet*, and not to the Writ of Right of Dower, becauſe they are intended to be given for the Detention of the Poſſeſſion, and on Writs of Right; where the Right itſelf is queſtionable, no Damages are *given, becauſe no Wrong done till the Right be determined; alſo that Statute extends only to Lands, whereof the Huſband died ſeiſed; and therefore Judgment for the Damages was reverſed, becauſe the Jury did not find that the Huſband died ſeiſed; for otherwiſe ſhe ſhall have no Damages; as if the Huſband aliens and takes back an Eſtate for Life, the Wife ſhall recover Dower, but no Damages; becauſe this dying ſeiſed was only of an Eſtate of Freehold; but if he makes a Leaſe for Years only, rendering Rent, ſhe ſhall recover a third Part of the Reverſion with a third Part of the Rent and Damages, becauſe there he died ſeiſed as the Statute ſpeaks.

Damages muſt be after Demand of Dower, for the Heir is not bound to aſſign this Proviſion till demanded, becauſe the Law caſts the Freehold of the whole upon him, which cannot divide without the Concurrence of the Wife; but a Demand *in Pais* before good Teſtimony is ſufficient; and if the Heir appear the firſt Day on Summons, and plead that he hath been always ready, and ſtill is, to render her Dower; ſhe may plead ſuch Requeſt; and Iſſue may be taken upon it; but the Feoffee of the Heir cannot plead *Tout temp priſt*, becauſe he had not the Land all the Time ſince the Death of the Anceſtor, and therefore ſhe ſhall recover the Meſne Profits, and Damages againſt him, and if he hath not provided his Indemnity and Recompence againſt the Heir, it is his own Folly.

Co. Lit. 32. Note; the Statute of *Merton* extends to Copy holds, whereof the Wife is dowable by Cuſtom. 4 Co. 30. Co. Lit. 33.

If the Heir or Feoffee aſſign Dower, and the Wife accepteth thereof, ſhe loſeth her Damages, becauſe having the Dower, which is the Principal, ſhe cannot ſue for the Damages, which are but Conſequential or Acceſſory.

Co. Lit. 33. a.

In Dower the Tenant, as to Part, pleads Non-Tenure, and to the Reſidue, Detinue of Charters, and Iſſue taken upon both Pleas, and both found againſt the Tenant; and it was found further that the Huſband died ſeiſed ſuch a Day and Year, leaving Iſſue a Son, which Son, together with the Demandant, as his Mother and Guardian, took the Profits for ſix Years after the Huſband's Death, and that ſuch a Time the Son died without Iſſue, and the Land deſcended to the Tenant as Uncle and Heir to him, and that he entered and took the Profits till the Purchaſe of the original Writ, and found the yearly Value of the Land, and aſſeſſed Damages for the detaining Dower and Coſts; and the Plaintiff had Judgment for the Damages from the Death of the Huſband without any Defalcation; in which Caſe my Lord *Coke* ſays there are many Things obſervable, but the moſt material ſeems to be the Recovery of Damages from the Huſband's Death, tho' there was no Demand of Dower, and tho' the Demandant herſelf took the Profits for ſix Years, which ſeems to be the Conſequence of the Tenant's pleading Non-Tenure, which being found againſt him, the other Matter found was ſuperfluous, except as to the Damages, for which he then remains Deforceor.*

Co. Lit. 33. a. Belfield v. Rous. Moor, pl. 213. S. C. Bendl. pl. 215. S. C.

*See *infra* 150.

In Dower upon Default, a *Grand Cape* was awarded, and on ſuggeſting that her Huſband died ſeiſed, a Writ of Enquiry of the Value of the Lands was awarded likewiſe, and Inquiſition taken and returned, and 60*l.* Damages for the Value of the Land; and it was moved to ſtay the Filing of the Writ of Enquiry, becauſe no Notice was given to the Te-
* nant thereof, nor of the Execution of it; and tho' it was anſwered that in real Actions no Perſonal Notice is to be given, but the Tenant ought to take Notice, becauſe the Summons is always executed on the Land, and not elſewhere; yet *per Curiam*, the *Grand Cape* is a Judgment, and by that the Suit is determined at Common Law, and the Damages for the Value of the Land is added by the Statute of *Merton*, and Perſonal Notice ought to be given of the Writ, and of the Execution of it, as in other Caſes of Writs of Enquiry; and therefore for Want of Notice they diſcharged the Inquiſition, and awarded Reſtitution of the Damages; but *Levinz* makes a Q. of it, and ſays the Practicers informed him that 'tis not uſual to give Notice of the executing of the Writ of Enquiry in Caſe of Dower.

* Page 150

3 Lev. 409. Perkins v. Lamb. Upon a Trial at Bar the Iſſue was, whether there was a Demand of Dower, and Refuſal, to intitle the Plaintiff to Damages; the Plaintiff proved an actual Demand of the Heir, being of the Age of 14 Years, then in her Cuſtody, tho' by his Father's Will committed to another; the Infant ſaid his Guardian would not let him aſſign Dower; reſolved *per tot' cur'* upon Debate. 1*ſt*, That it was demandable of the Heir, tho' he had been under Age. 2*dly*, That this Guardian was but in Nature of a Guardian in Socage, and that the Dower was not demandable of him, but of the Heir, tho' not in the Cuſtody of the Guardian; and that if the Heir had entered upon the Land to aſſign Dower, he had been no Treſpaſſor upon the Guardian, tho' the Cuſtody of the Land during ſuch Nonage was committed to ſuch Guardian. 3*dly*, That his not Aſſigning Dower upon Demand, tho' he did not refuſe to do it, was a Refuſal in Law, to intitle the Plaintiff to her Damages. Hill. 29 & 30 Car. 2. in C. *B.* between *Corſellis* and *Corſellis*.

In

Dower.

Daliſon 100. *Rich's* Caſe. 3 Leon. 52. S. C. Note; The Caſe in Truth was that after her Huſband's Death ſhe entred and abated without Aſſignment of Dower, and occupied for five Years, and then the Tenant re-entred, and ſhe brought Dower; and agreed that in ſuch Caſe the Tenant need not ſay *tout temp priſt* generally, but ſhew the Abatement and Re-entry, for the Time of her Occupying ſhall be conſidered and recouped in Damages.

In Dower the Tenant to Part pleads Non-Tenure, and to other Parts Detinue of Charters; and Judgment for the Demandant; but it was reverſed in Error, becauſe the Tenant, being within Age, appeared by Attorney, where it ought to be by Guardian; then a new Writ of Dower was brought, and the Tenant pleads *tout temp priſt*; the Demandant pleads the firſt Record to eſtop him; Tenant rejoins *Nul tiel Record*, becauſe it is reverſed; which the Court agreed; but they held that the Demandant might take Iſſue that he had not been *tout temp priſt*, and give in Evidence the firſt Record to prove it.

Leon. 56. Walker v. Nevil.

In Dower Judgment was given upon *Nihil dicit*, and becauſe the Huſband died ſeiſed, a Writ of Enquiry of Damages was awarded; by which it was found that the third Part of the Value of the Land was 8 *l. per Ann.* and that eight Years had elapſed *a Die Mortis Viri ſui proxime ante Inquiſition' & aſſident Damna* to 80 *l.* and upon the Record it appeared that after the Judgment in the Writ of Dower the Demandant had Execution by *habere fa. ſeiſinam*, and that Damages were aſſeſſed for eight Years; whereas it appeared upon all the Records, that the Demandant had been ſeiſed for Part of the eight Years; and therefore Error was brought and aſſigned, *1ſt*, That Damages are aſſigned till the Time of the Inquiſition taken, where they ought to be but to the Time of the Judgment; but this was diſallowed. *2dly*, That the Value being found but 8 *l. per Annum*, the Damages for eight Years are but 64 *l.* but *per Cur'* it may be that by the long detaining of Dower Demandants had ſuſtained more Damages than the bare Value; but becauſe it appeared that Damages were aſſeſſed for the whole eight Years, where the Demandant herſelf was ſeiſed for Part of them, by Force of the Judgment and Execution, it was held erroneous.

Brook 49, 73, 78, 93.

In Dower if Demandant recovers by Confeſſion, or otherwiſe, yet ſhe may after, upon Suggeſtion and Averment, that her Huſband died ſeiſed, have a Writ to inquire of the Value and Damages.

Lev. 38. *Alewerth* v. *Roberts.* Sid. 188. S. C. Keb. 85. S. C. 645, 711. Brownl. 127. cont'.

In Dower *unde nihil habet*, the Demandant had Judgment, and a Writ of Seiſin executed, and the Tenant brought Error, and the Judgment affirmed; but pending this, the Tenant aliens the Land, and dies; and now the Demandant brings *Scire facias* againſt the Heir of the Heir, and againſt the Alienee, to have her Damages, ſuggeſting that her Huſband died ſeiſed; the Tenants ſeverally plead the Matters aforeſaid; and Judgment againſt the Demandant; but therein agreed that the Judgment is complete at Common Law without the Damages, and Error lies of it before the Damages given, and that it is Time enough to ſuggeſt the Dying ſeiſed of the Huſband, in order to recover Damages after the Judgment given for the Dower; but the Statute of *Merton* gives Damages *contra* * Page 151 * *Deforciatores*, which here neither the Heir of the Heir, nor the Alienee are; and therefore they are loſt by the Death of the Heir, and are not a Lien upon the Land to paſs with it; for if they ſhould be recovered, from what Time muſt this Recovery be? not from the Huſband's Death, becauſe none of the preſent Tenants had the Land from that Time; nor from the Death of the Heir, againſt whom the Judgment was, for none of the now Tenants are Deforceors; and therefore they are like Damages in Treſpaſs, which die with the Party; and when the Tenant dies before Judgment for the Damages, the Judgment for the Dower remains as at Common Law.

3 Mod 281. *Mordant* v. *Thorold.*

A Widow brought a Writ of Dower, and recovered, and this Judgment was affirmed in a Writ of Error, after which ſhe took out a Writ of En-

quiry

quiry of Damages, but died before the ſame was executed; the Damages are loſt, being no Duty till they are aſſeſſed; and therefore a *Scire facias* by her Adminiſtrator in this Caſe was held not maintainable. Salk 252.pl.1. S. C. Carth. 133. S. C. 12 Mod. 346.

3 Lev. 275. 2 Ld. Raym. 1050. 10 Mod. 161.

(K) Of the Admeaſurement of Dower.

IF the Heir within Age aſſign to the Wife more Land in Dower than ſhe ought to have, he himſelf ſhall have a Writ of Admeaſurement of Dower at full Age by the Common Law; ſo if too much be aſſigned in Dower by the Heir within Age, or his Guardian in Chivalry, and the Heir dies, his Heir ſhall have ſuch Writ to rectify the Aſſignment; but the Heir, in whoſe Time the Aſſignment of too much was by the Guardian, cannot have ſuch Writ till his full Age, becauſe till then Intereſt of the Guardian continues; and if any Wrong be done, it is to the Guardian himſelf, and not to the Heir; if a Diſſeiſor aſſigns too much, the Heir of the Diſſeiſee ſhall have Admeaſurement by the Common Law. F.N.B. 148. Co.Lit. 39.a. 2 Inſt. 367.

If the Heir within Age, before the Guardian enters, aſſigns too much in Dower, the Guardian ſhall have a Writ of Admeaſurement of Dower, by the Statute of *W.* 2. *c.* 7. before which Statute the Guardian had no Remedy, becauſe the Writ of Admeaſurement, being a real Action, lay not for the Guardian, who had but a Chattel; alſo by the ſame Statute it is provided that if the Guardian purſue ſuch Writ faintly, or by Colluſion with the Wife, the Heir at full Age ſhall have a Writ of Admeaſurement, and may alledge the faint Pleading or Colluſion generally. 2 Inſt. 367.

If the Wife after Aſſignment of Dower improves the Lands, ſo as thereby they become of greater Value than the other two Parts, no Writ of Admeaſurement lies; ſo if they be of greater Value, by Reaſon of Mines open at the Time of the Aſſignment, no Writ of Admeaſurement lies, becauſe the Land in Quantity was no more than ſhe ought to have; and then it is lawful to work the Mines, which were open at the Time of ſuch Aſſignment. F.N.B 149. 2 Inſt. 368. 5 Co. 12. *Saunder's* Caſe

If the Sheriff aſſigns too much in Dower, by one Book it ſeems that the Heir ſhall have a Writ of Admeaſurement; but Q. whether he ſhall have that or a *Scire facias* upon the Recovery, which was of no more than the third Part. Palm. 266. Brook 83.

Theſe Writs of Admeaſurement of Dower are Vicontiel, and not returnable; and the Parties may plead before the Sheriff in the County, if they think fit; but if they are removed in *C. B.* by a *Pone*, as the Plaintiff may, without ſhewing any Cauſe, and the Defendant *upon ſhewing Cauſe; and thereupon Proceſs goes out, *viz.* Summons, Attachment, and *Diſtringas*; then the Sheriff cannot make Admeaſurement, but ought to extend all the Lands particularly, and return it in *C. B.* and upon that Admeaſurement ſhall be made. F.N.B.148. *Page 152

Dower by the Cuſtom.

This Kind of Dower varies according to the Cuſtom and Uſage of the Place, and is to be governed accordingly; and where ſuch Cuſtom prevails, the Wife cannot waive the Proviſion thereby made for her, and claim her Thirds at Common Law, becauſe all Cuſtoms are equally ancient with the Common Law itſelf. Co.Lit.33.b. Cro.Eliz.825 Leon.62,133.

Co. Lit. 33. b. 111. a. F. N. B. 150. Stanf. Prær. 44. b. Rol. Abr. 558. Brook Dower 70. Brook Tit. Cuſtom 67, 69 72.

By the Cuſtom of Gavelkind in *Kent*, the Wife ſhall have the Moiety ſo long as ſhe keeps herſelf chaſte and unmarried, and the Reaſon of this Proviſion for the Wife ſeems to be founded on the equal Diſtribution, which is obſerved in this Kind of Inheritance in the ſame Family for their equal Support; and therefore when ſhe proves unchaſte, or marries again, and thereby contracts a new Alliance, this Proviſion as to her ceaſes, and returns again into the Family; but the Preſumption of her Chaſtity is to continue till it be proved ſhe was delivered of a Child, begotten during her Widowhood, which may be in any Action brought by or againſt her.

2 Jon. 6. Sid. 136. *Lambart's* Perambulation 555.

Cro. Eliz. *Hunt & Uxor* v. *Gilburn.* Leon. 62. Cro. Eliz. 121 S. C. adjudged. Moor 260. pl. 408. S. C. adjudged.

Dower, and demands the third Part of the Lands of *A.* her late Huſband lying in *Kent*, *&c.* Defendant pleads that the Cuſtom there is, that Wives ſhall have the Moiety of their Huſbands Lands in Dower, ſo long as they live chaſte and unmarried, and *non aliter*, or *non ſecundum Curſum Communis Legis*, and that the Demandant after the Death of her firſt Huſband had married the other Demandant, *&c. et per Cur'*, the Cuſtom is good, and is the Law in *Kent*; and therefore ſhe can claim no other Dower, nor in any other Manner, and the rather by Reaſon of the negative Concluſion.

Cro. Eliz. 825. S. P. and S. C. cited.

Co. Lit. 33. b. 110. b. F. N. B. 150.

By the Cuſtom of Borough-Engliſh, the Widow ſhall have the whole of her Huſband's Lands in Dower, which is called her Free-Bench.

Cro. Eliz. 415. Moor, pl. 566. The Reaſon of which ſeems to be, that in theſe Boroughs the eldeſt Son was introduced into the Trade of his Father, and therefore the youngeſt Son inherited the Land, and conſequently the Wife that was intruſted with the younger Children of her Huſband had the whole during her Life.

Cro. Jac. 126. *Laſhmer* v. *Avery.*

Upon a ſpecial Verdict, the Caſe was this: A Cuſtom of a Manor was found to be, that if a Copyholder in Fee died ſeiſed, his Wife ſhould hold it during her Life as *Frank Bank*; the Lord infeoffs the Copyholder, who died ſeiſed; and adjudged that her Cuſtomary Eſtate was gone, becauſe by the Acceſſion of the Freehold the Copyhold Eſtate was extinguiſhed, and ſo her Huſband did not die ſeiſed thereof; *ſecus* if the Lord had enfeoffed a Stranger, for then the Copyhold remained ſo ſtill, and the Cuſtom with it.

Hob. 181. *Howard* v. *Bartlett.* Cro. Jac. 573. S. C.

Cuſtom of a Manor was, that the Wives of Copyholders for Life ſhould enjoy their Huſband's Eſtates during Widowhood; and the Caſe was, that *A.* a Copyholder for Life, purchaſed the Freehold and Inheritance of his Copyhold, but took the Conveyance to *B.* and his Heir during the Life of *A.* Remainder to *A.* in Fee, and then *A.* dies; adjudged that his Wife ſhould have her Cuſtomary Eſtate, becauſe the Cuſtomary Eſtate of *A.* her Huſband continued during his Life, and was not extinct, nor altered * Page 153 * by the Purchaſe of the Freehold, which during his Life was in *B.* and then all cuſtomary Incidents to ſuch cuſtomary Eſtate remain, whereof this is one, and grows out of it as an Excreſcence or Fruit, and ſhe may enter without Admittance.

3 Lev. 385. *Benſon* v. *Scot.* 4 Mod. 251. S. C. Salk. 185. pl. 3. S. C. Carth. 275. S. C.

Cuſtom of a Manor was, that the Copyholders Wives ſhould have their Free-Bench of all Copyholds whereof their Huſbands died ſeiſed; and a Copyholder, being married, ſurrenders to *A.* in Fee, by way of Mortgage, for ſecuring 70 *l.* and this Surrender was preſented to be inrolled; but before Admittance the Surrenderer dies, and after his Death *A.* is admitted; and if the Wife ſhould have her Free Bench, was the Queſtion. For the Wife it was ſaid, that till Admittance the Copyhold remained in the Huſband, and then he died ſeiſed, and ſo his Wife within the Cuſtom; and though

the Admittance after his Death has Relation to the Time of the Surrender, yet that is only by Fiction of Law between the Parties, but ſhall not prejudice the Wife who is a Stranger; alſo, though the Admittance hath Relation to the Marriage, which was before, and is perfected by the Death of the Huſband, and ſo her Title was begun and perfected too, before the Title of the Surrenderee; but the Court denied that the Wife had any initiate Title by the Marriage in this Caſe as Women have to their Dower at Common Law; but ſhe hath only conditional Inception of a Title ſubject to the Huſband's Power of preventing it by Alienation, as here he might have done; for ſhe is not to have her Free Bench but where the Huſband died ſeiſed; and this by the Relation of the Surrender he did not; and adjudged accordingly. Skin. 406. pl. 1. 12 Mod. 49.

The Cuſtom of a Manor was, that the Wife of a Copyholder dying ſeiſed ſhould have her Widow's Eſtate; a Commiſſion of Bankruptcy is taken out againſt the Copyholder, and his Eſtate ſold by the Commiſſioners, but before the Vendee was admitted the Copyholder dies; and yet adjudged that the Widow's Eſtate was gone, becauſe her Huſband did not die ſeiſed, his Eſtate and Right being bound by the Sale, to which the Admittance after has Relation, and deveſts the Widow's Eſtate. Cro. Car. 569. *Parker* v. *Edith.*

If the Cuſtom of a Manor be, that if any of the Tenants marry a Widow ſhe ſhall have no Dower; this is good, but Cuſtom, that the Wife of Tenant in Fee ſhall not be endowed, is not good. Rol. Abr. 562. Dav. 30. b.

If there be a Cuſtom, that where the Huſband ſells his Lands and his Wife receives Part of the Money, or if it be expended in the Family, that his Wife ſhall be barred of her Dower, this may be good. Rol. Abr. 562. *Brook* Title *Cuſtom* 53, 78.

Ancient Rent, or Common in Borough Engliſh, Gavelkind, *&c.* is of the Nature of the Land there, and Women ſhall have Dower accordingly; and ſo it ſeems to be of Rent, Common, *&c.* newly granted, though ſome have held the contrary; and in all theſe Caſes, whether it be of Land or Rent, the Cuſtom muſt be ſhewn ſpecially. *Brook*, Title *Cuſtom* 44, 58, 65, 69.

If the Cuſtom be, that the Wife ſhall have for her Dower the Moiety of the Lands and Tenements of her Huſband, *&c.* ſhe ſhall not be endowed of a Fair or Bailiwick, becauſe the Cuſtom ſhall be taken ſtrictly, and theſe are no Tenements; *ſecus* if they were appendant to a Manor, whereof ſhe is dowable, for then ſhe ſhall have a Moiety of the Profits as appendant to a Moiety of the Manor. Perk. 435, 436. 2 Sid. 139.

Dower ad Oſtium Eccleſiæ.

Dower *ad oſtium Eccleſiæ* is where a Man of full (*a*) Age, ſeiſed of Lands in Fee, after Marriage endows his Wife at the (*b*) Church-Door of (*c*) a Moiety, a third or other Part of his Lands, declaring them in * Certainty; in which Caſe, after her Huſband's Death, ſhe may enter into ſuch (*d*) Lands without any other Aſſignment, becauſe the (*e*) ſolemn Aſſignment at the Church-Door is equivalent to the Aſſignment *in pais* by Metes and Bounds; but this Aſſignment cannot be made before Marriage, becauſe before ſhe is not intitled to Dower. Lit. Sect. 39 Co. Lit. 34. a. 36. b. 37. a. * Page 154

(*a*) Cannot be made by one under Age, Perk. 438.

(*b*) *Dowment ad oſtium Cameræ Caſtri vel Meſſuagii* is not good. F. N. B. 150. Co. Lit. 34.

(*c*) It was formerly held that it could not be of more than a third Part of the Huſband's Eſtate. F. N. B. 150. Co. Lit. 34. b. 36. a.

(*d*) This Dower cannot be of the Capital Barony held of the King *in Capite*, or of the Capital Meſſuage held by Knight's Service.

(*e*) This Dower, before the Statute of Frauds and Perjuries, was held to be good without Deed, or without Livery and Seiſin. Perk. 437. Brook 7, 80. Dyer 18. pl. 108. Co. Lit. 34. a. 35. a.

If this Dower be aſſigned, with a Clauſe, that, notwithſtanding any Divorce that ſhall happen, the Wife ſhall hold it for her Life, this is good becauſe *Modus & Conventio vincunt Legem.* Co. Lit. 32. a.

If

Co. Lit. 38. If Tenant in Tail aſſigns ſuch Dower, this ſhall not bind his Iſſue againſt the Statute *de donis*, nor him in the Reverſion after the Eſtate ended.

Dower ex aſſenſu Patris.

Lit. Sect. 40. Co. Lit. 35, 36. Perk. 444. Brook, 7, 80. Plow. 304. b. Cro. Jac. 169. Dower *ex aſſenſu Matris* is as good. Perk 441. Co. Lit. 35. This Endowment of a Reverſion expectant on an Eſtate for Life is not good, nor of Lands held by the Father in Jointenancy, becauſe not dowable of them. Co. Lit. 35. a. Perk. 445. F. N. B. 150. (*a*) Can be only by the Heir apparent. Perk. 442. F. N. B. 150. 3 Co. 38. 6 Co. 22. Co. Lit. 35. But it is good, though the Heir apparent be within Age, for the Eſtate does not move from him. Co. Lit. 35. b. 38. a. Brook 80.

Dower *ex aſſenſu Patris* is where the Father is ſeiſed of Lands in Fee, and his Son and Heir (*a*) apparent after Marriage endows his Wife by the Father's Aſſent, *ad oſtium Eccleſiæ*, of a certain Quantity of them; in which Caſe, after the Death of the Son, his Wife may enter into ſuch Parcel, without any other Aſſignment, though the Father be living; but this Aſſent of the Father's muſt be by Deed, becauſe his Eſtate is to be charged *in futuro*, and this may likewiſe be of more than a third Part.

4 Co. 1. Co. Lit. 36. Brook 97. 3 Leon. 272.

Theſe Dowers *ad oſtium Eccleſiæ*, or *ex aſſenſu Patris*, if the Wife enters and aſſents to them, are a good Bar of her Dower at Common Law; but ſhe may if ſhe will waive them, and claim her Dower at Common Law, becauſe being made after the Marriage ſhe is not bound by them.

Co. Lit. 35. F. N. B. 150.

Theſe Dowers enſue the Nature of Dower at Common Law, and the Wife may have a Writ of Dower for them, though they are certain, as well as for her Dower at Common Law, and as well againſt the Guardian as the Tertenant.

Co. Lit. 33. a. 37. a.

Theſe Dowers are good, though the Wife be under the Age of nine Years at the Time of her Huſband's Death, being made by Conſent.

Co. Lit. 37. a. 41. Stanf. 195. a.

Theſe Dowers are forfeited for High or Petit Treaſon in the Huſband; and ſo they were anciently, if he were attainted of Felony or Murder; tho' now in theſe laſt Caſes they are ſaved by the Statutes 1 *E.* 6. *cap.* 2. and 5 *Edw.* 6. *cap.* 11. but remain forfeitable by his Attainder of High or Petit Treaſon.

Dower de la pluis Beale.

Lit. Sect. 48. Co. Lit. 38, 39. a. b.

Dower *de la pluis Beale* is where there is a Guardian in Chivalry, and the Wife occupies Lands of the Heir as Guardian in Socage, if the Wife brings a Writ of Dower againſt ſuch Guardian in Chivalry, he may ſhew this Matter, and pray that the Wife may be endowed *de la pluis Beale* of the Tenements in Socage; and it will be adjudged accordingly; and the Reaſon of this Endowment was to prevent the Diſmembring of the Lands holden in Chivalry, which are *pro bono Publico*, and for the Defence of the Realm.

* Page 155 Lit. Sect. 49.

*After Judgment given, the Wife may take her Neighbours, and in their Preſence endow herſelf of the faireſt Part of the Tenements, which ſhe hath in Socage, for her Life.

Lit. Sect. 49.

If the Lands, which the Wife hath as Guardian in Socage, are not of Value ſufficient for her Dower, or if a Rent-charge be iſſuing out of them, upon her ſhewing thereof, ſhe ſhall recover of the Guardian in Chivalry to make it up.

Perk. 451.

If all the Lands which the Huſband had were holden in Socage, and his Wife hath them as Guardian in Socage, ſhe ſhall be allowed the third Part of the Profits upon her Account in Allowance of Dower; but ſhe cannot endow herſelf of the third Part thereof, becauſe that would be to make herſelf

herſelf judge in her own Cauſe; neither can the Heir, in a Writ of Dower brought againſt him, plead that ſhe is Guardian in Socage, and may endow herſelf.

Guardian by Tort in Socage cannot endow herſelf *de la pluis Belle*, because the Law will not encourage ſuch Wrong and Violence. 5 Co. 30.

Dureſs.

EVERY legal Contract muſt be the Act of the Underſtanding, which they are incapable of uſing, who are under Reſtraints and Terrors; and therefore the Law requires the free Aſſent of the Parties as eſſential to every Contract, and that they be not under any Force or Violence; but for the better Underſtanding hereof I ſhall conſider,

(A) For what Dureſs or Degree of Reſtraint or Terror, a Man ſhall avoid his Deed or Contract. 155.

(B) On whom and by whom the Dureſs muſt be committed. 157.

(C) What Contracts or Securities may be thus avoided. 158.

(D) The Manner of avoiding them. 159.

(A) For what Dureſs or Degree of Reſtraint or Terror, a Man ſhall avoid his Deed or Contract.

IT ſeems clearly agreed, that where a Perſon is illegally reſtrained of his Liberty by being confined in a common Gaol, or (*a*) elſewhere, and during ſuch Reſtraint enters into a Bond, or other Security, to the Perſon * who cauſes the Reſtraint, that he may avoid the ſame for Dureſs of Impriſonment ‡. Co. Lit. 253. Jenk. 166. * Page 156

(*a*) For every Reſtraint of the Liberty of a Freeman is an Impriſonment. 2 Inſt. 482.

‡ And that is by pleading that the Bond, &c. was obtained by Dureſs of Impriſonment. See *poſt* 159.

But if a Man be impriſoned by Order of Law, the Plaintiff may take a Feoffment of him, or a Bond for his Satisfaction, and for the Deliverance of the Defendant, notwithſtanding that Impriſonment; for this is not by Dureſs of Impriſonment, becauſe he was in Priſon by (*b*) Courſe of Law; for it is not accounted in Law Dureſs of Impriſonment, but where either the Impriſonment, or the Dureſs that is offered (*c*) in Priſon, or at large, is tortious and unlawful; for *Executio juris non habet injuriam.* 2 Inſt. 482.

(*b*) That Dureſs of Impriſonment is intended only where the Party is wrongfully impriſoned till he makes a Bond, and not where a Man is lawfully impriſoned for another Cauſe, and for his Delivery makes a Bond. 3 Leon. 239. *per Cur'.*

(*c*) If a Man be lawfully in Priſon, yet if he makes

2 Inſt. 483. (c) 2 Rol. Abr. 124. S. P.

My Lord *Coke* ſays, that for Menaces, in four Inſtances, a Man may avoid his own Act. 1*ſt*, For Fear of Loſs of Life. 2*dly*, *(c)* Of Loſs of Member. 3*dly*, Of Mayhem. 4*thly*, Of Impriſonment.

2 Inſt. 483.

But Menacing to commit a Battery, or to burn his Houſes, or ſpoil his Goods, is not ſufficient to avoid the Act; for if he ſhould ſuffer what he is threatned, he may ſue and recover Damages in Proportion to the Injury done him.

Cro. Eliz. 646. *Stepney* and *Lloyd*. 4 Inſt. 97. S. C. Cro. Car. 596. (*d*) So where the Arreſt was by the Purſivant of the High Commiſſion by their Command, until he entred into a Bond to appear, *&c.* and it was held void. Rol. Abr. 687.

If a Man is taken by Virtue of a Proceſs iſſuing out of a Court that hath no Power to grant ſuch Proceſs, and for his Enlargement gives Bond to appear in the ſaid Court, this may be avoided, becauſe taken by Dureſs; adjudged in an Action upon ſuch Bond, given by one who was taken upon an Attachment under the Privy Seal of the Court of Requeſt; for that Court had (*d*) no Power to grant ſuch Proceſs, and therefore it was no Warrant to the Sheriff to take his Body.

Allen 92. Ruled by *Roll* accordingly, upon the Trial of an Iſſue on the Dureſs.

If *A.* falſly charges *B.* with Felony for ſtealing his Horſe, and procures a Warrant from a Juſtice of Peace to a Conſtable, whereby he is taken, and being in Cuſtody, upon *A.*'s Promiſe to diſcharge him, ſeals a Bond for 10*l.* to *A.* and is thereupon immediately diſcharged; this Bond may be avoided by Dureſs; and ſo ruled, it appearing that the Horſe was *B.*'s own Horſe, and that theſe Proceedings were only to cover the Deceit.

2 Vern. 497. *per Cur'*.

Alſo in Equity, if a Man by Compulſion enters into a Bond, though the Terror and Force are not ſufficient to make it Dureſs at Common Law, yet it may be relieved againſt.

Preced. Chan. 266. *Woodman & Skute*.

But in this every Caſe muſt depend on its own Circumſtances; for where *A.* being taken by the Huſband going to Bed to his Wife, gave Securities for Payment of 500*l.* and a Bill being brought to be relieved againſt the Securities, ſuggeſting a Plot to catch him; and that the Defendant with an Ax threatned to cut him in Pieces; but there being no Proof of a Plot, and it appearing that the Securities were entred into at three ſeveral Times, and when the Plaintiff was in cool Blood, and that he joined in concealing the Conſideration thereof, the Court refuſed to relieve.

Alſo, by a Rule of the Court of Common Pleas, 14 & 15 *Car.* 2. 1662. all Warrants for confeſſing Judgments, taken by any Sheriff or Bailiff from any Perſon in his * or their (*e*) Cuſtody by Arreſt, if not executed in the (*b*) Preſence of ſome ſworn Attorney of *(f)* either Court, and his Name ſet or ſubſcribed thereto as a Witneſs, ſhall not be *(g)* good, or of any Force; and upon Oath made that this was not done, the ſame ſhall be ſet aſide, and the Sheriff or Officer may be puniſhed for ſo doing; and if Judgment be entered thereon, the ſame on Motion will be vacated and ſet aſide; and if the Execution thereon be executed, the Party will have Reſtitution awarded him.

* Page 157

(*e*) So if a Man under Arreſt be ſeemingly diſcharged by the Bailiffs with a Deſign that he ſhould give a Warrant of Attorney to confeſs a Judgment, but if he did not, to be retaken; this is within the Rule. 6 Mod. 85. Mod. Rep. 1. Barnes 29, 38. 2 Barnes 43. So if he be really diſcharged; yet if he has probable Reaſon to believe himſelf not to be diſcharged, and under ſuch Apprehenſions, he gives a Warrant for confeſſing of Judgment, it will be ſet aſide. 6 Mod. 85. agreed *per Cur'*. (*f*) Though an Attorney be preſent, yet if there be Practice in obtaining it, it will be ſet aſide. 6 Mod. 85. See the above Authorities.

makes an Obligation againſt his Agreement and Will, he may avoid it by Dureſs. 43 E. 3. 10. b. Rol. Abr. 687.—Where after Judgment the Defendant, having no good Cauſe of Action, cauſed the Plaintiff to be arreſted and detained in Priſon, threatning him that if he would not ſeal a Releaſe to him, he ſhould lie there and rot; and thereupon he ſealed one, and was diſcharged; and it was ruled at *Guildhall* before *Bridgman* C. J. that this Releaſe could not be avoided by Dureſs, becauſe he was in Cuſtody in the Courſe of Law by the King's Writ when he ſealed, but offered it ſhould be found ſpecially if *Baldwin* would pray it, which he did not; and therefore the Releaſe was held good. Lev. 69.

(B) On whom and by whom the Dureſs muſt be committed.

THE Dureſs that will avoid a Deed muſt be done to the Party himſelf; therefore if *A.* and *B.* enter into an Obligation, by Reaſon of Dureſs done to *A. B.* (*e*) ſhall not avoid this Obligation, though *A.* may, becauſe he ſhall not avoid it by Dureſs (*f*) to a Stranger. Rol. Abr. 687. *Montal* and *Woolington.* Brownl. 66. S. C. adjudged.

(*e*) Cro. Jac. 187. S. P. adjudged, and that the Bond may ſtand good as to one, and be avoided as to the other.* (*f*) Dureſs by a Stranger, by Procurement of the Party that ſhall have the Benefit, is a good Cauſe to avoid, &c. 43 E. 3. 6. Rol. Abr. 688. S. C.—But Dureſs by a Stranger, without making the Obligee Party thereto, is no Cauſe to avoid, &c. Keilw. 154. a.

* But ſuppoſe ſuch Bond joint, and not ſeveral, will not the Dureſs of one Obligor avoid it, as to the other?

But (*g*) a Son ſhall avoid his Deed by Dureſs to his Father; ſo (*b*) ſhall the Father his Deed, by Reaſon of Dureſs to his Son. † *Qu.* (*g*) Rol. Abr. 687. (*b*) 2 Brownl. 276.

Alſo the Huſband ſhall avoid a Deed made by Dureſs to his Wife. Rol. Abr. 687. 2 Brownl. 267. S. P. For the Huſband and Wife are but one Perſon. Sid. 123. cited to be adjudged.—For Dureſs of Impriſonment of the Plaintiff's Commoign. Keilw. 154.

But a Servant ſhall not avoid a Deed made by Dureſs to his Maſter, nor *vice verſa.* Rol. Abr. 687. 2 Brownl. 276.

* (C) What Contracts or Securities may be thus avoided. * Page 158

IF a Man makes a (*a*) Leaſe by Dureſs, and the Leſſee enters, the Leſſor ſhall have an Aſſize againſt him as a Diſſeiſor, for the Free Conſent of Parties being eſſential to all Contracts, where either of the Parties is under Bro. Title Diſſeiſin 68. (*a*) So if a Man under

—So where an Adminiſtratrix owed Money to *A.* in Right of her Inteſtate only, and was arreſted by *A.* without naming her Adminiſtratrix, and gave a Warrant of Attorney to confeſs Judgment, whilſt under an Arreſt, though Judgment was entered, and her Goods taken in Execution; and although an Attorney was preſent; yet the Court ſet aſide the Judgment for Irregularity, and awarded Reſtitution. 6 Mod. 163. 7 Mod. 115, 139. Ld. Raym. 357, 555, 707, 797, 850, 896, 1142. (*g*) If one under an Arreſt confeſſes Judgment in *B. R.* in the Preſence of a ſworn Attorney of *C. B.* it is well. 2 Barnes 36. Str. 530. and ſo *vice verſa.* 6 Mod. 85. 1 Salk. 402. Comb 224. See the above Authorities. If one under an Arreſt by Proceſs of an inferior Court gives Warrant for confeſſing of a Judgment in that Court, it will not be ſet aſide in *B. R.* though no Attorney be preſent. 6 Mod. 85. See the above Authorities.—But if being in Cuſtody by Proceſs of an inferior Court he gives a Warrant of Attorney to confeſs Judgment in *B. R.* if an Attorney be not preſent it will be ſet aſide. 6 Mod. 85. (*d*) But if the Defendant is arreſted, and in Execution, and one becomes bound for him to the Plaintiff, and the Defendant gives him Judgment for his Counter-Security, it is good, though no Attorney were preſent. 5 Mod. 144. One in Execution may confeſs a new Judgment, without the Preſence of an Attorney. 2 Stra. 1245.

Dureſs makes a Letter of Attorney to give Livery, he ſhall have an Aſſize. Bro. Title Diſſeiſin 63.

der Force and Violence, his free Aſſent cannot be ſuppoſed, and therefore ſuch Contract is void, and the Perſon who enters by Virtue of it is a Wrong-doer.

Bro Title Diſſeiſin 63. *Vide* 2 Inſt. 483. where it is ſaid that a Feoffment made by Dureſs is not void, but voidable only.

But if a Man by Dureſs make a Feoffment and Livery in Perſon, he ſhall have no Aſſize againſt the Feoffee, becauſe ſuch Dureſs ſhall not be preſumed, for then the Power of the *Pais*, preſent at the Solemnity, would have been ſuppoſed to have come in to his Reſcue.

Moor 42. Cro. Eliz. 88. S. P.

So if a Man acknowledges and enrolls a Deed, he cannot afterwards plead Dureſs.

And the Court inclined accordingly. Rol. Abr. 862. S. P. And that no Averment ſhall be taken, that a Deed inrolled was made by Dureſs.

Rol. Abr. 687. Owen 142. S. C. *Vide* Vidian Ent 107.

But a Statute Merchant may be avoided by *Audita querela*, becauſe it was made by Dureſs of Impriſonment.

Leon. 13. The Earl of *Northumberland's* Caſe, adjudged by all the Judges.

In Debt, for the Arrears of an Account, the Defendant may ſhew that the Plaintiff of his own Wrong impriſoned the Defendant, and aſſigned Auditors to him, being in Priſon, and that ſo the Account was by Dureſs.

Dyer 143. b. (*b*) So if a Man makes a Will in his Sickneſs by the over Importunity of his Wife, to the end he may be quiet, this ſhall be ſaid to be a Will made by Reſtraint, and ſhall not be good. Styl. 427.

A Will ſhall be (*b*) avoided by Dureſs or Menace of Impriſonment.

Keilw. 52. b. 1 N. Dyer 13. *in Margine.* Sid. 65. (*c*) Tho' *de Jure* it cannot, yet *de facto* it may, and ſo within the Statute 3 H. 7. *cap.* 2. Cro. Car. 488.

If a Man takes *A. S.* to Wife by Dureſs, though the Marriage be ſolemnized *in facie Eccleſiæ*, yet it is merely void, and they are not Huſband and Wife, for without a free Conſent (*c*) there can be no Marriage.

* Page 159

* (D) The Manner of avoiding them.

5 Co. 119. Reſolved *per Cur'* 2 Inſt. 483. S. P. *Vide* Keb. 516.

IF a Man executes a Deed by Dureſs, he cannot plead *Non eſt factum*, for it is his Deed, though he may avoid it by ſpecial pleading Judgment *ſi Actio*.

That in Pleading, the ſpecial Manner of the Dureſs, *viz.* whether it was *per Minas Vitæ, Minas Impriſonam'*, &c. muſt be ſet forth, and note ſo are all the Entries.

(a) Ejectment.

(a) It were to be wiſhed that the fictitious Proceedings in the common Action of Ejectment were altered. No Client can poſſibly be made to underſtand the Reaſon of ſuch a Fiction. If it is anſwered, that there is no Occaſion for his underſtanding it; I ſtill inſiſt that Myſtery ſhould always be removed, eſpecially when no one bad Conſequence can be ſuggeſted for ſuch a Removal. Obſerv. on Stat. 101.

(A) Of the Nature of the Action and Antient Manner of Proceeding in Ejectment. 160.

(B) Of the Modern Manner of Commencing and Proceeding in Ejectment; 161. And herein,

1. Of ſerving the Declaration, Notice to the Tenant in Poſſeſſion, and entering into the common Rule. 161.
2. Of adding proper Parties. 163.
3. Of the Coſts 164.

(C) In what Caſe the Antient Form is ſtill to be adhered to. 165.

(D) Of the Declaration in Ejectment: 166. And herein,

1. Of what Things an Ejectment will lie. 166.
2. What ſhall be a ſufficient Deſcription thereof. 168.
3. Of the Demiſe and Right of Entry in the Leſſor of the Plaintiff, and of the Ouſter. 171.

(E) Of the Plea and General Iſſue in Ejectment. 176.

(F) Of the Verdict and Judgment in Ejectment. 177.

(G) Of the Writ of Execution: 178. And herein,

1. Of the Time when the Writ is to be ſued. 178.
2. How the Writ is to be executed. 179.
3. How the Plaintiff is to be quieted, and what Relief he has where his Poſſeſſion is diſturbed. 180.

(H) Of the meſne Profits, and how to be recovered. 181.

(I) Of bringing a new or ſecond Ejectment. 182.

* Page 160 (A) Of the Nature of the Action and antient Manner of Proceeding in Ejectment.

5 Co. 105. 9 Co 77.

AN (*a*) Ejectment is a mixed (*b*) Action, in which a Leſſee for Years, when ouſted, ſhall recover his Term, as alſo his Damages.

(*a*) This is almoſt the only Remedy in Practice for recovering Land wrongfully with-held. 2 Bur. Rep. 667. (*b*) For it is *real* in Reſpect of the *Lands*, and *perſonal* in Reſpect of the *Damages* and *Coſts*. By *Holt* Ch. Juſt. Comb. 250. and 15 Days between *Teſte* and Return need not be in a *ſcire facias* on a Judgment in Ejectment, becauſe an Ejectment is a mixed Action. Comb. 68. 10 Mod. 177. ſays it is a poſſeſſory Action. ‡

‡ It's founded on a Poſſeſſion within 20 Years of the Party claiming, or of him under whom he claims, and is an Action within the Statute of Limitations, 21 Jac. 1. *c.* 16.—It is a poſſeſſory Remedy, and only competent, where Leſſor and Plaintiff may enter. If 20 Years are elapſed, before Ejectment brought, Leſſor muſt bring himſelf within ſome one of the Exceptions in the Statute or he cannot recover. *Taylor* v. *Horde* 1 Bur. 60 — Twenty Years *adverſe* Poſſeſſion in Defendant takes away Plaintiff's Right of Poſſeſſion as well as his Action or Remedy by Ejectment. *Id.*—See *poſt* 171, 2. n. and E. 176.

6 Co. 7. *Ferrar*'s Caſe.

This Remedy was contrived to ſupply ſeveral Defects which attended the bringing of real Actions; for in theſe the Party could not recover any Damages, neither could he regularly bring a ſecond Action if he was barred in the firſt.

But the concluding the Demandant by one Action being oftentimes found to have been very prejudicial to his Right; to ſupply this and ſeveral other Inconveniences which attended the bringing of real Actions, the Manner of forming a Term for Years, and the Leſſee's bringing an Ejectment to recover the Term, and thereby to aſſert the Title of the Leſſor of the Plaintiff, was found out, and was (*c*) firſt introduced in the 14 *H.* 7. before which Time it ſeems that Leaſes for Years were but of very ſhort Duration, and were generally defeated or determined before any intricate Title could be decided, and were ſuch precarious Poſſeſſions with Reſpect to the Power that the Owner of the Freehold and Inheritance had over them, that every ſuch Leſſee was looked upon only as his Bailiff; and if ouſted, could only have recovered Damages for the Loſs of his Poſſeſſion; and if ouſted by his Leſſor, he could only ſeek a Remedy from his Covenants.

(*c*) F. N. B. 220.

It ſeems alſo, that ſome Time before the above-mentioned Period, long Terms had their Beginning, which to ſecure to themſelves, the Leſſees uſed, when moleſted, to go into Equity againſt the Leſſors for a ſpecific Performance, and againſt Strangers, to have perpetual Injunctions to quiet their Poſſeſſions, which drawing the Buſineſs into the Courts of Equity, was probably one Reaſon which obliged the Courts of Law to come to a Reſolution, that they ſhould recover the Land itſelf in an *Habere facias poſſeſſionem*. Hence this Action became, and ſtill continues, the common Method of controverting the Title to Lands and Tenements.

As this Reſolution brought on a new Method of Trial unknown before to the common Law, it became uſual for a Man that had a Right of Entry into any Lands to ſeal Leaſes of Ejectment on the Lands, and then any Perſon that next entered on the Freehold was an Ejector; but as this was a Means of turning any Man out of Poſſeſſion, becauſe the Leſſee would recover his Term without any Notice to the Tenant in Poſſeſſion, therefore the Courts of Juſtice would not ſuffer that they ſhould loſe their Poſſeſſions without any Opportunity to defend them; wherefore the Court made it a ſtanding Rule, that no Plaintiff ſhould proceed in Ejectment to recover his Lands againſt ſuch a feigned Ejector, without delivering the Tenant in

Poſſeſſion a Declaration, and making him an Ejector and proper Defendant if he pleaſed.

This was a proper Rule of Court, and in its Power to form; for otherwiſe the Court would be made inſtrumental in doing an Injury to a third Perſon, becauſe a Declaration might otherwiſe be delivered to a Stranger, a feint Defence be made, and a Verdict, Judgment, and Execution obtained without the Tenant's having any Notice of it; tho' it is not to be doubted, but that ſuch Actions were brought at firſt againſt the real Ejectors that reſided in the Poſſeſſions; but becauſe any Perſon that came into the Land *animo poſſidendi*, was equally an Ejector with him that reſided, the Action in Strictneſs of Law might be brought againſt him; but becauſe this, as has been ſaid, turned to the Injury of the reſiding Poſſeſſor, the Rule was made, that he ſhould have Notice of it, and therefore they would not give Judgment in Ejectment, unleſs an Affidavit * was made that the Tenant in Poſſeſſion was ſerved with a Copy of the Declaration. F. N. B. 489. * Page 161

Upon ſuch Notice to the Tenant in Poſſeſſion, and Affidavit as aforeſaid, the Tenant in Poſſeſſion uſed to move the Court, that as the Title of the Land belonged to him, he might defend in the caſual Ejector's Name, which the Court, upon an Affidavit of that Matter, uſed to grant, and that the Suit ſhould be carried on in the caſual Ejector's Name, the Tenant in Poſſeſſion ſaving him harmleſs; and then the caſual Ejector was not permitted to releaſe Errors in Prejudice of the Tenant in Poſſeſſion, ſince the Suit was carried on in his Name by Rule of Court, and the Proceſs for Coſts was taken out againſt the caſual Ejector; and he was obliged to put the Bond of the Tenant in Poſſeſſion in Suit, who undertook to ſave him harmleſs. Style 468. T. Raym. 93. Keb. 705, 740.

Alſo by the ancient Practice ſuch Leaſes were actually to be ſealed and delivered, becauſe otherwiſe the Plaintiff could maintain no Title to the Term, and were alſo obliged to be ſealed on the Land itſelf, becauſe it was Maintenance to convey out of Poſſeſſion.

(B) Of the modern Form of Commencing and Proceeding in Ejectment: And herein,

1. Of ſerving the Declaration, Notice to the Tenant in Poſſeſſion, and entring into the common Rule.

ACcording to the modern Practice there is regularly no Neceſſity of ſealing and delivering Leaſes on the Lands; but the Party who claims a Title feigns a Leaſe, and in the Name of the feigned Leſſee delivers a (*a*) Declaration to the Tenant in Poſſeſſion in the Name of the caſual Ejector, who is alſo now ſome feigned Perſon; on this Declaration there is (*b*) Notice to the Tenant in Poſſeſſion in the caſual Ejector's Name.

(*a*) Which is the firſt Proceſs. 2 Barnes 153.

(*b*) Which Notice is, that as the caſual Ejector does not claim Title, unleſs the Tenant appears and defends his Title, the caſual Ejector will ſuffer Judgment to paſs by Default, whereby the Tenant will be turned out of Poſſeſſion. It muſt be ſigned by the caſual Ejector. *Barnard* K. B. 43. and not by the nominal Plaintiff. *Barnard.* K. B. 116. Barnes 115.

Salk. 255. pl. 5. Barnes 120. 2 Barnes 148. But the Court of *C. B.* has held the Tenant's Acknowledgment † of the Receipt of the Declaration not to be enough, and that an actual Delivery or Tender and Refusal, ought either to be proved or confessed. Barnes 114, 117. *Rep. & Cas. of Pract.* C. P. 76, 100. 2 Barnes 152. when leaving Declaration at the House sufficient.

It hath been holden, that the Service of the Declaration ought to be on the Tenant *(c)* himself, or his *(d)* Wife, and that Service on any of his Children or *(e)* Servants is not good, unless it appears the Defendant knew of it. But it has lately been determined, that if Tenant in Possession absconds, Service of his Niece, Father, Son, or Daughter, observing particular Directions, shall be good. 2 *Barnes* 148. 2 *Bur. Rep.* 1116. *Barnes* 120. *Rep. and Cas. of Pract. C. P.* 115. *Supplement to Barnes* 23, 24, 26. and now by the 4 *Geo.* 2. *cap.* 28. it is enacted, "That in all Cases between "Landlord and Tenant, as often as it shall happen that one half Year's "Rent shall be in Arrear, and the Landlord or Lessor, to whom the "same is due, hath Right by Law to re-enter for the Non-payment there-"of, such Landlord or Lessor shall and may, without any formal Demand "or Re-entry, serve a Declaration in Ejectment for the Recovery of the "demised Premisses; or in case the same cannot be legally served, or no "Tenant be in actual Possession of the Premisses, then to affix the same "upon the Door of any demised Messuage; or in case such Ejectment "shall not be for the Recovery of any Messuage, then upon some notorious "Place of the Lands, Tenements or Hereditaments comprized in such De-"claration in Ejectment; and such Affixing shall be deemed legal Service "thereof; which Service or Affixing such Declaration in Ejectment shall "stand in the Place or Stead of a Demand and Re-entry, *&c.* ‡

(c) See Stra. 575. (c) Which may be on any Place off the Premisses. 2 Stra. 1064. though Tenant both Deaf and Dumb, yet good. 2 Barnes 130, 131. How if Tenant in Possession be personated. 2 Bur. Rep. 1081, 1082. (d) Which must be on the Premisses, (e) Service on Servant is ill in *K. B.* 12 Mod. 313. unless Tenant absconds. 2 Bur. Rep. 1181, 1182. 2 Barnard *K. B.* 311. But it is allowed in *C. P.* Comb. 47. Barnes 116. 2 Barnes 157.

† It must appear there was not a sufficient Distress, *vide* the Statute. But if the Landlord has a Right to enter, exclusive of the Statute, he may bring his Ejectment, tho' there be sufficient Distress, and if Defendant appears, by entering into the Rule to confess Lease, Entry, and Ouster, I conceive he precludes himself from objecting to want of actual Entry, as that is only necessary to avoid a Time, for which see 3 Burr. 1895. —If Tenant does not appear and Judgment goes against the casual Ejector, there will not be any one to object.

‡ *Sed qu.* If the Court would not now hold that sufficient?

* Page 162

* After the Declaration delivered, the Plaintiff's Attorney (except as is above excepted by the Statute) is obliged to make Oath that he delivered to *J. D.* Tenant in Possession of the Premisses in Question, a true Copy of the annexed Declaration, with the before-mentioned Subscription, which said Subscription the Deponent did then read to the said *J. D.* and acquainted him with the Contents thereof.

Barnard. *K. B.* 330, 429. Affidavit of Service on *A. B.* Tenant, or *C.* his Wife; or the Wives of *A.* and *B.* who or one of them are Tenants: neither sufficient. Barnes 116, 118. *Supplement to Barnes* 26. *Rep. & Cas. Pract. C. P.* 68, 107.

This Affidavit is to be positive, that *J. D.* was Tenant in Possession, or that the Defendant acknowledged himself to be so, because no Man should be turned out of Possession without a positive Affidavit, on which he might charge the Defendant with Perjury.

(a) For the Substance of a proper Affidavit on a vacant Possession, See *Rep. & Cas. of Pract. C. P.* 68. and before whom it ought *not* to be sworn. *Supplement to Barnes* 26. (b) Salk. 259. pl. 14.

Upon this (a) Affidavit the Plaintiff moves for Judgment against the casual Ejector, which is always granted, unless the Defendant in due Time enters into the common Rule of confessing Lease, Entry and Ouster; this Rule being made by Assent of Parties, an Attachment lies for Non-performance of it, as for all other Rules of Court that are disobeyed; and this is all *(b)* the Remedy which the Parties on both Sides have for their Costs.

If

If there be ſeveral Perſons that claim Title, the Rule may be drawn generally or particularly; generally that *J. H.* who claims Title to the Premiſſes in Queſtion in his Poſſeſſion ſhould be admitted Defendant for ſuch Meſſuages; and this puts a Neceſſity on the Plaintiff at the Aſſiſes to diſtinguiſh by Proof what Tenements are in each Defendant's Poſſeſſion, becauſe by the Rule he is to confeſs Leaſe, Entry and Ouſter, only for the Lands in his Poſſeſſion; and if the Plaintiff cannot diſtinguiſh by Proof what Tenements are in each Defendant's Poſſeſſion, he can have no Verdict againſt him, and conſequently no Judgment. See *Supplement to Barnes* 24, 25.

Or the Rule may be drawn ſpecially, that *J. H.* who claims Title to ſuch Lands, expreſſing them particularly, ſhould be admitted Defendant, and that ſuperſedes the Neceſſity of Proof, that the Lands are in his Poſſeſſion; and if the Defendant's Attorney will not give a Note of the Particulars of the Land for which he was admitted Defendant, the Plaintiff may ſummon him before a Judge, who will order the Rule thus ſpecially to be drawn up, in caſe the Party in Poſſeſſion will admit himſelf to be Defendant. See 2 *Barnes* 148.

The Declaration againſt the caſual Ejector ought to be delivered before (*d*) the Eſſoign-Day of the iſſuable (*e*) Terms when the Cauſe is deſigned to be tried, and if one delivers an Ejectment before the Eſſoign-Day of either of the two iſſuable Terms, the Party is bound to plead without further Notice, within eight Days in that Term; but if the Declaration be delivered before the Eſſoign-Day of *Michaelmas* or *Eaſter* Term, which are not iſſuable Terms, the Party is not bound to plead without Motion made, and a Rule obtained in thoſe reſpective Terms; and if that Rule be to plead before the common Time in the iſſuable Terms, then there muſt be Notice given of the Rule, otherwiſe not.

(*d*) Otherwiſe Plaintiff cannot have Judgment till the ſubſequent Term. *Barnes* 115.
(*e*) viz. *Hilary* and *Trinity*.

Alſo where the Declaration was delivered after the Eſſoign-Day of *Michaelmas* Term, and the Plaintiff let that Term paſs without doing any Thing, and alſo till the laſt Day of *Hilary* Term in like Manner, when he moved for a Rule to plead, and for want of a Plea ſigned Judgment; the Court held this to be a Surprize upon the Defendant; for when he let all *Hilary* Term ſlip without doing any Thing, within which Time he might have had a Trial, he ought to have given freſh Notice, as in caſe a Man lets an Aſſizes paſs in a Country Cauſe without Proceeding; and for this Reaſon the Judgment was ſet aſide. Salk. 257. pl. 9. See 2 *Barnes* 153, 154, 218.

If on the Trial the Defendant will not appear and confeſs Leaſe, Entry and Ouſter, the Courſe is to call the Defendant and his Attorney, if he be within the Rule, and then to call the Plaintiff himſelf and nonſuit him, * and then, upon the (*a*) Return of the *Poſtea*, (*b*) Judgment will be given againſt the caſual Ejector. See *Barnard. K. B.* 48, 49, 139. * Page 163

(*a*) But the Judgment againſt the caſual Ejector cannot be entred till the *Poſtea* be returned, on which is indorſed, that the Nonſuit was for want of confeſſing Leaſe, Entry and Ouſter; for it does not appear that the Defendant has not complied with the Rule till after the Aſſiſes at which the Cauſe was to have been tried, and therefore the Judgment cannot be entred till the next Term after ſuch Aſſiſes †. (*b*) Of which Judgment the Defendant cannot bring a Writ of Error, for he was no Party thereto; and if he brings ſuch Writ in the Name of the caſual Ejector, the caſual Ejector being a Friend to the Plaintiff's Leſſor, may either releaſe the Errors, or upon a Motion for a *Nonpros'*, the Court will order it to be entred.——But if an Infant be Tenant in Poſſeſſion, and the Plaintiff obtains Judgment againſt the caſual Ejector for want of Confeſſion of Leaſe, Entry and Ouſter, and the Infant brings a Writ of Error in the caſual Ejector's Name; and the Defendant in Error ſets up a Releaſe from a caſual Ejector; upon making this out to be the Caſe of the Infant, on Motion on the Writ of Error the Court will not ſuffer ſuch a Releaſe to be pleaded in Bar to ſuch Writ of Error, becauſe no Latches can be imputed to the Infant for want of Confeſſion of Leaſe, Entry and Ouſter. See *infra* n.

† *Sed qu.* If Plaintiff ſigns Judgment againſt the caſual Ejector, as of the preceding Term, and takes out Execution immediately, who can complain the next Term? for the Defendant who entered into the Rule, by not confeſſing, is, I conceive, in the ſame Situation as if he had never appeared, and there is not any Reaſon why he ſhould delay the Plaintiff after he has voluntarily given up all Pretence of Title.

7 Keb. Rep. 372. If the Plaintiff in Ejectment, who is but a nominal Perſon, dies, yet the Action ſhall not abate, becauſe if there be any other Perſon of the ſame Name, the Court will intend him to be the Perſon mentioned in the Declaration, becauſe he is only nominal, and therefore while there is any Perſon of the Name living, the Leſſor of the Plaintiff, who is only concerned in the Intereſt, may proceed in the Suit.

Salk. 260. pl. 15. Alſo if the Plaintiff, who is only a Truſtee for the Leſſor, releaſes the Action, he may be committed for the Contempt †.

† The conſtant Mode now is, to declare in a fictitious Name, ſuch as *John Doe, &c.* for the Leſſor of the Plaintiff is the real Party.

Carth. 288. The Rule in the Common Pleas is, that the Tenant in Poſſeſſion ſhall forthwith appear and receive a Declaration; and this ſuperſedes the Neceſſity of an original Writ, becauſe the Tenant is to appear and receive a Declaration, and therefore cannot take any Advantage for want of an Original, unleſs in a Writ of Error; but when a Writ of Error is brought, they muſt file an Original, unleſs it be after a Verdict, when it is helped by the Statute 18 *Eliz. c.* 14 §.

§ After Verdict the want of Original is helped by the Statute. If Judgment goes againſt the caſual Ejector, as he is only fictitious, Error cannot be brought, for there is not any one in Court to ſue the Writ. And I queſtion if the Note above, as to an Infant Tenant bringing Error, where Judgment is againſt the caſual Ejector, is conſonant to modern Practice, or Reaſon. If he entred into the Rule, he ſhould have complied with it, and have confeſſed. If he does not he muſt take the Conſequences, ſhould a Judgment be obtained by Surpriſe againſt caſual Ejector, where an Infant is Tenant (or indeed in any Caſe) the Court on Motion, would, if there was ſufficient Ground for it, ſet aſide the Judgment. And, if Application was not made in due Time, ſuch Judgment is not ſo far binding on the Tenant, as to prevent him from bringing an Ejectment, and trying his Title. I do therefore conceive Error cannot be brought in any Caſe, where Judgment goes againſt the caſual Ejector.

2 Show. Rep. 249. pl. 253. *Boucher* and *Friend*. Alſo in the King's Bench, where a Perſon may proceed as well by Original as by Bill, there is no Need of an Original nor of a *Latitat*, or Bill of Ejectment; but before there be any Proceedings, common Bail muſt be filed for the caſual Ejector; alſo in caſe of a Writ of Error, the Party muſt file a Bill of Ejectment, beſides the Plea-Roll, before the Errors are aſſigned.

5 Mod. 333.

Sid. 24. pl. 5. The Court hath changed the Plaintiff in Ejectment after the Declaration delivered, and hath (*c*) enlarged the Term where the Cauſe hath been long in Agitation, and Judgment entred againſt the Plaintiff after he is dead.

(*c*) In Carth. 3 Comb. 13, 50. it is ſaid that the Court will enlarge the Term; but in Carth. 401, 402. 6 Mod. 130. Comb. 110. Salk. 257. pl. 8. it is ſaid that it cannot be done without Conſent of Parties, although the Plaintiff is hung up by an Injunction in Chancery, or delayed by a Writ of Error brought in the Exchequer Chamber, for that this would be altering Records; and it was the Party's Fault in not delivering a Declaration of a Term long enough to get Judgment‡.

‡ In Str. 1211. 'tis ſaid the Court will not in any Caſe allow an Amendment in the Declaration, becauſe in Ejectment it is in Nature of Proceſs.

2. Of adding proper Parties.

By Holt C. J. Comb. 209 See *Supplement to Barnes* 29. Barnard *K.B.* 422. No (*d*) Perſon is admitted to defend in Ejectment unleſs he be Tenant, and is or hath been in Poſſeſſion, or (*e*) receives the Rent, becauſe it is an Act of Champerty for any Perſon to interpoſe to cover the Poſſeſſion with

(*d*) And therefore a Mortgagee has been refuſed to be made a Defendant with the Tenant, for nobody is admitted to that but the Landlord; but this muſt be where the Mortgagee had not got into Poſſeſſion. *Supplement to Barnes* 29. (*e*) To make the Landlord a Defendant in Ejectment, is of Right; 2 Barnard *K. B.*

* with his Title; and if the Party would make any Perſon Defendant with another, who was not concerned in the Poſſeſſion of the Tenements, this was a Miſchief at Common Law, becauſe recovering againſt one of the Defendants, there was conſequently no Remedy for the Stranger for his Coſts; but that is remedied by 8 & 9 *W.* 3. *cap.* 10. whereby Coſts are given to ſuch Stranger who is made Defendant, unleſs the Judge certifies immediately on the Trial, that the Plaintiff had a probable Cauſe for making ſuch Stranger Defendant. * Page 164

In Ejectment, where there are two Defendants for the ſame Premiſſes, and one appears and confeſſes Leaſe, Entry and Ouſter, and the other does not, the Plaintiff cannot proceed againſt the other, but he muſt be nonſuited, becauſe both the Defendants not admitting the Demiſe, and the Plaintiff not proving an actual † Entry and Demiſe, he cannot maintain his Declaration; but if there appeared any Covin between ſuch Perſon not appearing, and the Leſſor of the Plaintiff, the Court will ſtop the Judgment againſt the caſual Ejector, for the Part of him who appeared, and oblige him who did not, to releaſe the Coſts, becauſe a Declaration was delivered to each of them for their reſpective Parts; and therefore, where one does not pay Obedience to the Rule, the Plaintiff has Judgment againſt the Ejector for his Part only. Vent. 255. 2 Vent. 195.

† We conceive this Caſe, is not, now, Law.—Defendants who appear, enter into a Rule to confeſs *Entry*, and an actual Entry is not neceſſary, unleſs to avoid a Fine.—Beſides the Defendant is nominal, before ſuch Rule entered into.—If there are two Tenants, one appears and one does not, Judgment againſt the caſual Ejector may be ſigned as to the Tenant not appearing, and Execution iſſue, if he holds any Part of the Premiſſes ſeparately, and Proceedings go on againſt the other Tenant.—If they jointly hold, then Execution ſhould not iſſue 'till after Verdict and final Judgment, againſt the Tenant who appears.

And where there are ſeveral Defendants to whom the Plaintiff delivers Declarations that are ſeverally concerned in Intereſt, and the Plaintiff moves to join them all in one Declaration, yet the Court will (*a*) not do it; but the Plaintiff muſt deliver ſeveral Declarations to each of them, becauſe each Defendant muſt have a Remedy for his Coſts, which he could not have if they were joined in a Declaration, and the Plaintiff prevailed only againſt one of them; and by this Means the Plaintiff might have a Tenant of his own, Defendant with others, in order to ſave the Coſts. 2 Keb. 524.

(*a*) For the Leſſor might have ſued them at different Times, and it would be obliging him to go on againſt all, when perhaps he might be ready in ſome of them only. 2 Stra. 1149. Barnes 121. and *Rep. & Caſ. Pract. C. P.* 119. both *contra*.

3. Of the Coſts.

The Parties by entring into the common Rule are under the Power of the Court, by virtue whereof the Court awards Coſts, which being taxed by Salk. 259. pl. 14.

K. B. 149, for otherwiſe he might be prejudiced in his Inheritance, by Combination between the Plaintiff and Tenant in Poſſeſſion. Salk. 257. pl. 10. See Stat. 11 G. 2. c. 19. ſ. 13. and 9 Vin. Abr. 330. 2 Stra. 1241, 1242. Barnes 114. 2 Barnes 125, 126.— So the Landlord, though a Peer, Comb. 339, or a Member of Parliament, muſt be joined, if he applies for it; for every Perſon, who has any Privilege, has it by Law which the Courts cannot compel him to waive. Salk. 256. pl. 6.——But a Landlord may refuſe to be made Defendant. Salk. 256. pl. 6.——Where it was moved, that the Wife of the Leſſor of the Plaintiff might be made Defendant, the Plaintiff's Title being by a pretended Marriage, which was controverted, and the Court inclined accordingly; but perceiving it to be a Trick to gain Time, and ſo to put off the Trial, it was refuſed. Salk. 257.—One who is only a Truſtee need not be joined. Comb. 332.——If a material Witneſs is alſo made a Defendant, the right Way is for him to let Judgment go by Default; but if he pleads, and by that Means admits himſelf Tenant in Poſſeſſion, the Court will not afterwards upon Motion ſtrike out his Name. *Dormer* v. *Forteſcue*, Mich. 9 Geo. 2.

by the Maſter, if demanded of the Party, and he refuſes to pay them, the Court on Affidavit thereof will grant an Attachment.

2 Lev. 66. 6 Mod. 309. 12 Mod. 318. Str. 402.

And although the Plaintiff in Ejectment be but a nominal Perſon, yet if he be not to be found, or if he be not able to pay the Coſts, the Attorney or Solicitor is liable, or may be committed until he pay the Coſts, or produce a Plaintiff that is able to pay them.

Alſo if a Stranger carries on a Suit in another's Name, who has a Title, and yet is ſo poor that he cannot pay Coſts; in caſe he fails, upon Affidavit of this Matter, the Court will order ſuch Perſon, who carries on the Suit, to pay Coſts to the Defendant.

Str. 694. 2 Str. 932. 2 Barnard. K. B. 140. 2 Kel. 65. pl. 17. 2 Barnes 149.

If an Infant delivers a Declaration to the Defendant, ſome Friend or Guardian muſt be ſet up as Plaintiff to anſwer the Defendant's Coſts; but if ſuch Perſon dies inſolvent, ſo that the Defendant has no Remedy, by this Rule the Infant himſelf muſt anſwer the Coſts, becauſe the Rule was entred into for the Infant's Benefit; and even Infants muſt not diſturb the Poſſeſſion of others by unlawful Entries, without being puniſhed with Coſts.

Proceedings were ſtayed till the Leſſor of the Plaintiff ſhould give Security for the Coſts, his Reſidence being in *Ireland*; altho' this Ejectment was brought under the Direction of the Court of *Chancery*, and 40 *l.* Security had been already given there. 2 Bur. Rep. 1177.

2 Keb. Rep. 827. pl. 1.

If there be Baron and Feme Leſſors in Ejectment, and one dies after entring into the Rule, the ſurviving Perſon is liable to pay Coſts.

If Ejectment be brought to be tried at Bar to bring a Matter in Queſtion, as the Validity of a Will, and a Parcel of Land is inſerted in the Declaration, which is not concerned in the Queſtion, but to which the Plaintiff hath undoubted Right, and the Defendant confeſſes Leaſe, Entry and Ouſter for the Whole, not obſerving this Part, the Plaintiff ſhall * not on this Account be excuſed from the Coſts; but the Court will give the Defendant leave to retract his Confeſſion as to this Parcel; and ſo it was done in (*a*) a Caſe where a Parcel of Copyhold Land being inſerted in the Declaration, which was not touched by the Will, no Surrender being made to the Uſe of the Will.

* Page 165

(*a*) Mich 27. Car. 2 in *B. R.* between *Oddy* and *Preſton*.

(C) In what Caſes the ancient Form is ſtill to be adhered to.

(*b*) But by 4 Geo. 2. c. 28. in all Caſes between Landlord and Tenant, in caſe there be no Perſon reſiding in the Houſe, or in caſe the Declaration cannot legally be ſerved, it is ſufficient to affix it to the Door of the Houſe or on ſome notorious Place on the Lands, in caſe the Ejectment be for Lands.*

WHERE the Houſes or Things for which the Ejectment is brought are (*b*) empty, in ſuch Caſe no Declaration can be delivered, nor Affidavit made thereof, by Reaſon of which the Court cannot proceed to give Judgment againſt the caſual Ejector; and therefore it is neceſſary to proceed the old Way, by ſealing a Leaſe on the Land, and giving Rules to plead, and when theſe Rules for Pleading are out, Affidavit muſt be made of the whole Matter; upon which the Court grants Judgment; but (*c*) there can be no Judgment againſt the caſual Ejector without moving the Court for that Purpoſe, tho' the Rules for Pleading are out, becauſe the Court will not grant any Judgment againſt the caſual Ejector, who is only nominal, without ſuch proper Affidavit, leſt otherwiſe a third Perſon ſhould be tricked out of his Poſſeſſion. So

(*c*) Salk. 255. pl. 3.

* And

So if the Tenant in Poſſeſſion kept his Door ſhut, it was thought the beſt Way to ſeal a Leaſe on the Land, and proceed in the old Way; but in this Caſe it ſeems, that if the Practice and Fraud of the Tenant be made appear to the Court by Affidavit, the Court will grant Judgment againſt the caſual Ejector *niſi*.

It has been held, that where a Corporation is Leſſee of the Plaintiff they muſt give a Letter of Attorney to ſome Perſon to enter and ſeal a Leaſe upon the Land, for a Corporation cannot make an Attorney or Bailiff but by Deed, nor can they appear but by making a proper Perſon their Attorney by Deed; therefore they cannot enter and demiſe upon the Land in Perſon as natural Perſons can; nor can they ſubſtitute an Attorney to enter into a Rule for their Coſts; nor will an Attachment go againſt them for Diſobedience to that Rule, and by Conſequence they are put to make an (*d*) actual Leaſe upon the Land, which Leaſe muſt try their Title, and then the Attorney may proceed in the common Method that is not altered by the ſaid Statute.

(*d*) But in Carth. 390. *Patrick* v. *Bolls*, in Ejectment, where the Plaintiff declared upon a Demiſe made to him by the Aldermen and Burgeſſes——without ſetting forth that it was by Deed, or under the Seal of the Corporation; and on a Writ of Error it was held well enough; and that this being a fictitious Action to try the Title, the Demiſe need not now be ſet out to have been by Deed.

Another Inſtance, where the old Method is to be obſerved is, where the ſeveral Intereſts of the Leſſors of the Plaintiff be not known, and there it is a good Way to ſeal a Leaſe upon the Premiſſes, leſt they ſhould fail in ſetting out in their Declarations the ſeveral Intereſts which each Man paſſes; and in that Caſe it is the beſt Way to proceed in the old Manner even now. *

* Or they may declare on Joint, and on ſeveral Deviſes, in ſo many different Counts, and in each Count go for the whole, and recover according to the Title.

So where the Proceedings are in an inferior Court, there they muſt proceed by actually ſealing a Leaſe, becauſe they cannot make Rules to confeſs Leaſe, *&c.* in as much as ſuch Courts have not an Authority to * impriſon for Diſobedience to their Rules; and the Reaſon is, the inferior Courts having but a limited Authority cannot make any new Rules to bind Perſons that do not come in by proper Proceſs of ſuch Court; but the Courts above, having an unlimited Authority in every Thing within their Juriſdiction, ſhall bind any Perſon that conſents to their Rules; and therefore in ſuch inferior Courts the Leaſe is ſealed on the Land, and the Defendant tries the Title in the Name of the caſual Ejector to ſave Expence.

* Page 166

If an Ejectment be brought in an inferior Court, and a *Habeas Corpus* be brought to remove it, and the Plaintiff in Ejectment declares againſt the caſual Ejector, there may be a Rule to confeſs Leaſe, *&c.* as if he had originally declared in the Court above, and the Court will not grant a *procedendo*.†

Sid. 331. Cro. Car. 82.

† For in the Court above the Plaintiff declares *de novo*.

If a *Habeas Corpus* be brought to remove a Cauſe in Ejectment out of an inferior Court, and the Lands lie within their Juriſdiction, and the Leſſor of the Plaintiff ſeals a Leaſe on the Premiſſes, the Courts above will grant a

2 Keb. 119.

* And by 11 *Geo.* 2. *c.* 19. *ſ.* 16. where Tenants deſert the Premiſſes, Landlords may be put in Poſſeſſion by two Juſtices of the Peace. *Vide* as to 4 *Geo.* 2. *Ante* 161.

procedendo, becauſe the Title of the Land is a local Matter, properly within the Juriſdiction of the Court below, where, if they proceed regularly, they ſhall not be prohibited; but if the Leſſor has not ſealed a Leaſe on the Premiſſes, they will not. ‡

‡ *Sed qu.* as to a *procedendo*, if the inferior Court has not an exclusive Juriſdiction?

2 Keb. 69. But if the Lands do lie partly within the *Cinque* Ports and partly without, the Defendant cannot plead above the Juriſdiction of the *Cinque* Ports; for tho' the Land be local Matter, yet the Demiſe is tranſitory and triable any where; therefore tho' the Plaintiff may lay his Action for that which lies within an inferior Juriſdiction in the Court below, if he takes proper Meaſures for that Purpoſe; yet if he will lay it above, ſince the Demiſe is tranſitory, the Defendant cannot ſtop his Proceeding, becauſe the Courts above for ſuch tranſitory Matters have a proper Juriſdiction.

Moor 86. Keb. 785. If the Defendant in an inferior Court comes into a Rule to confeſs Leaſe, &c. and the Cauſe be removed by *Habeas Corpus*, and the Judge of the inferior Court grants an Attachment againſt the Defendant for Diſobedience to the Rule, the ſuperior Court will grant an Attachment againſt ſuch Judge for compelling Obedience to their Rules, and thereby obſtructing the Buſineſs of the ſuperior Courts, ſince the Defendant is not bound by the Rule he entred into the inferior Court, ſuch Rule being only the Practice of the ſuperior Courts.

(D) Of the Declaration in Ejectment: And herein.

1. Of what Things an Ejectment will lie.

(a) For Common appendant it will lie. Str. 54. Andr. 107. Cro. Car. 202. AN Ejectment does not lie for a Rent or Common (*a*) appendant, or other Things that lie merely in Grant, becauſe theſe being (*b*) incorporeal Things are in their Nature inviſible *quæ nequæ tangi nec videri poſſunt* and therefore not in their Nature capable of being delivered in Execution.

Cro. Jac. 146. (*b*) Co. Lit. 9. a.

Yelv. 143; *Challener* and *Thomas* adjudged. * Page 166 Brownl. 142. S. C. Poph. 167. S. C. cited, & *vide Godb.* 157. So an Ejectment does not lie *de quodam rivulo, &c. aquæ curſu*, called *Locar* in *L.* for *rivulus ſive aquæ curſus* lies not in Demand; for *non mo-* * *ratur*, but is always flowing; nor (*c*) can Execution by *Habere facias ſeiſinam* be made thereof, and therefore the Action ought to have been of ſo many Acres of Land *aqua coopert:* But if the Land under the River does not belong to the Plaintiff, but the River only, then upon a Diſturbance the Remedy is by Action upon the Caſe only.

which ſeems contrary. (*b*) For this Reaſon an Ejectment does not lie *de piſcaria* in ſuch a River more than of a Common Apprender or Rent; adjudged upon a Writ of Error upon a Judgment out of *Ireland*, and the Judgment for this Reaſon reverſed. Cro. Car. 492. But *Jones* ſaid, perhaps an Aſſiſe would lie for it, becauſe it is *proficuum in certo loco capiend.* & *vide* Cro. Jac. 146. See 8 Mod. 277. But an Ejectment lies *pro ſtagno*, becauſe in Law the Word *ſtagnum* comprehends both Land and Water. Yelv. 143. Co. Lit. 5. Regiſt. 227. —— So *de gurgite* is good for the ſame Reaſon. Co. Lit. 5.

So

So an Ejectment does not lie *de pannagio*, becauſe this is only the Maſts that fall from the Trees which the Swine feed on, and not Part of the Soil itſelf, as the Herbage is, and is no more than the Fruit which falls from the Trees, which the Swine have a Right to feed on.

Lev. 212. *Pemble* and *Stern* adjudged. Sid 416. S. C. adjudged.

But an Ejectment lies of a Boilary of Salt, that is, where a Man hath no Inheritance in the Soil in which there is a Well of Salt-Water, but only a Leaſe or Grant of ſo many Buckets of the Water as will ariſe (which are called the Boilaries) and theſe are with-held from him, he may bring his Ejectment for ſo many Boilaries as his Grant was.

Cro. Jac. 150. ſaid to have been adjudged. Sid 151. Lev. 114. S.P. admitted.

So an Ejectment lies for a Coal-mine, becauſe it is not to be conſidered as a bare Profit *apprender*; but a Coal-mine comprehends the Ground or Soil itſelf, which may be delivered on the Execution; and though a Man may have a Right to the Mine without any Title to the Soil, yet the Mine itſelf being fixed in a certain Place, the Sheriff has a Thing certain before him, to deliver in Execution.

Cro. Jac. 150. *Commyn* and *Kinſlo*, adjudged. Noy 121. S.C. Rol. Rep. 483. S. C. cited.

Hard. 57. S. C. cited to be adjudged, Carth. 277. 4 Mod. 143. Comb. 201. Show. Rep. 364. Salk. 255. pl. 2. S. P. admitted.

An Ejectment lies *pro prima tonſura*, that is, if a Man hath the Grant of the firſt Graſs that grows on the Land every Year, he may recover it in Ejectment of him that with holds it from him; for the firſt Graſs, or *prima tonſura*, is the beſt Profit and Grant of the Property; and therefore he that hath it ſhall be eſteemed the Proprietor of the Land itſelf till the contrary be proved; for the After-Graſs or Feeding is in the Nature of Commonage; as therefore he, that hath the firſt Graſs or *tonſura*, has the moſt ſignal Profits of the Land, and may keep it longer or ſhorter on the Land, according to the Seaſonableneſs of the Year, it is but reaſonable to give him this Remedy againſt the Perſon that ouſts him of it, eſpecially when it is a fixed determinate Thing, which the Sheriff may put him in Poſſeſſion of; which diſtinguiſhes it from a Right of Common or other Profit *apprender*; for the Commoner cannot aſſign any one Acre which he hath a Right to ſeparate from the reſt of the Commoners; whereas the Grantee of the firſt Graſs has in Reality a Right to the Land itſelf till the Crop be taken off; for no Man can enter on the Land till that be off, without being a Treſpaſſer.

Cro. Car. 262. *Ward* and *Petifer*. Ejectment for Lands in *Wales*, good. *Barnis* 129. For Lands in a County Palatine, ſee 2 Barnard. K. B. 126. 2 Stra. 1120.

So an Ejectment lies *pro herbagio*, becauſe the Herbage is the moſt ſignal Profit of the Soil, and the Grantee hath at all Times a Right to enter and take it.

Hard. 303, 401.

So an Ejectment lies (*a*) *pro paſtura centum ovium*, that is for ſo much Land as will feed One Hundred Sheep.

Dal. 95. (*a*) But *vide* Hard. 58. where a Caſe is cited to have been adjudged, that Ejectment lay not *de Paſtura*.

Although Tithes are eſteemed Part of the incorporeal Inheritance, and by the Common Law were only of Eccleſiaſtical Conuſance; yet being in the Hands of Lay Proprietors are now conſidered as a Temporal Eſtate, for by the 32 *H.* 8. *cap.* 7. it is provided, that every * (*b*) Lay Perſon having any Eſtate of Inheritance, Freehold, Right, Term, or Intereſt in Tithes, and being thereof diſſeiſed, ouſted, wronged, or otherwiſe kept from the ſame, ſhall have his Remedy in the Courts of Law for them in like Manner as for Lands; and hence it is that an Ejectment lies for Tithes.

Cro. Car. 301. Jon. 321. 2 Ld. Raym. 789. * Page 168 (*b*) This Remedy is given only to Lay-Impropriators, and therefore the Act of Parliament leaves Spiritual Perſons to purſue their old Remedy in the Spiritual Court. Co. Lit. 159. Dyer 116. pl. 71.——That an Ejectment lies only for Tithes in Kind, but does not lie where the Tithing conſiſts *in Modo Decimandi*; but for this and of the Manner of ſuing for and recovering Tithes, *vide* Head of *Tithes*.

An

Latch. 62. An Ejectment lies *pro Rectoria*, becauſe a Rectory conſiſts of a Church, Glebe-Lands and Tithes.

11 Co. 25. Style 101. Doct. Pl'it. 191. Salk. 256. pl. 7. but ſee 2 Str. 914. It was formerly held, that an Ejectment did not lie *pro Capella*, becauſe it was *Res Sacra*, which was not demiſable; but now ſince they are become Lay Inheritances, they are recoverable in Ejectment, as other Lay Eſtates; but it muſt be demanded by the Name of a Meſſuage, or it is not formal.

2. What ſhall be a ſufficient Deſcription of thoſe Things for which an Ejectment will lie.

2 Barnes 151. 2 Ld. Raym. 1470. Barnard. K.B. 171, 464. 2 Stra. 908. In this Action the Law requires, that the Thing demanded be ſo particularly ſpecified, that the Sheriff may certainly know what to give the Poſſeſſion of, if the Plaintiff ſhould recover; for the Judgment is in order to Execution, and the Judgment would be vain, if Execution could not be had of the Thing ſpecifically demanded; but in this Action the Judges did not confine themſelves to thoſe Rules which govern the *Præcipe*, but allowed ſome Things to be recovered in this Action, which could not be demanded in a *Præcipe*; becauſe ſince the Eſtabliſhment of that Real Action, (*a*) many Things have been added and improved by Art, and acquired new Appellations that are perfectly underſtood now by the Law, which are not found in the antient Law-Books; and as Men begun to contract by new Names which were not known in the old Law, ſo it was reaſonable to ſuffer the Remedy to follow the Nature of ſuch Contracts.

(*a*) Hence it is ſaid in Palm. 337. by Noy *arguendo*, that an Ejectment will lie of a Hop-yard.

Dyer 84. pl. 85 But the Judges did not extend this Action as far as they went in an (*c*) *Aſſize*, becauſe the Recognitors having the View of the Thing demanded in the Aſſize, muſt have more certain Knowledge of the Thing demanded than could be given in Ejectment.

(*b*) And therefore it hath been held, that an Ejectment will not lie *de Croſto*, tho' an Aſſiſe will. Style 30.——But if an Ejectment be brought for a *Croft* and an Acre of Meadow, and the Plaintiff hath a Verdict, he may have a ſpecial Judgment for his Acre of Meadow, releaſing the Damages for the Reſt. Lev. 58. but for this *vide* Title *Damages*.——Alſo an Ejectment will lie *de uno Croſto vocat*. B. Lev. 58. *per* Twiſden.

Noy 37. *Wright* and *Wheatley* adjudged, Cro. Eliz. 854. An Ejectment lies of an *Orchard*, becauſe it is a Word of a certain Signification, though in a *Præcipe* it muſt be demanded by the Name of a Garden; and it being well enough underſtood, the Sheriff may with Certainty deliver it upon an Execution.

S. C. adjudged, becauſe but a Perſonal Action, wherein Damages are the Principal. Rol. Rep. 55. S. C. Cro. Jac. 654. Palm. 337. S. P. adjudged, Hard. 55. S. P. by *Baldwin arguendo*, Lev. 58. S. P. *per Twiſden*.

Lev. 58. Lady *Dacres*'s Caſe adjudged upon View of ſeveral Precedents of Recoveries *de Stabulo*. So an Ejectment lies of (*d*) a Stable, becauſe it is a Word of a determinate Signification, and may be delivered by the Writ of Execution.

(*e*) So an Ejectment lies of a Cottage. Cro. Eliz. 818. Cro. Car. 555. Hardr. 57.

*Page 169 (*a*) And ſo it is for Part of an Houſe. Stra. 695. Cro. Jac. 654. * An Ejectment of an (*a*) Houſe is good, though in a *Præcipe* it ought to be demanded by the Name of a Meſſuage; becauſe the Ejectment is an Action of Treſpaſs in its Nature; as a Treſpaſs, *wherefore he* broke into the Houſe has been allowed; for they allowed it good in Ejectment, and the Import and certain Signification of the Word *Domus* or Houſe being well enough

enough underſtood in the Law; for in Waſte the Thing itſelf is recovered, beſides Damages, and yet the Action of Waſte is given *de Domibus*. *Rayſton* and *Eccleſton*, adjudged. Palm. 337.

S. C. adjudged, & *vide* 3 Lev. 97. Hard. 76.

So an Ejectment of a Chamber in the ſecond Story of ſuch a Houſe was held good, there being Certainty enough to direct the Sheriff in the Execution. 3 Leon. 210. Noy 109. Hard. 57. S.P.

But an Ejectment *de Coquina*, *Anglice* a Kitchen, is naught; for though the Word is well enough underſtood, yet becauſe any Chamber in the Houſe is applicable to that Uſe, the Sheriff hath not Certainty enough to direct him in the Execution, in Regard the Kitchen may be changed between the Judgment and Execution. Noy 109. *Ford* and *Lerk*, adjudged.

An Ejectment lies not of (*b*) a Cloſe, becauſe it is of an uncertain Extent; nor will it mend the Declaration, though the Cloſe be called by a particular Name, becauſe that alſo leaves the Extent of it uncertain, ſo that the Sheriff cannot tell what Quantity of Land to deliver in Execution; and tho' the Number of Acres contained in the Cloſe ſhould be mentioned in the Declaration, and be ſet forth to belong to a Meſſuage for which the Ejectment was alſo brought; yet even that hath been (*c*) held too general, becauſe the Nature and Quality of the Land is thereby left uncertain, ſo that the Sheriff is ſtill at a Loſs what to deliver the Poſſeſſion of, as whether Meadow, Paſture, *&c.* Godb. 53. 11 Co. 55. Rol. Rep. 55. Bridg. 56. adjudged, being of an uncertain Extent, and that the giving it a Name did not help it; but *vide* Cro. Eliz. 235, 339.

Cro. Jac. 654. which ſeem contrary. (*b*) An Ejectment of a Piece of Land called *D.* without ſhewing the Contents. *Palmer*'s Caſe, Owen 18. the Court was divided, but after adjudged that it was well enough, becauſe it was but an Action of Treſpaſs, and Damages were the Principal, though it would be otherwiſe in a *Præcipe*; but upon a Writ of Error in the Exchequer Chamber this Judgment was reverſed. Hetl. 176. Moor 422. pl. 587. (*c*) So adjudged in *Savil*'s Caſe, 11 Co. 55. and the S. P. held and admitted to be Law, in Style 164. Lev. 212. Bridg. 56. Hard. 133. Palm. 102. 3 Lev. 97. Salk. 254. pl. 1. where *Savil*'s Caſe is affirmed to be Law by *Holt* Ch. Juſt.

But an Ejectment for a Cloſe called *D.* containing three Acres of Land, is good, becauſe the Quality of the Land is mentioned, the Word *Terra* ſignifying in Law arable Land. Cro. Jac. 573. Palm. 102. 4 Mod. 98.

An Ejectment does not lie for a Meſſuage and forty Acres of Land, Meadow and Paſture thereto belonging, (*d*) without diſtinguiſhing how much of one Sort, and how much of the other. Cro. Car. 435. *Martin* and *Nicholi*, adjudged, Cro.

Car. 471. S. P. adjudged, Hard. 59. S. C. cited. (*d*) So where an Ejectment was brought for five Cloſes called *Furlong*, containing ten Acres of Arable and Paſture; and it was held naught, becauſe not ſpecified how many Acres of each there were, ſo that the Sheriff had no Rule to govern himſelf by in the Execution. *Knight* and *Syms* adjudged, Salk. 254. pl. 1. Holt 263. pl. 2. Show. 338. Carth. 204. 4 Mod. 97. Comb. 198. S. C.—But an Ejectment of twenty Acres *Jammorum & Bruer.* is well enough, becauſe intended of Lands of the ſame Nature, *viz. Heath*, on which *Gorſe* and *Furſe* grow. Cro. Car. 179. Mod. 90.

An Ejectment *de uno Meſſuagio ſive Tenemento* is naught for the (*e*) Uncertainty of the Word *Tenement*, being of a more extenſive Signification than the Word *Meſſuage*, and conſequently uncertain what is demanded by the Ejectment. 2 Stra. 834. Barnard. *K.B.* 155. Barnes 117. 8 Mod. 355.

Cro. Eliz. 186. *Wood* and *Pain*, adjudged. 3 Leon. 228. S. C. Poph. 197, 203. Noy 86. Cro. Jac. 125. Style 364. S. P. Sid. 295. S. P. adjudged. (*e*) For this *vide* Cro. Eliz. 116. March 96. 2 Rol. Abr. 80.

But an Ejectment for a Meſſuage or Tenement called the *Black Swan* is good, becauſe the Addition reduceth it to a Certainty of a Dwelling-houſe. Sid. 295. 3 Mod. 238. 4 Mod. 136.

Hard. 173. & *vide* Poph. 203.

So an Ejectment for a Meſſuage or Burgage in *H.* is good, becauſe both ſignify the ſame Thing in a Borough.

*Page 170 Cro. Car. 555. Jon. 454. S. C.

* An Ejectment does not lie *de Repoſitorio*, becauſe it ſignifies a *Voider* or *Cupboard*, as well as a *Warehouſe*, and therefore uncertain what is demanded; but if it had been with an *Anglice*, a Warehouſe; this had confined it to that particular Thing.

Hard. 57. *Hancock* and *Price*, adjudged, becauſe it may contain Land of any Quality.

An Ejectment for one hundred Acres of Waſte, or *pro centum acris* (*a*) *montis*, was held naught for the Uncertainty, becauſe both Waſte and Mountain comprehend ſeveral Sorts of Lands, but for one hundred Acres of (*b*) *Bogg* is good, in *Ireland*, becauſe the Word there hath but one Signification, and comprehends but one Sort of Land.

(*a*) Palm. 100. *Stafford* and *Macdonnough*, adjudged upon a Writ of Error out of *Ireland*, and the firſt Judgment reverſed accordingly. Rol. Rep. 166. S. C. But both are denied to be Law in 9 Vin. Abr. 336. pl. 19. & Stra. 71. It lies for Alder-cave, and for Cattle-gates. 2 Stra. 1063. So it does for a Beaſt-gate. 2 Stra. 1084. Andr. 106. (*b*) Cro. Car. 512. *Mulcarry* and *Eyres* adjudged. Palm. 100. S. P. Salk. 254. pl. 1. Show. 338. S. C. cited, and admitted to be Law.

Yelv. 166. 4 Mod. 143. Show. 364.

The Plaintiff in Ejectment declared upon the Leaſe of a Houſe, ten Acres of Land and twenty Acres of Meadow, by the Name of a Houſe and ten Acres of Meadow, be the ſame more or leſs, and had a Verdict, but the Judgment was arreſted; for the Declaration was ſo repugnant and uncertain, that even the Verdict could not help it, in Regard the Land mentioned in the Declaration is of a different Nature from that mentioned in the *Pernomen*; beſides the Number of Acres is ſo different, that the Words more or leſs cannot reduce it to any Certainty, for it were unreaſonable to extend them to twenty Acres more than was mentioned in the *Pernomen.*

Hetl. 146. Lit. Rep. 301. Latch 61.

An Ejectment for a Manor ſeems ill, without deſcribing the Quantity and Species of the Land contained therein. †

An Ejectment lies for a Garden, by the Name of three Roods of Land, for it may be ſometimes uſed as a Garden, and at other Times ploughed. Godb. 6. adjudged, though it was ſaid it might more properly have been demanded by the Name of a Garden. An Ejectment *pro quatuor Molendinis* is good, without ſaying Wind-mills or Water-mills, becauſe both are comprehended under that Name in the *Regiſter*. Mod. Rep. 10. pl. 55.—An Ejectment *de decem acris piſarum* was held good; for the Court held ten Acres of Peaſe, and ten Acres ſowed with Peaſe, to be all one, and therefore certain enough.

† *Sed qu.* If the Manor is properly named, if an Ejectment will not lie for it, if it is for the Manor, with the *Appurtenants*, without deſcending to Particulars?

2 Rol. Rep. 482. *Warren* and *Wakely*.

An Ejectment brought for ten Acres of (*c*) Wood, and ten Acres of Under-wood, this was inſiſted upon as a *bis petitum* in Error, but diſallowed, becauſe plainly they are of different Natures; and thoſe who argued for the Error ſeemed by their Argument to have admitted it themſelves, becauſe they inſiſted that no Ejectment lay of Under-wood, which ſhews it muſt be of a different Nature from Wood; but that Objection was diſallowed, becauſe the Nature of Underwood is ſo well underſtood in the Law, ſo that the Sheriff will have Certainty enough to direct him in the Execution. ‡

(*c*) Where the Declaration among other Things was of ſo many *Acres Ligni* inſtead of *Boſci*, and it was moved to amend it before the Trial came on at Bar; but it was denied, and the Jury directed to find ſeparate Damages as to that Particular. Carth. 402. cited to have been ſo ruled in the Caſe of *Thompſon* and *Leech*.

‡ It is not a *Bis-petitum* in a perſonal Action. See 2 Cro. 21.

Yelv. 118. adjudged upon a Writ of Error out of *Ireland*.

An Ejectment was brought *de caſtro, villa & terris*, without expreſſing the Number and Certainty of Acres; and it was held ill on a Verdict, and a Writ of Error brought thereon, becauſe it was too generally demanded, and it was impoſſible for the Sheriff to know what Quantity of Land he muſt deliver upon the *Habere facias poſſeſſionem.*

An Ejectment *de omnibus & omnimodis decimis in decem Acris in D.* without ſaying *Garbarum fœni, Lanæ Agnellorum*, or ſome other Certainty of the Nature or Quality of the Tithes, is ill, as it would be for one hundred Acres of Land, without expreſſing the ſeveral Natures and Qualities of the Land; for in this Action the Plaintiff muſt be as particular and certain in his Demand of them, as he would be of Land. 11 Co. 25. *Harpin's* Caſe. Moor 837. pl. 1130. Rol. Rep. 68. S. C. Palm. 101. S. C. cited.

*But in this Action the Plaintiff is not obliged to ſet forth the Quantity of every Sort of Tithe, as he muſt do of every Sort of Land, becauſe it is in it's Nature uncertain, the Quantity depending intirely on the Goodneſs and Fruitfulneſs of the Land and Seaſons, and therefore an Ejectment *pro quadam portione granorum & fœni* was held good, becauſe impoſſible to ſay how much the Quantity would be. * Page 171 11 Co. 25. Hard. 57. Dyer 116.

An Ejectment for a certain Place called the *Veſtry* in *D.* is well enough, becauſe that Place belonging to a Church, called a *Veſtry*, is perfectly known, and therefore the Thing demanded is ſufficiently deſcribed to have Execution thereof. 3 Lev. 96. *Hutchinſon* and *Puller*, adjudged.

In Ejectment in the County Palatine of *Durham*, the Plaintiff declared upon a Demiſe *de Mineriis carbonum in parochia de D.* generally, not ſaying how many Mines, and had a Verdict, and Judgment upon a Writ of Error brought in *B. R.* the Error aſſigned was in the Declaration, becauſe of the Uncertainty thereof; for not ſetting forth the Number of Coal-mines, ſo as the Sheriff might know of how many to give Poſſeſſion; and for this Reaſon the Court inclined, that the Judgment was erroneous; but then the Plaintiff producing ſeveral Precedents in *Durham*, and alledging that all the Entries there in Ejectments for Coal-mines were the ſame as in this Caſe, the Judgment was affirmed. Carth. 277. *Andrews* and *Whittingham*, 4 Mod. 143. Comb. 201. Show 364. Salk. 255. pl. 2. S. C.

3. Of the Demiſe and Right of Entry in the Leſſor of the Plaintiff, and of the Ouſter.

Although by the modern Practice the Plaintiff is not obliged to prove the Leaſe mentioned in the Declaration, for that is confeſſed by the Rule of Leaſe, Entry and Ouſter, which he is obliged to enter into; yet that being only deſigned for Expedition in the Trial of the Right, and not to give the Plaintiff a Right of Action which he had not at Law; therefore it muſt appear by the Declaration, that the Plaintiff had actually the Poſſeſſion, and was ouſted thereof by the Defendant; hence it is, that (*a*) if *A.* a Leſſee for Years, makes a Leaſe to *B.* at Will, and *B.* is ejected, *A.* cannot have this Action upon that Ouſter, becauſe though the Poſſeſſion of *B.* was in Law the Poſſeſſion of *A.* yet the Treſpaſs *vi & armis*, which is complained of in this Action, muſt be againſt the actual Poſſeſſion, and that was in *B.** (*a*) Rol. Rep. 3.

* But *A.* may maintain Ejectment, if the Perſon who ouſted *B.* refuſes to deliver up the Poſſeſſion to *A.* See the next Note

So if *A.* be Leſſee for Years, the Remainder to *B.* for Years, and *A.* is ejected, and then his Term expires, *B.* ſhall not have an Ejectment on the Ouſter of *A.* becauſe the Poſſeſſion was not actually in him, and therefore he cannot complain of a Treſpaſs done to another.†

† But on Demand and Refuſal of the Poſſeſſion *B.* may maintain Ejectment, for he has Title, and the Perſon in Poſſeſſion hath not any, and on Trial of an Ejectment, 'tis the Title only comes in Queſtion. The Ouſter is confeſſed by the Rule; and I do not conceive that, in this or the preceding Caſe, a Demand of the Poſſeſſion is actually neceſſary.

Also the Lessor of the Plaintiff must have a Right of Entry when this Action is brought; for if his Entry were taken away he is a Disseisor, and cannot enter to make a Lease to try the Title; and therefore where Tenant in Tail makes a Discontinuance, the Issue in Tail is put to his *Formedon*, and cannot have his Ejectment, because his Entry by the Discontinuance is taken away.

Vide Tit. *Discontinuance.*

Also by the Statute of Limitations 21 *Jac.* 1. *cap.* 16. none shall make an Entry into Lands, but (*a*) within twenty Years after their Right or * Title, which shall first descend or accrue to them; but this Act hath the usual Savings for Infants, Feme Coverts, *&c.* which *vide* under Title *Limitations.*

* Page 172

(*a*) Where the Plaintiff was nonsuited, because not able to prove that he had been in Possession for twenty Years. Keb. 681. Hard. 461.—That this Statute shall not affect the King or his Tenant. Hard. 176. 2 Leon. 206. Cro. Eliz. 331.——Nor a common Person whose Tenant has been in Possession, and has paid the Rent, for the Possession of the Tenant is the Possession of the Landlord. 2 Keb. 127.——So the Possession of one Jointenant is the Possession of the other, so as to prevent the Statute from being a Bar in the Ejectment; so of Coparceners. Salk. 285. pl. 19.

Cro. Jac. 511. Lev. 170. Sid. 223, 262, 344. Saund. 12. Raym. 135.

If a Rent be granted in Fee, or otherwise, to *A.* with a Clause or Proviso, in case it be in Arrear, to enter and hold the Land till the Arrears be satisfied out of the Profits thereof, if the Rent be in Arrear, *A.* may recover the Possession in an Ejectment; for this Proviso creates an Interest in the Land to answer the Rent; and regularly, whoever hath an Interest may demise the same to another, and consequently the Person claiming under such Demise may maintain an Ejectment; and this is now a settled Point where the Rent is created by Grant at Common Law, or by Way of Use; but in this Case there must be an (*b*) actual Entry made, because the Title of the Land accrues by the Grantee's Entering.

(*b*) For it seems now clearly agreed that the Confession of Lease, Entry and Ouster, is not a Confession of any Entry sufficient to make out the Plaintiff's Title, where an Entry is necessary thereto, but the Party must actually enter, as appears by Saund. 319. Sid. 233. Mod. 10. Vent. 42, 332. 3 Keb. 218. Salk. 246. pl. 2. Skin. 424 ‡. But by the Stat. 4 Geo. 2. cap. 28. in all Cases between Landlord and Tenant, the Landlord for Nonpayment of Rent may deliver a Declaration in Ejectment, or serve the same, as by the Statute is prescribed, and such serving shall be sufficient without a Demand or Re-entry.—And, *note*, that if a Man enters and delivers a Declaration in Behalf of the Lessor of the Plaintiff; this is no Entry to avoid a Fine, unless an express Authority was given to enter for that Purpose, because the Entry must be pursuant to the Intention, and that was to deliver a Declaration in order to try the Plaintiff's Title, and not to make any Title to the Lessor of the Plaintiff. Mod. 10. *Clerk, Rowell* and *Phillips.* Saund. 319. Vent. 42.

‡ *Sed qu.* If Entry now necessary in any Case but to avoid a Fine? That seems to be now the settled Doctrine. See 3 Burr. 1897.

Cro. Eliz. 800. Noy 33. *Note*, That in these Cases the usual Method now is, to apply to a Court of Equity.

A. covenanted to stand seised of Land to the Value of 100 *l. per Ann.* to the Use of himself for Life, and after to the Use of his Daughters, who should be unmarried at the Time of his Death, till they severally should receive and levy 500 *l.* a-piece, the Remainder to his Son; *A.* died the 30 *Eliz.* and the eldest Son entred 42 *Eliz.* the eldest Daughter (there being four of them) brought her Ejectment, but did not recover the Lands, because her Entry was taken, she having passed the Time allowed her to enter and receive the Profits; otherwise she might keep the other Daughters out of the Perception of the Profits; for if the eldest Daughter lets the Son enjoy during the Time the Profits may be levied, she lapses her Time, and must therefore have Remedy against the Son who received the Profits in her Prejudice, and cannot charge the Land with her Portion which is then onerated with Portions to be raised for the younger Sisters.

Law Ejectm. 76.

The Plaintiff must lay the Commencement of his supposed Lease in his Declaration to have been preceding the Ouster and Ejectment by the Defendant; for though such Ouster be a Wrong, yet it can be no Wrong to

the Plaintiff if it was done before his Title commenced; (*b*) as where the Plaintiff declared on a Leaſe made the 27th of *April*, *Anno primo Regis*, and laid the Ouſter by the Defendant to be the 26th of *April*, *Anno primo prædict'*, this was held bad, becauſe it was plain the Plaintiff had no Title till the 27th, and therefore that Ouſter the 26th was no Treſpaſs or Injury to him. (*b*) Yelv. 182.

So if the Leaſe had been made 27 *April*, *habend. a Dict' 27 April'*, *virtute cujus* the Plaintiff entered and was poſſeſſed till the Defendant *poſtea eodem 27 die Aprilis* did eject him; this is bad, becauſe the Ejectment was before the Plaintiff's Title commenced, for the Leaſe did not commence till 28 *April*.† 1 Sid. 8. 3 Mod. 198. Ld. Raym. 728. 2 Ld. Raym. 870. 3 Salk. 8.

10 Mod. 2, 177, 265. 12 Mod. 113, 125. Barnes 12. 2 Barnes 13, 153, 154. See Andr. 125. *Caſes Temp.* Hardw. 98, 99. 2 Barnard. *K. B.* 217. Cro. Jac. 135, 258, *154, 312, 662. 2 Bul. 29. *cont'*. 2 Stra. 1086. Cro. Jac. 96,

† *Sed qu.* If *eodem die Aprilis*, might not be rejected as Surplaſage, the Declaration adjudged good?

But if the Leaſe be made the 27, *habend.* from *thenceforth*, there the Ejectment may be laid the 27th, becauſe the Leaſe commences the 27th, and an Ejectment may be the ſame Day the Plaintiff's Title commences. Cro. Jac. 258. 5 Co. 1.

* But the Law doth not neceſſarily oblige the Plaintiff expreſsly to mention the Day of the Ouſter, ſo it appears to be after the Term commenced, and before the Action brought; for where the Declaration was on a Demiſe the 25th of *March primo Regis*, for three Years, by virtue whereof the Plaintiff entred and was poſſeſſed, until the Defendant *poſtea*, *viz. Anno ſupradict'* entred and ejected him, without ſpecifying the Day of the Ejectment; this was held good in Error, the Action being commenced *ſecundo Regis*, and the Ejectment laid to be *primo*, it was plain from the Declaration, the Ouſter and Ejectment was after the Plaintiff's Title commenced, and before the Action brought, and confeſſes the Plaintiff had good Cauſe of Complaint, though he did not ſpecify the Day the Injury was done. * Page 173 Cro. Jac. 311. *Merrel* and *Smith*.

Neither is the Plaintiff, as it ſeems, neceſſarily obliged to alledge the particular Day of his Entry in the Declaration; and therefore where the Plaintiff declared on a Leaſe to commence at a future Day, *virtute cujus* he entred, and was poſſeſſed till ejected by the Defendant; this was held good on a Writ of Error, becauſe it is ſaid he entred by virtue of the Leaſe, which could not be before it commenced, for he could not enter by virtue of the Leaſe till the Leaſe commenced; *aliter* if the Declaration had been *prætextu cujus* he entred, for the Plaintiff might enter unlawfully, or before his Time, under a Pretence of the Leaſe. 2 Rol. Rep. 466. Latch 199.

The Plaintiff declares in Ejectment in the Common Pleas, and after an Imparlance (as the Courſe of the Court is) makes a ſecond Declaration, if in ſuch Caſe the Plaintiff by the firſt Declaration ſhould lay the Ejectment and Ouſter before the Commencement of his Term, or omit any Matter of Subſtance in the firſt Declaration, though the ſecond were right, and the Ouſter were laid after his Term commenced; yet the Plaintiff ſhall not recover, becauſe the Declaration on the Imparlance-Roll is the material one on which the Action is grounded, and muſt be ſupported by it, and the Plea-Roll is but a Recital of the other, and therefore ought to begin with an *Alias prout patet*, &c. ‡ Law Ejectm. 78. Cro. Jac. 311.

‡ *Sed qu.* If 'tis not the Declaration in the Iſſue, in Ejectment, that is entred on the Roll, that being the Declaration to which the Defendant pleads, the firſt being only in the Nature of Proceſs, to bring him into Court, and of which there is not any one to take Advantage; as the Moment the Defendant appears and enters into the Rule, another Declaration is delivered, with the Defendant's Plea, in the Form of an Iſſue.

2 Vent. 174. Sid. 432.

And though the Declaration in Law relates to the first Day of the Term, because the Term is in Law considered as one Day, yet the Plaintiff may declare on a Lease made some Time after the first Day of the Term, and shall recover thereon, but then it must appear to the Court that the Declaration was filed after the Day of the Commencement of the supposed Lease, for otherwise the Plaintiff complains of an Ejectment before he had Title; and if the Time of filing a Bill were not examinable, the Act of Law, which makes the Relation of Bills to the first Day of the Term, would be an Act of Injury to the Plaintiff, and delay his Right; for then a Man ejected out of a Lease made in Term-time could not complain till Term was over.

Law Ejectm. 79, 80. but *vide* Carth. 401, 402.

A Declaration on a Lease made the 6th of *May*, *Anno* 7 of the King, *&c.* setting forth, that the Plaintiff was possessed *quousque postea* the Defendant the 18th Day *ejusdem mensis anno sexto supradict'* ejected him; this was objected in Arrest of Judgment, because the Ejectment, as was insisted, was laid to be *Anno sexto*, which was the Year before the Commencement of the Lease, that being laid to begin the 6th of *May*, *Anno septimo*; but the Declaration was allowed to be good by the Court, because the Ejectment was laid to be 18 *ejusdem mensis*, which could not be, if it were done in the sixth Year, and therefore they rejected the Word *sexto* as inconsistent and void.

Cro. Jac. 662. *Rutter* and *Miles*.

So where the Declaration was of a Lease 22 *May*, *habendum a primo die Maii* for three Years, *virtute cujus* the Plaintiff entred and was possessed *quousque postea*, viz. *eodem die & anno*, the Defendant ejected him; this on a Writ of Error was allowed a good Declaration, though it was insisted, that *eodem die & anno* must refer to the first Day of *May*, which was the last Antecedent, and then the Ejectment was laid to be twenty-one Days before the Lease was made.

* Page 174 Law Ejectm. 81.

* The Plaintiff in Ejectment declared, that whereas *J. S.* by Indenture the 9th Day of *June*, (without saying when it was made or delivered) did demise, *&c. habend. a die dat. sigillationis & deliberationis indenturæ prædict'*, *virtute cujus* the Plaintiff entred and was possessed till the Defendant the same Day ousted him; it was moved in Arrest of Judgment, that it was uncertain by the Declaration when the Term began, neither the Day of the Date nor of the Sealing and Delivering being mentioned in the Declaration; yet Judgment was given for the Plaintiff, because after a Verdict it shall be intended not only to bear Date, but also to be sealed and delivered the Day mentioned in the Declaration, which was the 9th, for all Deeds are presumed to be delivered the Day that they bear Date, till the contrary appear.

Law Ejectm. 81.

But where the Limitation of the Lease is altogether uncertain, the Plaintiff cannot recover, because where the Commencement of the Lease is uncertain, the Lease is void in itself, and then the Plaintiff cannot have a Title; besides that, the Court cannot possibly perceive whether the Ejectment was before or after the Plaintiff's Title accrued, if such uncertain Lease could give him one; otherwise it is where the Limitation or Commencement is impossible; for in such Case the Lease commences from the Delivery, as if it had no Date, and then the Court may judge whether the Ejectment is laid to be before or after the Commencement: But there is this further Reason for the Difference, for the impossible Limitation is rejected, because it could not be Part of the Agreement or Contract; but an uncertain Limitation is Part of the Contract, and vitiates the whole Agreement, because the Court cannot reduce it to any Certainty.

Hetl. 63. *Brady* v. *Johnson*.

Thus where the Plaintiff declared on a Lease, *habend. a die datus indenturæ prædict.* without mentioning an Indenture before; this was held bad for the Uncertainty when the Lease commenced.

But

But if the Plaintiff had declared on a Demiſe to him *per quoddam Scriptum obligat' habend. a die Datus indent. prædict.* this had been good, becauſe the *Scriptum Obligatorium* ſhall be intended an Indenture. Vent. 137. 2 Keb. 796.

The Plaintiff declared on a Leaſe of the fourth Part of a Houſe, in four Parts to be divided, by Force of which he entered *in Tenement. prædict.* and was poſſeſſed till the Defendant ejected him *de Tenementis prædictis*; this was objected in Error, that the Plaintiff laid the Ouſter to be of more than by his Leaſe he had a Title to, for the Ouſter was *de Tenementis prædict.* which at leaſt muſt be underſtood of the whole Houſe, and the Leaſe was only of the fourth Part; but the Objection was over-ruled, becauſe *de Tenementis prædict.* ſhall be intended only of the fourth Part of which the Leaſe was made; beſides, it was but juſt he ſhould recover as much as he had Title to, though he laid his Ejectment for more. Law Ejectm. 82, 83.

The Plaintiff declared on a Demiſe the ſixteenth Day of *January*, by an Indenture dated the ſecond Day of *January*, without ſaying *primo Deliberat.* the ſixteenth, yet the Declaration was held good; for though all Indentures ſhall be preſumed to be delivered the Day they bear Date, unleſs the contrary be ſhewn, and that therefore this Leaſe muſt commence the ſecond Day of *January*, which, if true, would be a different Leaſe from what the Plaintiff declared; yet in regard it declared on a Demiſe the ſixteenth, it muſt neceſſarily be intended that it was delivered on the ſixteenth, becauſe it cannot poſſibly be a Demiſe before the Delivery, and therefore the Delivery muſt neceſſarily be intended the Day the Demiſe is ſaid to have been made, and not the Day of the Date of the Indenture. Cro. Eliz 890. Law Ejectm. 83.

But where the Plaintiff does not make mention of any particular Day when the Demiſe was made, but only in general ſays, that *J. S.* by his Indenture bearing Date 1 *Jan.* did demiſe to him, ſo that it doth not appear by the Plaintiff's own Shewing, when the Leaſe commenced, the * Law in ſuch Caſes conſtrues the Delivery to have been the Day it bears Date; and ſo the Declaration was held to be good, and not void for the Uncertainty of the Commencement of the Leaſe, as was objected. Cro. Eliz. 773. Law. Ejectm. 83, 84. * Page 175

Though by the modern Practice the Plaintiff is not obliged to prove the Leaſe mentioned in the Declaration, for that is confeſſed by the Rule, and by that Means the Miſchief of any Variance between the Leaſe declared on and the Leaſe produced and proved on the Trial is avoided, which was a Danger the Plaintiff was expoſed to, and often miſcarried by the old Method of Proceeding; yet in the modern Practice the Plaintiff muſt take Care to declare on ſuch a Leaſe as ſuits with his Leſſee's Title; and therefore (*a*) if there be ſeveral Leſſors, and you lay the Declaration *quod Demiſerunt*, you muſt ſhew in them ſuch a Title that they might demiſe the Whole, for the Word *Demiſerunt* muſt be taken in Pleading, according to the legal Senſe it bears; and therefore, if any of the Leſſors have not a legal Intereſt in the whole Premiſſes, he cannot in Law be ſaid to demiſe them, for it is only his Confirmation where he is not concerned in Intereſt, and therefore the Confeſſion of this joint Leaſe doth not help, becauſe you do not confeſs the Title by the Rule. Law Ejectm. 84. (*a*) Cro. Jac. 613. 2 Keb. 376.

So where the Plaintiff declared on a Leaſe made by *A.* and *B.* and it appeared on the Trial that *A.* was Tenant for Life, Remainder to *B.* in Fee; this on a ſpecial Verdict was adjudged againſt the Plaintiff, becauſe it could not be the Leaſe both of *A.* and *B.* to paſs the Land *in præſenti* to the Plaintiff, for during the Life of *A.* it could not be his Leaſe only, becauſe he was the Tenant in Poſſeſſion, and *B.*'s joining in the Leaſe amounted only to a Confirmation, but could paſs no Intereſt during the Life of *A.* and therefore the Allegation of the Plaintiff, that *A.* and *B.* did demiſe, was not proved. 6 Co. 14. b. 15. a. Poph. 37. Co. Lit. 42. Jones 305. Rol. Rep. 299. Raym. 142. 2 Jon. 137.

If the Plaintiff declares on a Leaſe made by *A.* and *B.* and on the Trial it appears that they are *(b)* Tenants in Common, the Plaintiff cannot recover; but if *A.* and B. had been Jointenants, a joint Leaſe to the Plaintiff had been good, and he might have declared *quod Demiſerunt*; and the Reaſon of the Difference is, that Tenants in Common are of ſeveral Titles, and therefore the Freehold is ſeveral; and if they be diſſeiſed they ſhall be put to their ſeveral Actions; as therefore the Lands of Tenants in Common are to be conſidered as different Eſtates depending upon different Titles, the Plaintiff ſhall not recover, becauſe that were to allow the Plaintiff to try two ſeveral and different Titles in one Iſſue at the ſame Time; and therefore the Plaintiff to make out his Title muſt ſhew and prove that each demiſed the Whole to him, or elſe he doth not prove the Declaration, whereas the Diſcovery of the Tenancy in Common proves the contrary; and as they have different Titles to a Moiety only, ſo they could not each of them demiſe the Whole; but Jointenants are ſeiſed *per my & per tout*, and they derive by one and the ſame Title, and therefore each may be ſaid to demiſe the Whole; and as they muſt join in an Action for any Violation of their Poſſeſſion, ſo for the ſame Reaſon too their Leſſee on their joint Demiſe (*c*), and Coparceners ſeem to ſtand on the ſame Foundation and Reaſon, becauſe both coming in as one Heir, the Poſſeſſion muſt be joint as that of Jointenants.

Show. Rep. 542. 2 Vent. 214. Comb. 190. Carth. 224. (*b*) Where Ejectment is brought by one Tenant in Common againſt another, there muſt be an actual Ouſter of one by the other, or elſe he ſhall not be compelled to confeſs Leaſe, Entry and Ouſter. *Per* Holt C. J. 7 Mod. 39. Ld. Raym. 312, 716, 737.

2 Ld. Raym. 750, 830. 8 Mod. 109. Comyns 113. pl. 74. Stra. 531. 2 Stra. 960, 1180. Salk. 259. pl. 13. 2 Salk. 456. pl. 6. 12 Mod. 651, 655. (*c*) That to avoid any Difficulty in theſe Caſes, the beſt Way is * for the Plaintiff to count of ſeveral Demiſes, *i. e.* of an *undivided Moiety*, &c. by *A.* an *undivided Moiety* by *B.* and he may add a Count for the Whole on the Demiſe of both or all the Parties intitled, for I am not perfectly convinced that the Doctrine laid down in the Text would now hold. See farther, the Note at the End of this Head, *infra* 176.

In Ejectment the Plaintiff declared upon two Demiſes of ſeveral Lands by ſeveral Parties, but laid only one *Habendum*, *viz.* *Habendum Tenementa prædicta* ſo demiſed by the aforeſaid ſeveral Parties for ſeven Years, and lays in his Declaration, that the Defendant entered into all * Page 176 * the aforeſaid Tenements, & *ipſum* (the Plaintiff) *a firma ſua prædicta* (in the ſingular Number) *ejecit*, *expulit & amovit*; and it was aſſigned for Error, that the Declaration was ill for want of another *Habendum*, for that the Verdict is general, and it is uncertain to which Demiſe this ſingle *Habendum* relates; but the Court held, that *reddendo ſingula ſingulis* it was well enough.

Carth. 224. *Furden* and *Moor*, adjudged in *B. R.* upon a Writ of Error. Comb. 190. S. C. adjudged. 2 Vent. 214. S. C. adjudged in *C. B.*

Raym. 463. If the Heir brings an Ejectment, and pending the Suit his Anceſtor dies, yet he ſhall not recover, becauſe every Man muſt recover according to the Right he had at the Time of the Action brought; but during the Lifetime of the Anceſtor the Ejectment was done to him only, and therefore to be puniſhed by the Anceſtor, for one Man cannot complain in a Court of Juſtice of an Injury done to another.

Hard. 330. A Leaſe made by a Guardian to try the Title of an Infant ſeems good; for though ſuch Leaſe may be voidable as to the Infant, yet a Stranger cannot defeat it; and if the Leſſee ſhould not be allowd to maintain his Ejectment on ſuch Leaſe, the Infancy would deprive the Minor of that Remedy of puniſhing the Treſpaſſor, which Perſons of full Age are intitled to, which were to deny the Minor the common Right and Privilege of other Subjects.

2 Co. 61. Cro. Jac. 332. A Man may bring an Ejectment on a joint Leaſe made by Baron and Feme, of the Lands of the Wife, ſo the Leaſe be made by herſelf in Perſon,

ſon, whether it be by Parol or Indenture; for the Contracts of the Wife relating to her own Eſtate are but voidable during the Coverture, that ſhe may have the Benefit of them after the Death of her Huſband, if they ſhall be for her Intereſt to confirm them; and the Huſband ought to join in the Leaſe, becauſe they are conſidered in the Law but as one Perſon, and he having, during the Coverture, an Intereſt in the Property of his Wife, both muſt join, and on ſuch joint Leaſe each may be ſaid to demiſe the Whole, and the Leſſee may maintain his Ejectment on ſuch Demiſe, becauſe during the Coverture he hath the Power of her Property; and therefore all his Contracts relating to it are good during his Life, becauſe his Pleaſure muſt determine her who hath reſigned her Will to him, but after his Death ſhe may avoid the Leaſe. 417, 617. Cro. Eliz. 470, 488.

But if the Plaintiff declares on a joint Leaſe by Baron and Feme, and the Leaſe appears on the Evidence to have been executed by a third Perſon, by Virtue of a Letter of Attorney from the Huſband and Wife, ſuch Evidence will not maintain the Declaration, becauſe ſhe cannot delegate a Power to a third Perſon to act for her, who hath already devolved all Power and Authority on her Huſband; and therefore the Letter of Attorney being void as to the Wife, it muſt remain as to the Huſband only; and hence it hath been held, that the Leſſee might in this Caſe declare on that Leaſe as the Leaſe of the Huſband only ‡. Cro. Jac. 617. *Gardiner* and *Norman*.

‡ In ſuch Caſes as theſe, it is not now the Practice to make any actual Leaſe, but to declare, that *A.* and *B.* his Wife demiſed, &c. and perhaps to add another Count, on the Demiſe of *A.* alone. If the Tenant appears, he enters into the common Rule to confeſs Leaſe, Entry and Ouſter. On the Trial, therefore, if he confeſſes, nothing comes in Queſtion but the *Title*. If he does not confeſs, the Plaintiff is nonſuited, for the not confeſſing by the Tenant, which is marked on the *Poſtea*, and the Plaintiff ſigns Judgment againſt the caſual Ejector, ſues out Execution, and turns the Tenant out of Poſſeſſion. So that Leaſe or no Leaſe cannot come in Queſtion.

(E) Of the Plea and General Iſſue in Ejectment.

THE general Rule in the Iſſue in this Action is, that whatſoever bars the Right of Entry is a Bar to the Plaintiff's Title; therefore the Plaintiff muſt prove Seiſin within twenty Years in himſelf or his Anceſtors, or you muſt prove a Deed or Seiſin in the Perſon that has a particular Eſtate in the Land, and that you claimed within twenty Years after the Reverſion accrued, or that you was an Infant, Feme Covert, *Non compos*, impriſoned, or beyond the Sea at the Time when the Title accrued. Law Ejectm. 89.

* Fine and Nonclaim, which take away the Entry, are good Pleas in this Action in Bar of the Plaintiff's Right of Entry. * Page 177 *Vide* Tit. *Fines and Recoveries*, and *Deſcent*.

Accord is a good Plea in Ejectment, as is alſo Antient (*a*) Demeſne. 9 Co. 77. *Petoe's* Caſe, 3 Barnes 151 ‡

(*a*) which may be pleaded without Affidavit. 2 Ld. Raym. 1418.

‡ *Qu.* If any Plea is now uſed in Ejectment, but the general Iſſue, Not guilty, except in the Caſe of *antient Demeſne*, and if every Thing which ſhews the Plaintiff is not intitled to recover, may not be given in Evidence, under the general Iſſue, as the *Title* only is in queſtion? Except a Plea at the Aſſizes of Entry into Part, *Puis darreign Continuance*. *Vide* Yelv. 180. Cro. Car. 261.

(F) Of the Verdict and Judgment in Ejectment.

AS the Verdict is the Ground of the Judgment, it ought not to be entred for more Land or different Parcels than the Defendant was found guilty of by the Verdict; but a Variance between the Verdict and Judgment, occaſioned by the Miſpriſion or Default of the Clerk in entring the Judgment, is not fatal, but hath been amended by the Court after a Writ of Error brought; as where the Plaintiff had Judgment *quod recuperet Terminum* of a Meſſuage and ten Acres of Land, and the Verdict acquitted the Defendant *quoad* the Land, here the Judgment was larger than the Verdict; and becauſe it appeared to be the Miſpriſion of the Clerk, who had not purſued the Verdict, which ought to have been his Guide in making up the Judgment, and no Miſtake in Point of Law in giving the Judgment, therefore the Party ought not to ſuffer for his Miſpriſion, ſince the Statute of 8 *H.* 6. *cap.* 12. gives the Judges, in Affirmance of their Judgment, Power to amend and reform what in their Diſcretion ſeems to be the Miſpriſion of Clerks ‡.

‡ Though a Plaintiff declares on a Demiſe of the Whole, and recovers but a Moiety, &c. yet the Judgment is now entred up, that he recover his Term of and in the Tenements aforeſaid, &c. but he muſt only take in Execution, a Moiety, &c. according to his Recovery.

F. N. B. 220. Cro. Eliz. 144. (b) But it ſeems, that

If the Plaintiff hath a Verdict for all, the Entry of the Judgment is, that the Plaintiff *recuperet terminum verſus Def' de & in Tenementis prædict. & (b) quod def' capiatur.*

ſince the Statute 5 & 6 *W. & M.* c. 12. which takes away the *Capias pro Fine*, no Judgment of *Capiatur* ſhall be entred againſt the Defendant, nor any Thing in lieu thereof, but the Clauſe ſhall be totally left out of the Judgment, but then the Plaintiff is to pay the Officer, in lieu of the Fine, ſix Shillings and eight Pence, which is to be allowed the Plaintiff in his Coſts. Carth. 390. *Linſey* and Sir *Talbot Clerk*. 5 Mod. 285. S. C.

Law Eject'.

But if the Judgment in Ejectment be entred *quod recuperet Poſſeſſionem termini prædict'* †, this is as well as if it had been *recuperet Terminum præd'*, becauſe both ſignify the ſame Thing, the Poſſeſſion itſelf being to be recovered on the *Habere facias Poſſeſſionem*.

† The proper Entry is that the Plaintiff recover *his Term*, of and in the Tenements aforeſaid, &c.

Sav. 28.

And hence it is, that if the Term expires pending the Suit, the Plaintiff cannot recover the Poſſeſſion, becauſe the Court cannot give the Plaintiff Judgment for the Land, when it appears upon the Face of the Record, that his Title to it is determined; yet he (c) ſhall have his Judgment for Damages, becauſe the Treſpaſs ſtill remained.

(c) Co. Lit. 285.

Cro. Car. 406. *Mayo* and *Cogghill*.

In Ejectment againſt Baron and Feme, the Huſband was acquitted and the Wife found guilty; the Judgment was *quod capiantur* ‖; and held good, becauſe that is only for the Fine, which the Huſband muſt pay, for the Wife cannot.

‖ See *ſupra*, N.

Cro. Eliz. 763.

If the Defendant be acquitted of Part, and Judgment be entred *quod Def. ſit quietus quoad, &c.* that Part whereof he is acquitted; this is Error, becauſe the Judgment in this Action is not final, as in the Writs of Right, and the Judgment in this Action doth not protect the Defendant from any further Suit, but only quits againſt the Title ſet up by the Plaintiff in that Action;

Action; but ſince it appears that the Plaintiff's Demand was groundleſs as to that Part whereof the Defendant was acquitted, the Judgment as to that Part muſt be ſet down to be *quod Def' eat inde ſine die*; the Plaintiff as to that having no farther Cauſe to detain him longer in Court.

* If one of the Defendants (*a*) die after a Verdict, the Plaintiff ſhall have Judgment againſt the Survivors, on his ſuggeſting the Death of one on the Roll, but then the Judgment muſt be entred as to the Perſon deceaſed *quod Quer' nil Capiat, &c.* * Page 178

(*a*) How far the Death either of the Plaintiffs or Defendants makes an Abatement, *vide* Tit. *Abatement*, and Moor 469. Cro. Car. 513—14. Jon. 401. Law Ejectm. 97—8. The Death of one Plaintiff or Defendant, where there is another ſurviving, not to abate the Suit. 8 & 9 W. 3. *c.* 11. § 7.—And the Death of a Party between Verdict and Judgment, not to be Error, provided Judgment be entered within two Terms, 17 Car. 2. *c.* 8.

If an Ejectment be brought againſt Baron and Feme, and the Plaintiff hath a Verdict againſt both, and before Judgment the Huſband dies, the Plaintiff may on the Suggeſtion have Judgment againſt the Wife, not only becauſe this is a Treſpaſs committed by the Wife, and that therefore ſhe is puniſhable for her own Act, which is injurious to another; but becauſe where the Wife is found Guilty of the Ejectment, ſhe muſt have obtained that unlawful Poſſeſſion, either jointly with her Huſband, and then it ſurvives, or elſe ſhe had the whole Poſſeſſion in her own Right, and in either Caſe the Plaintiff may puniſh her, and recover the Poſſeſſion, which is wholly in her on the Death of her Huſband.

Rol. Rep. 14. Cro. Jac. 356. In Ejectment, againſt ſeveral if one only confeſſes Leaſe, Entry, and Ouſter, and the others do not, how the Verdict ſhall be.

Com. Rep. 113. pl. 74. 2 Salk. 456. pl. 6.—Judgment muſt be moved for the ſame Term in which the Declaration is delivered. 2 Barnard. *K. B.* 144.

(G) Of the Writ of Execution: And herein,

1. Of the Time when the Writ is to be ſued.

ALthough after Judgment the Plaintiff is intitled to, and may ſue out the Writ of *Habere facias Poſſeſſionem*; yet if he neglect to ſue out Execution within a Year after the Judgment, he muſt bring (*b*) a *Scire facias*, (*c*) as on all other Judgments, otherwiſe the Court will award a Writ of Reſtitution *quia erronice emanavit*.

Vide Tit. *Sci. Facias*. Supplement to Barnes 30, 31. 2 Barnes 148, 152, 154.

169. (*b*) Where the Defendant in Ejectment dying, a *Scire facias* went out againſt the Tertenants of the Land, and the Writ was demurred unto; for that the Heir was not named, nor was it alledged that any Strangers had intruded; but the Court ruled it well, for the Heir may come in as a Tertenant. Sid. 317. 2 Keb. 143. But for this *vide* Cro. Car. 295, 312. *Eyres* and *Taunton*. Cro. Jac. 506. 2 Brownl. 145.——Where in Ejectment there was Judgment againſt the Teſtator, and a *Scire facias* againſt the Executor, without naming him Tertenant; and it being objected, that in Ejectment the Defendant is ſuppoſed to be a Diſſeiſor, and that the Lands deſcend to his Heir at Law, the Plaintiff took out a new *Scire facias* and amended the Fault. Carth. 2.——Where Judgment in Ejectment was for two Meſſuages, and after a Year a *Scire facias* upon it recited a Judgment of one Meſſuage only, to which *Nul tiel Record* being pleaded, it was moved to amend it, but denied, for there may be ſuch a Judgment; and this does not appear to be erroneous on the Face of it. 6 Mod. 310. (*c*) It ſeems to have been doubted, whether a *Scire facias* lay to revived Judgment in Ejectment after the Year, becauſe by the Common Law it lay only in Real Actions; and at the Time of *Weſtm.* 2. *cap.* 45. which extends it to Perſonal Actions; the Term or Poſſeſſion was not recovered in this Action, but ſeems now agreed, that a *Scire facias* lies to revive the Judgment in this Action after the Year, as well as in any other. Sid. 351. *Okey* and *Viccars*, Salk. 258. pl. 11.

But if the Plaintiff hath a Judgment, with Stay of Execution for a Year, he may, after the Year, take out his Execution without the *Scire facias*, becauſe 6 Mod. 288. Rol. Rep. 104.

See Salk. 258. pl. 11. 3 Mod. 187, 189. 6 Mod. 14, 212, 292, 296.

cauſe the Delay is by Conſent of Parties, and in Favour of the Defendant; and the Indulgence of the Plaintiff ſhall not turn to his Prejudice, nor ought the Defendant to be allowed any Advantage of it, when it appears to be done for his Advantage and at his Inſtance.

12 Mod. 377, 506, 541. Barnes 132. 2 Barnes 165, 166, 172. Stra. 300, 301.

Keb. 785. 6 Mod. 288. and the above Authorities.

But it ſeems this Delay of Execution, being only the Compromiſe or Agreement of the Parties, is never entred on the Roll; and therefore after the Year the Plaintiff ought to move the Court for the *Scire facias*, leſt the Execution ſhould be ſuſpended *quia erronice emanavit* after the Year without the *Scire facias*.

* Page 179

5 Co. 88. a. Cro. Eliz 416. 2 Inſt. 471. 6 Mod. 288.

* So if the Defendant brings a (*a*) Writ of Error, and thereby hinders the Plaintiff from taking his Execution within the Year; and the Plaintiff in Error is nonſuit, or the Judgment affirmed, the Defendant in Error may proceed to Execution after the Year without a *Scire facias*, becauſe the Writ of Error was a *Superſedeas* to the Execution, and the Plaintiff muſt acquieſce till he hears the Judgment above; beſides, while the Cauſe is depending on the Writ of Error, the Cauſe is ſtill *ſub judice*, whether the Plaintiff ſhall recover the Land or not.

(*a*) But if the Party had been tied up by an Injunction out of Chancery for a Year, he could not take out Execution after the Year without a *Scire facias*, becauſe the Courts of Law do not take Notice of Chancery Injunctions as they do of Writs of Error; beſides in that Caſe it had been no Breach of the Injunction to have taken out the Execution within the Year, and continued it down by *Vic. non miſit breve*. Salk. 322. pl. 9. 6 Mod. 388. S. C. Stra. 301. —— † But now, according to the Caſe of *Michel* and *Cue, et Ux.* in *B. R.* 32 Geo. 2. 2 Burr. 660. If a Delay of Execution for a Year hath ariſen from the Defendants, by Bills for Injunctions, and by obtaining Time for Payment, Execution may be ſued out without a *Scire facias*; and if a Rule to ſhew Cauſe why it ſhould not be ſet aſide is obtained, the Court will diſcharge it with Coſts. And this ſeems founded on Reaſon; and *qu.* if this Doctrine will not extend to Caſes in Ejectment? —— A *Scire facias* lies upon a Judgment in Ejectment where a Stranger enters after Judgment. *R. Lut.* 1268. 3 Lev. 100. Clift 676, 677.

2. How the Writ is to be executed.

5 Co. 91. b. Law Ejectm. 108.

The Words of the Writ are *Quod habere facias Poſſeſſionem*, ſo that there muſt be a full and actual Poſſeſſion given by the Sheriff, and conſequently all Power neceſſary for this End muſt be given him; and therefore if the Recovery be of a Houſe, the Sheriff may juſtify breaking open the Door, if he be denied Entrance by the Tenant, becauſe the Writ cannot be otherwiſe executed.

Law Ejectm. 108.

If the Plaintiff recovers ſeveral Meſſuages in the Poſſeſſion of different Perſons, the Sheriff muſt go to each Houſe and deliver the Poſſeſſion thereof; and this is done by turning the Tenants out of each of the Houſes; for the Delivery of the Poſſeſſion of one Meſſuage, in the Name of all, is not a good Execution of the Writ, becauſe the Poſſeſſion of one Tenant is not the Poſſeſſion of the other, but each hath his ſeveral Poſſeſſion.

Rol. Abr. 886.

But it ſeems by *Roll*, that if all the Meſſuages had been in Poſſeſſion of one Tenant, it had been ſufficient to give Poſſeſſion of one in the Name of all; but without Doubt the ſureſt and beſt Way is, for the Sheriff to remove all the Tenants entirely out of each Houſe, and when the Poſſeſſion is quitted, to deliver it to the Plaintiff.

Leon. 145. *Upton* and *Wells*.

If the Sheriff turns out all Perſons he can find in the Houſe, and gives the Plaintiff, as he thinks, quiet Poſſeſſion, and after the Sheriff is gone there appears ſome Perſons to be lurking in the Houſe; this is no good Execution, and therefore the Plaintiff ſhall have a new *Habere facias Poſſeſſionem*, becauſe he never had Execution.

Where the Recovery is of Land, and there was more demanded than recovered, as ſuppoſe the Demand had been for 500 Acres, and a Verdict and

Judgment only for 100 Acres, it ſeems doubtful how the Sheriff is to give Execution. (*b*) Roll ſays, it is ſufficient to give the Plaintiff Poſſeſſion of two or three Acres in the Name of the whole; and this indeed ſeems the ſafeſt Way for the Sheriff, becauſe he does at his Peril execute the Writ; and if he gives Poſſeſſion of any Land not recovered, and not in the *Habere facias Poſſeſſionem*, he is a Treſpaſſer, and ſhall be puniſhed in an Action of Treſpaſs; but in regard the *Habere facias* is to give the Plaintiff the Benefit of his Judgment, and that cannot be done without an actual Poſſeſſion be given of the whole Quantity, it hath been held by (*c*) others, that the Sheriff does not diſcharge his Duty by giving one Acre in the Name of all; but he ought in ſuch Caſe to ſet forth all the Acres particularly, for to have it otherwiſe would be to leave the Execution uncertain, and conſequently not to give the Plaintiff the full Benefit and Advantage of his Judgment; but *note*, (*d*) at this Day the Practice is for the Plaintiff to give the Sheriff Security to indemnify him from the Defendant, and then the Sheriff to give Execution of what the Plaintiff demands †.

(*b*) Rol. Abr. 886.

(*c*) Palm. 289.

(*d*) Law Ejectm. 110.

† The uſual Way is now to take a general Verdict, but to take in Execution only what was actually recovered, *i. e.* only that Part to which the Plaintiff on the Trial made Title; for Declarations in Ejectment are now general, of ſo many Meſſuages, ſo many Acres of arable Land, ſo many of Paſture, *&c.* See *ante* 177, N.

* If the Execution goes to the Sheriff for twenty Acres, it ſeems the Sheriff muſt give twenty Acres, according to the common Eſtimation of the County where the Lands lie *.

* Page 180 Rol. Rep. 410.

* See *ante* laſt Note in 179.

3. How the Plaintiff is to be quieted, and what Relief he has when his Poſſeſſion is diſturbed.

And here it is further obſervable, that this Writ of Execution is only returnable at the Election of the Plaintiff; and the Court, at the Inſtance of the Defendant, will not direct the Writ to be returned; this ſeems to be left to the Choice of the Plaintiff, that he may take what is moſt for his Advantage, in order to have the full Benefit of his Judgment; and the Way to that is, to ſuffer him to renew the Execution at his Pleaſure till a new Execution be had; but the Plaintiff cannot renew Execution after one *Habere facias* is returned and filed, becauſe it then appears on Record, that the Plaintiff hath had the Benefit of his Suit; and then the new Execution is but *actum agere*, and conſequently ſuperfluous; and therefore the Court will not oblige the Sheriff to make any Return, but at the Deſire of the Plaintiff.

Rol. Abr. 886. 2 Keb. 245. Rol. Rep. 353. Palm. 289. 2 Brownl. 253. 6 Mod. 27. See Ld. Raym. 252, 346, 482, 718, 725. 2 Ld. Raym. 1072. Carth. 496. Salk. 260. pl. 1. 5 Mod. 443. Comyns 61. pl. 40.

If the Writ be returned by the Sheriff, tho' not filed, it ſeems no new *Habere facias* ſhall iſſue, becauſe when the Return is made, it becomes a Record, which the Court then becomes intitled to. 2 Brownl. 216.

But where the Writ is neither returned nor filed, there is then no Act of Record, by which it appears to the Court that the Plaintiff hath had any Benefit by his Judgment; and there upon a Suggeſtion, that *Vic' non miſit breve*, the Plaintiff is intitled to a new Writ, becauſe the Omiſſion of the Officer ſhall not turn to the Plaintiff's Delay or Prejudice, but the new Writ cannot iſſue till the Return of the firſt Writ be out; becauſe till the Return be paſt *non conſtat* to the Court, but the Sheriff may do his Duty, and the Plaintiff thereby have the full Benefit of his Judgment, and then there can be no Occaſion for a new *Habere facias*. Palm. 289.

6 Mod. 27. If the Officer be disturbed in the Execution of the Writ, on an Affidavit the Court will grant an Attachment against the Party, whether he be the Defendant or a Stranger, because the Writ is the Process of the Court, and any Disturbance given to the Execution of it is a Contempt to the Authority of the Court from whence it issues, and as such will be punished by the Court. The Process is not understood to be executed, nor the Execution compleat, till the Sheriff and his Officers be gone, and the Plaintiff left in quiet Possession.

Keb. 479. *Ratcliff* and *Tate*. But after the Possession given, either on the *Habere facias Possessionem*, or Agreement of the Parties, the Law seems to make a Difference where the Plaintiff is turned out of Possession by the Defendant, and where by a Stranger; where it is done by the Defendant himself, the Plaintiff may have either a new *Habere facias* or an Attachment, because the Defendant himself shall never by his own Act keep Possession, which the Plaintiff recovered from him by due Course of Law; but where a Stranger turns the Plaintiff out of Possession after Execution fully executed, the Plaintiff is put to a new Proceeding upon an Indictment of forcible Entry, where the Force will be punished, because the Title was never tried between the Plaintiff and a Stranger; and he may claim the Land by Title Paramount to the Plaintiff, or he may come in under him, and then the Recovery and Execution in the former Action ought not to hinder the Stranger from keeping that Possession which he may have a Right to; and if the Law were otherwise, the Plaintiff might by Virtue of a new *Habere facias* turn out even his own Tenants, who came in after the Execution executed; whereas the Possession was given him only against the Defendant in the Action, and not against others not Parties to the Suit.

* Page 181 (a) Style 318. * Thus in the Case of (a) *Fortune* and *Johnson*, the Court was moved for an Attachment against *Johnson*, for ejecting one who had been put into Possession by an *Habere facias*; but because it appeared that *Johnson* claimed under an elder Judgment, the Court would not make any Rule in it, because it was Title against Title, and therefore left them to take their Course at Law.

Style 408. Law Ejectm. 113. The Plaintiff had Judgment in Ejectment, and by Agreement afterwards, the Defendant was to hold the Land for the Residue of his Term, and held it accordingly for some Time; and the Plaintiff took out an *Habere facias* and executed it; the Defendant moved the Court for Restitution on the Agreement, but the Court would not grant it, but left the Defendant to his Action on the Case on the Agreement, for the Judgment was entred absolutely; but if the Judgment had been entred with a *Cessat executio* for such a Time, there, if the Plaintiff takes Execution within the Time, the Defendant shall have Restitution, because the Judgment was entred with this Limitation, that the Plaintiff should not have the Fruit of it till such a Time; but *Quære*, how this appears to the Court, since it seems the *Cessat executio* is not entred on the Roll. The Difference seems to be between a Judgment by Confession, and a Judgment on Verdict, where the former is given with a *Cessat executio*; if the Execution be afterwards taken contrary to the Agreement, the Court will set it aside, and lay the Attorney by the Heels; but where Judgment is given on Verdict, there the Verdict is the Foot and Ground of the Judgment, and the Court will not take Notice of the subsequent Agreement of the Parties, but leave them to their Remedy §.

§ The Author has certainly explained the Difficulty.

(H) Of the meſne Profits, and how to be recovered.

ALthough in Ejectment the Plaintiff, if he prevails, is to recover (*b*) Damages, yet the Damages that he hath ſuſtained by being kept out of the meſne Profits are not (*c*) recoverable in this Action, becauſe it is never laid with a (*d*) *Continuando*, and therefore comprehends only the Damages ſuſtained in that particular Act of Ouſter complained of, but does not extend to the meſne Profits that were taken during the whole Ouſter, ſince every Act is a new Treſpaſs.

Pract. Reg. C. P. 62.

(*b*) That theſe Damages may be recovered on a Writ of Inquiry; but yet a Writ of Error will lie on a Judgment in Ejectment *quod recuperet*, &c. before a Writ of Inquiry executed. Carth. 205. *per Holt* Ch. Juſt. (*c*) They are. 2 Barnes 59. † (*d*) Though Ejectments are Creatures of the Court, the Action for meſne Profits is like Treſpaſs with a *Continuando*. 2 Barnes 368.

† *Sed qu.* If it ever has been done? Or, if it hath, yet whether 'tis not more eligible to ſue in an Action for the meſne Profits, and for the Coſts of the Ejectment, &c.

But where a Perſon recovers in Ejectment, he may bring an Action of (*e*) Treſpaſs for the meſne Profits, and recover the ſame (*f*) from the Time of the Defendant's Entry laid in the Declaration; and at the Trial it is ſaid not to be neceſſary to prove any (*g*) Entry of the Defendant, becauſe the Defendant doth in the Rule confeſs Leaſe, Entry and Ouſter; alſo the Entry of the Defendant is found by the Recovery in Ejectment againſt him.

(*e*) That this is the proper Action for Recovery of the meſne Profits or Damages, there being none recoverable at Common Law in any Real Action, except in an Aſſiſe, *vide* Co. Lit. 257. 19 H. 6. 27, 28. 2 Rol. Abr. 550. 11 Co. 51. and Tit. *Damages*. (*f*) And therefore it is ſaid, that if a Man is put to his Election, whether to proceed at Law, or in Equity, if the Bill be for the Land, and to have an Account of the meſne Profits, he may elect to proceed in an Ejectment at Law for the Poſſeſſion, and in Equity upon the Account, becauſe at Law he can recover Damages for the meſne Profits from the Time only of the Entry laid in the Declaration. Vern. 105.* But where a Diſſeiſor, or one who wrongfully keeps the Poſſeſſion of Lands, ſhall in Equity account for all the meſne Profits during the whole Time that he has been in Poſſeſſion, *vide* Tit. *Account*. (*g*) Style's Pract. Reg. 242. *Vide* Skin. 424. that the Leſſor of the Plaintiff cannot bring an Action for the meſne Profits, unleſs he entred and was ouſted, but the Leſſee may; and 6 Mod. 222. where it is holden, that without an actual Entry there can be no Recovery of the Profits.

* If Plaintiff can prove his Title accrued before the Time of the Demiſe, and prove Defendant to have been longer in Poſſeſſion, he ſhall recover antecedent Profits; but in ſuch Caſe the Defendant will be at Liberty to controvert the Title. *Vide De Coſta and Atkins. Ni. Pri.* 86.

*If Treſpaſs be brought for the meſne Profits, and the Action is brought againſt a Stranger to the former Verdict, it muſt be brought in the Leſſor's Name, and the Title may be ſtood upon, for there was no Leaſe, and no Reaſon for an Eſtoppel; but if it be brought againſt the Defendant in Ejectment in the (*b*) Leſſee's Name, there the Verdict ſhall be concluſive Evidence, and ſhall bind the Leſſor of the Plaintiff, though no ‡ Party to the Record; and in this Caſe it is ſufficient to prove the Value of the meſne Profits, without entring into the Title.

* Page 182

Sid. 279. Keb. 944. 2 Barnes 367.

(*b*) That if ſuch Leſſee releaſes the Action, it is a Contempt, for which he will be committed. Skin. 247. pl. 1. Salk. 261.

‡ He is conſidered as the real Plaintiff, and it's his Title that is tried and determined in the Ejectment.

(I) Of bringing a new or ſecond Ejectment.

ONE of the Advantages attending this Action is, that a Man may have a Remedy *toties quoties*, in being allowed to bring as many Ejectments as he pleaſes, (*b*) which has ſometimes proved a very great Miſchief, but is yet without Remedy; for though it has been ſometimes attempted in Chancery, after three or four Ejectments, by a Bill of Peace, to eſtabliſh the prevailing Party's Title; yet it hath been always denied to alter the Courſe of the Law, for that every Termor may have an Ejectment, and every new Ejectment ſuppoſes a new Demiſe; and the Coſts ‖ in Ejectment are a Recompence for the Trouble and Charge to which the Poſſeſſor is put; but where the Suit begins in Chancery for Relief touching pretended Incumbrances on the Title of Lands, and the Court has ordered the Defendant to purſue an Ejectment at Law, there, after one or two Ejectments tried, and the Right ſettled to the Satisfaction of the Court, the Court hath ordered a perpetual Injunction againſt the Defendant, becauſe there the Suit is firſt attached in that Court, and never began at Law; and ſuch precedent Incumbrances appearing to be fraudulent and inequitable againſt the Poſſeſſor, it is within the Compaſs of the Court to relieve againſt it.

(*b*) 10 Mod. 1.

‖ And if the Coſts of a former Ejectment, at the Suit of the ſame Party, are not paid, the Court will, on Motion, ſtay Proceedings till they are paid.——If the firſt Ejectment was in *C. P.* and a Rule there to ſtay him in a ſecond, till Coſts paid, there ſhall be the ſame Rule in *B. R.* if he afterwards ſues there. 1 Salk. 255.——To avoid Miſtakes, it's proper here to obſerve, that the *Defendant* in a former Ejectment ſhall not be reſtrained, if the Verdict was againſt him, till he pay the Coſts; for tho' there was a Recovery againſt him, the new Ejectment by him is not vexatious. R. 4 Mod. 379.

Str. 279. 8 Mod. 225, 226. Str. 548, 554, 681.

If a Man has (*c*) a Verdict in Ejectment, and Coſts taxed, and an Attachment iſſues for Non-payment of the Coſts, the Defendant ſhall not have an Ejectment againſt the Plaintiff in the ſame Court till he hath paid Coſts; but he may proceed in Ejectment in (*d*) another Court without Coſts paid; the Reaſon is, becauſe the ſame Court will ſee an Obedience paid to their Rules before they will ſuffer the diſobedient Perſon to proceed in a Cauſe of the ſame Kind; but another Court cannot take Cogniſance of the Rules of a diſtant Court; but every Court can inforce Obedience to its own Rules.

(*c*) So if the Plaintiff is nonſuit, he cannot bring a ſecond Ejectment, without paying the Coſts of the firſt. Salk. 255. pl. 4. Comb. 110. (*d*) *Vide* the Note on the preceding Clauſe, &c. 2 Barnes 107. Andr. 17, 298. 2 Str. 1099, 1105, 1152.

Salk. 258. pl. 12. *per Holt* C. J.

No new Ejectment ſhall be brought by the Defendant after Recovery againſt him, till he has quitted the Poſſeſſion, or the Tenants have attorned to the Plaintiff; ſo that he be in Poſſeſſion, and the Defendant out.

Court would not ſtay Proceedings in one Ejectment till the Event of another was determined. Barnard. *K. B.* 47. But Proceedings in ſecond Ejectment ſtayed till ſpecial Verdict in former determined. Andr. 298. 2 Str. 1105. *——If a Defendant againſt whom there is a Recovery brings Error, and afterwards delivers a Declaration in Ejectment, he ſhall not be bound to pay the Coſts in the firſt Ejectment before he proceeds. 1 Salk. 259. ——Yet the Court will ſtay all Proceedings on the ſecond Ejectment, till Error determined. 1 Salk. 258.

*Election.

* Page 183

(A) In what Cases an Election is given. 183.
(B) To what Person; and herein of him that is to do the first Act. 184.
(C) Where it shall be said to continue, or be determined. 185.
(D) What shall be said a sufficient Election. 186.

(A) In what Cases an Election is given.

IF a Man grants twenty Acres, Parcel of his Manor, without any other Description of them; yet the Grant is not void, for an Acre is a Thing (*a*) certain, and the Situation may be reduced to a Certainty by the Election of the Grantee.

Keilw. 84. 2 Co. 36.

(*a*) But if a Man sells 20*l.* worth of his Land, Parcel of a Manor; this is void, it being neither certain in itself, nor reducible to a Certainty, for no Man is made Judge of the Value. 2 Co. 36. Keilw. 84.

So if one being seised of a great Waste (*b*) grants the Moiety of a Yard-land lying in the Waste, without ascertaining what Part, or the special Name of the Land, or how bounded; this may be reduced to a Certainty by the Election of the Grantee; but it is otherwise in the Case of the King's Grant, for there can be no Election in his Case, and therefore the Grant is void for Incertainty.

Leon. 30. Noy 29. 1 Co. 86.

(*b*) But if *A.* seised in Fee of 100 Acres, makes a Feoffment of eighteen, without any Description of their Situation, *&c.* it is void, and no Election can reduce it to a Certainty, because a Feoffment with Livery cannot operate *in futuro*. Rol. Abr. 725. N. Bendl. 148. And. 11. Hob. 174. Moor 181. S.C. & *vide* Tit. *Feoffment*. †

† *Qu.* if for valuable Consideration, it may not amount to a Covenant, and intitle the Grantee to an Action for adequate Damages?

So if a Man levies a Fine *come ceo que il ad de son done* of an House and an hundred Acres of Land in *D.* where he hath there an House and 118 Acres, (*c*) the Conusee may elect which 100 Acres he will have, (*d*) for the Election is given to him (*e*) by the Fine.

Rol. Abr. 725 (*c*) Moor 84, 102. S. P. N. Dyer 280. *Margine* S. P.

(*d*) That *Cestui que Use* shall have it. Moor 102. pl. 247, 602. pl. 832. adjudged.——Where the Devisee of two Acres not ascertained shall have the Election. N. Dyer 280. *Margine*.——Upon a Covenant, in Consideration of Marriage, to stand seised of so much Land as shall be of the yearly Value of forty Marks; it hath been a Question, whether they, to whom the Assurance was made, might enter into any Part of the Land of the Value of forty Marks, at their Election, and hold the same in Severalty; or if they shall be only Tenants in common with the other; and whether they may chuse one Acre in one Place, and one Acre in another; and so through the whole Land where they please. 3 Leon. 27. & *vide* Keilw. 84. Dyer 280. Rol. Rep. 187. Lit. Rep. 218. (*e*) But if the Conusee renders it back to the Conusor for a certain Number of Years, the Conusor hath the Election given him, which hundred Acres he will have, and he may elect. Rol. Abr. 725.

If a Man grants 600 Cords of Wood out of a large Wood, the Grantee hath Election to take them, when and in what Part of the Wood he pleaſes, * without any Appointment of the Grantor, and conſequently may aſſign his Intereſt in them to a third Perſon, and he ſhall have the like Election.

* Page 184

5 Co. 24. *Palmer*'s Caſe. Cro. Eliz. 819. Way 32. Moor 691. S. C. Jon. 276. S. C. cited. Hob. 174. like Point.

5 Co. 24. in *Palmer*'s Caſe.

But if one grants to me 1000 Cords of Wood, to be taken at my Election, and the Grantor or a Stranger cuts down Part of the Wood, I can take no Part of that which is cut down, but muſt ſupply myſelf out of the Reſidue ſtill remaining.

Vent. 271. *Motteram* and *Jolly*. 2 Lev. 142 S. C. by the Report of which *A.* granted twenty of his beſt Trees, *&c.* and adjudged the Grantor could not take any in the mean Time, at leaſt without Requeſt to the Grantee to make his Election; and ſo it was not like *Palmer*'s Caſe, for that being only of ſo many Loads of Wood, it was ſufficient if ſo many were left for the Grantee.

But if *A.* covenants with *B.* that he ſhall have twenty of the beſt Trees in the Wood of *A.* to be taken at the Election of *B.* within ſuch a Time; it is a Breach of the Covenant in *A.* to cut down any Trees within that Time, becauſe the Latitude of Election which *B* had is thereby abridged.

2 Rol. Abr. 428. but for this *vide* Head of *Rent*.

If Rent be reſerved payable at the Church of *S.* or *D.* upon Condition, *&c.* the Leſſee hath his Election to pay it at either Place; and therefore to take Advantage of the Condition, the Leſſor muſt demand it in ſuch Places, where by his own Agreement he has permitted the Tenant to pay it.

(B) To what Perſon; and herein of him that is to do the firſt Act.

Co. Lit. 145. 2 Co. 37. a. ſame Rule.

IT is laid down as a general Rule, that in caſe an Election is given of two ſeveral Things, he that is the firſt Agent, and which ought to do the firſt Act, ſhall have the Election.

Co. Lit. 145. a.

As if a Man grants a Rent of 20*s.* or a Robe to one and his Heirs, the Grantor ſhall have the Election, for he is the firſt Agent by Payment of one or Delivery of the other.

Co. Lit. 145. a.

So if a Man makes a Leaſe, rendring a Rent or Robe, the Leſſee ſhall have the Election.

Co. Lit. 145. a.

But if I contract with you to pay you a Robe, or twenty Shillings, at *Eaſter*, you may, after the Feaſt, bring Debt for the one or the other.

Rol. Abr. 925. *Denny* and *Parnell*.

So if a Man leaſes Lands for Years, reſerving weekly nine Quarters of Wheat, or the Value thereof, as it ſhall then be ſold in the Market of *W.* if the Leſſee pays neither of theſe at the Time appointed, the Leſſor may have his Action, at his Election, for the Wheat only; for though the Leſſee might have paid any of them, at his Election, at the Day, yet after the Day, the Law gives the Election to the Leſſor.

Co. Lit. 145. Moor 82. Dyer 91.

If *A.* gives one of his Horſes in his Stable to *B.* *B.* hath the Election which Horſe to take, for he is the firſt Agent by taking the Horſe.

Co. Lit. 145. a.

If one grants to another twenty Loads of Maple to be taken in his Wood of *D.* there the Grantee ſhall have the Election, for he ought to do the firſt Act, *viz.* fell and take the ſame.

Leon. 268. Sir *Thomas Lee*'s Caſe.

If one ſeiſed in Fee of a Manor aliens the Manor, except one Cloſe called *N.* Part of the Manor, and there are two Cloſes called *N.* which are Part of the Manor, and one contains nine Acres, and the other but three Acres, the

the Alienee ſhall not chuſe which of the ſaid Cloſes he will have; but the Alienor ſhall have the Election, which of the ſaid Cloſes ſhall paſs.

If I have three Daughters, and I covenant that *J. S.* ſhall diſpoſe of one of them in Marriage, it is at my Election of which, and after Requeſt, I am bound to deliver her to him. Moor. 72. pl. 197. Dal. 73. S. C.

* If an Obligation be conditioned to pay *B.* or his Heirs annually 12 *l.* at *Midſummer* and *Chriſtmas*, or to pay him or his Heirs, at any of the ſaid Feaſts, 150 *l.* the Obligor hath Election to pay the 12 *l.* or the 150 *l.* but he ought to continue the Payment of the 12 *l.* annually, until he pays the 150 *l.* Though he may at any Time determine the Payment of the 12 *l.* by Payment of the 150 *l.* * Page 185 Cro. Jac. 594. *Abbot* and *Rockwood*, adjudged.

If *A.* covenants with *B.* that *A.* or his Son *C.* or either of them, ſhall work with *B.* at the Grinding and Poliſhing of Glaſs, *B.* paying to each of them ſo much, *&c.* and *B.* requeſts *C.* to work with him, *&c.* if he doth not, the Covenant is broken, for *B.* had the Election to require both or any of them to work with him. 2 Sid. 104. Sir *Paul Neele* and *Reeve*, adjudged.

In Debt on an Obligation, that if a Ship put to Sea, and either the Goods or the Obligor come ſafe, he ſhould pay ſuch a Sum over and above the Uſe allowed by the Statute; the Defendant pleads, that the Obligor died before he returned, and inſiſted, that he, as his Executor, had an Election to pay at which of the Contingencies he pleaſed, and that therefore, the Teſtator never returning, no Action accrued; but it was reſolved, that the Payment ſhould ariſe on either of the Contingencies; and that this being agreeable to the Intention of the Parties, the Law ſupplies the Words, *which ſhould firſt happen.* Lev. 54, 55. *Sayer* and *Glean*, adjudged.

(C) Where the Election ſhall be ſaid to continue, or be determined.

WHERE the Things granted are annual, and to have Continuance, the Election (where the Law gives it him) remains to the Grantor, as well after the Day as before; otherwiſe when to be performed *unica vice.* Co. Lit. 145. a. 2 Co. 37. Moor 85. Keilw. 78.

As if I grant to another for Life an Annuity or Robe at *Eaſter*, and both are behind, the Grantee ought to bring his Writ of Annuity in the Disjunctive; for if he ſhould bring it for the one only, and recover, this Judgment would (*a*) determine the Election for ever; for he ſhould never have a Writ of Annuity afterwards, but a *Scire facias* upon the Judgment; which Reaſon *Fitzherbert* (*b*) in his *Natura Brevium* not obſerving, held an Opinion to the contrary. Co. Lit. 145. a.

(*a*) Yet it ſeems that if a Leſſor reſerve yearly a Rent, or a Pair of Spurs, and the Leſſee fail of Payment at the Day, the Leſſor may diſtrain for either of them; for in this Caſe the Leſſee loſes his Election only *pro hac vice.* Rol. Abr. 725. Co. Lit. 90. b. (*b*) Fol. 152.

When nothing paſſes to the Feoffee or Grantee (*c*) before Election to have the one Thing or the other, there the Election ought to be made in the Life-time of the Parties; and the (*d*) Heir or Executor cannot make the Election. Co. Lit. 145. a. 2 Co. 37. *a.* Same Rule.

(*c*) When Election creates the Intereſt nothing paſſes till Election. Hob. 174.—As if a Man grants one of his Horſes in a Stable, the Election muſt be made in the Time of the Parties. Co. Lit. 145.—But if a Man gives one of his Horſes to *A.* and *B.* and after *A.* dies, yet *B.* may elect, becauſe this was a Thing in Intereſt in them, and no expreſs Election limited. Rol. Abr. 725.—But if a Man gives one of his Horſes to be elected by *A.* and *B.* if *A.* dies before Election, *B.* cannot elect. Rol. Abr. 725.—6. (*d*) For if he ſhould, he ſhould take as a Purchaſer, where named only by Way of Limitation. Leon. 254.

Co. Lit 145. 2 Co. 36. a. 37. a. Same Rule.

But where an Eſtate or Intereſt paſſes immediately to the Feoffee, Donee or Grantee, there the Election may be made by them, or their Heirs or Executors.

* Page 186 Co. Lit. 145. a.

* When one and the ſame Thing paſſeth to the Donee or Grantee, and the Donee or Grantee hath Election in what Manner or Degree he will take this; there the Intereſt paſſeth immediately, and the Party, his Heirs or Executors, may make Election when they will.

2 Co. 35. Sir *Rowland Heywood's* Caſe. 2 And. 202. S. C. adjudged. Poph. 95. S.C. Hob. 159. S.C cited.

If *A.* being ſeiſed in Fee of a Manor, Part in Demeſne, and Part in a Leaſe for Years rendring Rent, and Part in Copyhold, in Conſideration of a Sum of Money, by Indenture grants, bargains and ſells it to *B.* to hold for ſeventeen Years from the Death of *A.* and after *A.* covenants to ſtand ſeiſed thereof to the Uſe of himſelf and the Heirs of his Body, and dies, and *B.* enters; (*a*) he may elect whether he will take by the Common Law, or by Bargain and Sale, for *A.* had Power to paſs it either Way; and if he ſhould be obliged to take by Demiſe at Common Law, then *B.* would loſe the Rents reſerved upon the Leaſes for Years for want of an Attornment; and it was alſo held, that this Election remained notwithſtanding the Alteration of the Eſtate by the ſecond Indenture, and the Death of the Leſſor.

(*a*) A Bargain and Sale is inrolled *Quind. Paſch.* and at the ſame Time the Bargainor levies a Fine to the Bargainee, he may elect to take by one or the other this *vide* 3 Leon. 16. 2 And. 161. 4 Co. 72. a. and for

Rol. Abr. 725.

If a Man levies a Fine *come ceo, &c.* of an Houſe and 100 Acres of Land in *D.* (where he hath there 118 Acres) and the Conuſee renders to the Conuſor for 100 Acres, and after the Conuſor dies, his Executor may elect which of the 100 Acres he will have, becauſe this was a Thing in Intereſt in the Teſtator.

Hard. 381. Sir *William Ingolby* and *Wivel.*

There was a Compoſition between the Prebend of *A.* and the Abbot and Convent of *B.* that the Prebend of *A.* and his Succeſſors, for all Time to come, ſhould have their Election yearly, either to receive Tithes in Kind of Corn or Grain ariſing within certain Lands of the Abbey, or elſe to receive five Marks to be paid by the ſaid Abbot and Convent in Lieu thereof; ſo as ſuch Election was notified to the Abbot, or any of the Monks or Porter of the Abbey, *&c.* and the Lands came to the King by the 31ſt of *H.* 8. and from him to the Defendant, and the Prebendary came to the King by the 1ſt of *Edw.* 6. of Chanteries, *&c.* and from him to the Plaintiff. Upon admitting the Compoſition good, it was adjudged that the Power of Election was gone, becauſe it cannot now be made according to the Compoſition; but in this Caſe it was ſaid by *Hale* Ch. Baron, that in one (*b*) *Southwell's* Caſe, in 44 *Eliz.* where an Abbot had a Quantity of Wood, to be taken yearly in ſuch a Wood, or a Sum of Money at his Election; it was held the Election was transferred to the King by the Statute of Diſſolution of Monaſteries.

(*b*) Which *vide* in Poph. 91.

Co. Lit. 145. a. 2 Co. 37. a. 6. P.

If one enfeoffs another of two Acres, to hold the one for Life, and the other in Tail, and he before Election makes a Feoffment of both; in this Caſe the Feoffor ſhall enter into which of them he will, for the Feoffee, by this wrongful Act, hath loſt his Election.

Election.

(D) What ſhall be ſaid a ſufficient Election.

IF a Man gives two Acres to another, to hold the one for Life and the other in Fee, and the Donee after makes a Feoffment of one Acre; (a) this is an Election to have the Fee in that. Plow. 6. Rol. Abr. 726.

(a) That when one who is both Executor and Deviſee enters generally, without Claim or Demonſtration of Election, that he ſhall have the Thing deviſed, as Executor, which is his firſt and general Authority. 10 Co. 47. b. & *vide* Plow. 520. Cro. Eliz. 223. 2 Co. 37. b.

*If a Man leaſes two Acres for Life, the Remainder of one Acre in Fee, and after licenſes the Leſſee to cut Trees in one Acre; this is an Election that he ſhall have the Fee in the other Acre. *Page 187 Plow. 6. Rol. Abr. 726.

When the Election is given to ſeveral Perſons there, the (b) firſt Election made by any of the Perſons ſhall ſtand. Co. Lit. 145. a. 2 Co. 37. a. ſame Rule.

(b) Where an Election made by Tenant for Life ſhall bind him in Remainder. Moor 102.

As if a Man leaſes two Acres to *A.* for Life, the Remainder of one Acre to *B.* and of the other Acre to *C.* *B.* or *C.* may elect which of the Acres they will have, and the firſt Election by one binds the other. 2 Co. 36. b.

Error.

A Writ of Error is (c) a Commiſſion to Judges of a Superior Court, by which they are authorized to examine the Record, upon which a Judgment was given in an inferor Court, and on ſuch Examination to affirm or reverſe the ſame, according to Law.

(c) Therefore differs from another Writ or Action. Jenk. Rep. 25. 2 Inſt. 40.

Yelv. 209.— But yet, if by the Writ of Error the Plaintiff therein may recover, or be reſtored to any Thing, it may be releaſed by the Name of an Action Co. Lit. 288. b.—In a Writ of Error to reverſe a Fine as Couſin and Heir of the Conuſor, it need not be ſhewn in the Writ of Error, how he is Couſin; for it is but a Commiſſion to examine Errors, and needs not ſuch Certainty as other Writs. Cro. Jac. 160.

This Writ lies where a Man is grieved by any Error in the Foundation, Proceeding, Judgment or Execution of a Suit. Co. Lit. 289. b.

But for the better Underſtanding hereof I ſhall conſider,

(A) In what Caſes a Writ of Error will lie, 189. And herein,

Error.

1. In what Cases a Writ of Error is the proper Remedy to be relieved againſt an erroneous Judgment. 189.
2. On what Judgments a Writ of Error will lie. 191.
3. In what Court the Judgment muſt be given on which a Writ of Error will lie. 194.

(B) Who may bring a Writ of Error, and againſt whom; and herein of the Perſons neceſſary to be made Parties thereto. 195.

(C) Of the Time of bringing a Writ of Error. 199.

* Page 188 * (D) Of the Manner of bringing it. 200. And herein,

1. Of the Form of the Writ, and where the Record ſhall be ſaid to be removed. 200.
2. What is neceſſary to be removed; and herein of removing the Record, or a Tranſcript. 202.

(E) Of alledging Diminution and granting a Certiorari. 204.

(F) Of the Scire facias. 207.

(G) Of the Proceedings after the Record removed; and herein of the Abatement of the Writ of Error. 209.

(H) How far the Writ of Error is a Superſedeas. 210.

(I) To what Court a Writ of Error lies. 211. And herein,

1. Of Writs of Error into Parliament. 211.
2. Of Writs of Error into the Exchequer-Chamber. 212.
3. Of reverſing Judgments in the Court of Exchequer. 213.
4. Of Writs of Error into the King's Bench. 213.
5. Of Writs of Error into the Common Pleas and other Inferior Courts. 214.
6. Where a Writ of Error lies in the ſame Court in which the Record is. 215.

(K) Of aſſigning Errors. 216. And herein,

1. Of the Manner of aſſigning Errors. 216.
2. Of aſſigning Errors in Fact and in Law. 217.
3. Of aſſigning that for Error which appears contrary to the Record. 218.
4. Of aſſigning that for Error which is for the Party's Advantage. 220.
5. Where the Matter aſſigned for Error is aided by the Appearance of the Party, and in not being taken Advantage of in proper Time. 221.
6. Where Matters which might be aſſigned for Error are aided by a Releaſe, and the Conſent of Parties. 223.

(L) What Defence the Defendant in Error may make; and herein of pleading a Releaſe. 225.

(M) Of

(M) Of the Judgment to be given on the Writ of Error. 227. And herein,

1. Where on a Writ of Error, Part only, or the whole Judgment ſhall be reverſed. 227.
2. What Judgment ſhall be given on the Reverſal of the firſt. 230.
3. To what the Parties ſhall be reſtored on the Reverſal of the firſt Judgment. 231.

*(A) In what Caſes a Writ of Error will lie: And herein,

*Page 189

1. In what Caſes a Writ of Error is the proper Remedy to be relieved againſt an erroneous Judgment.

REgularly an erroneous Judgment given in a Court of Record can (a) only be reverſed by Writ of Error.

(a) When a Statute is erroneouſly acknowledged, as before one that has no Authority, or if a Statute Merchant hath but one Seal, &c. an *Audita Querela* lies, and not a Writ of Error; but if a Statute is well acknowledged, and the Execution erroneous, a Writ of Error lies. Cro. Eliz. 233, 810. Owen 142. Dyer 35. pl. 27. Leon. 233.——A Judgment in a Copyhold Court reverſed upon Petition to the Lord, and the Party reſtored to his Damages by *Audita Querela*. 4 Co. 30. b.—Where the Fact aſſigned for Error is in the Suggeſtion of the Writ itſelf, and not in any of the Proceedings in the Cauſe, no Writ of Error lies, but the Party muſt bring an *Audita Querela*. Carth. 282. 4 Mod. 314. Salk. 262. pl. 3. but for this *vide* Tit. *Audita Querela*.

Therefore if the Tenant in a *Cui in vita* dies ſeiſed (b) pending the Writ, and after Judgment is given againſt him, which is erroneous, and after the Recoverer ſues Execution againſt the Heir, and he brings an Aſſiſe, he ſhall not avoid this Judgment againſt his Father, by ſaying, that his Father died pending the Writ; for the Judgment is not void, but only voidable.

28 Aſſ. 17. Rol. Abr. 742. S. C. 2 Bulſt. 242. S. P.

(b) So if in Ejectment the Defendant had died after Verdict and before Judgment, his Heir could not avoid the Judgment but by Writ of Error. Rol. Abr. 742.——*Note*, that this is aided by 16 & 17 Car. 2. *c.* 8. and cannot be taken Advantage of on a Writ of Error; for which *vide* Tit. *Amendment and Jeofail*.

In an Action upon the Caſe, if the Plaintiff be nonſuit, and after it is entered, that he *Reliquit actionem ſuam, & fatetur ſe nolle ulterius proſequi*, upon which Coſts are aſſeſſed, though it be admitted, that this Judgment is erroneous, becauſe this is not any Nonſuit, as it is entered; yet in an Action of Debt for the Coſts, the Defendant ſhall not avoid it by Plea without a Writ of Error; for it is a Judgment *de facto* not void, but only voidable by Writ of Error.

Rol. Abr. 742. *Cole* and *Lawe*, adjudged.

If a Man recovers againſt the Principal, and ſues a *Scire facias* againſt the Bail, they cannot ſay the Principal died before the Judgment, and (c) ſo avoid the Judgment by Plea, for it is againſt the Record.

Rol. Abr. 742. Cro. Eliz. 199. S. C.

Leon. 101. S C. (c) But it is a good Plea by Way of Excuſe for not bringing in the Body, but not to avoid the Judgment, being a Record, which muſt be avoided by Writ of Error †. 2 Mod. 308. & *vide* Godb. 377. and Tit. *Bail in Civil Cauſes*.

† The

2 Inſt. 513. but for reverſing erroneous Fines and Recoveries, *vide* Head of *Fines and Recoveries.*

If a Fine is levied without an Original, or of more than is contained in the Original, it is not void, but only voidable by Writ of Error.

Rol. Abr. 742-3. Style 246. S. C. for this *vide* Head of *Infancy and Age.*

If an Infant ſuffers a Common Recovery, in which he comes in as Vouchee in his proper Perſon, and not by Attorney or Guardian; tho' this ſhall not bind him, but that he may in a Writ of Error avoid it, becauſe it is Error in Law; yet at his full Age he cannot enter into the Land, and avoid it by his Entry, before he has reverſed it in a Writ of Error, becauſe he himſelf is privy to the Judgment, and may reverſe it by ſuch Means, and he is not a Stranger to the Judgment; for Judgment ought not to be ſubverted by Matter *in Pais*, without Matter of Record, as a Recognizance or Fine by an Infant where he appears by Attorney, and not by Guardian.

* Page 190 3 Co. 5. a.

* If *A.* levies a Fine to *B.* who grants and renders to *A.* and his Wife, and the Heirs of the Body of *A.* this is not void as to the Wife, though ſhe is no Party to the Original, but only voidably by Writ of Error.

2 Hawk. P.C. 458-9. Rol. Abr. 742-3 (*a*) But whether an Outlawry on the Crown Side of the King's Bench can be reverſed in the ſame or different Term. with a Writ of Error, *vide* 2 Hawk. P. C 459. and Tit. *Outlawry.*

By the Practice of the Court of (*a*) *Common Pleas*, a Defendant coming in by *Capias utlagatum* the ſame Term in which an Exigent is returnable, may avoid the Outlawry without Writ of Error, by ſhewing that he purchaſed a *Superſedeas* out of the ſame Court, and delivered it to the Sheriff before the *Quinto exactus*, &c. or by ſhewing any other Matter apparent on Record, which makes the Outlawry erroneous; as the Want of an Original, or the Omiſſion of Proceſs, or Want of Form in a Writ of Proclamation, &c. or a Return by a Perſon appearing not to be Sheriff, or a Variance between the Original and Exigent, or other Proceſs, or the Want of ſuch Addition as required by 1 *H.* 5. *c.* 5.

3 Inſt. 214.

If one be attainted upon an erroneous Indictment, he cannot be relieved but by Writ of Error, for the Judgment being *quod ſuſpendatur*, &c. which is the Judgment of Law due for the Offence, it muſt be preſumed to have been given, for that he was guilty of the Offence; but if Judgment of Acquittal is given upon ſuch Indictment, the King need bring no Writ of Error; but the Offender may be newly indicted, for the Judgment being *quod eat ſine die*, &c. may be given as well for the Inſufficiency of the Indictment as for the Party's Innocence.

3 Inſt. 231. Hawk. P. C. 459. (*b*) a Judgment in the *Marſhalſea*, where none of the Parties were of the King's *Hoſtel*, was void, and being *coram non judice* might be avoided by Plea. 10 Co. 77. 2 Brownl. 24. & *vide* Lev. 23, 204, 234.* Yet a Writ of Error alſo lies to reverſe ſuch Judgment. Cro. Eliz. 502. 6 Co. 20. Rol. Abr. 744. Sav. 36. 2 Jon. 209.

Alſo any Judgment whatſoever, given by Perſons who had no good Commiſſion to proceed againſt the Perſon condemned, may be falſified, by ſhewing the ſpecial Matter, without Writ of Error, becauſe it is (*b*) void; as where a Commiſſion authorizes to proceed on an Indictment taken before *A. B. C.* and twelve others, and by Colour thereof the Commiſſioners proceed on an Indictment taken before eight Perſons only.

* That Allegation is now uſed, and the Fiction obtains, ſimilar to the Allegation of a Defendant ſued by Bill in *B. R.* being in the Cuſtody of the Marſhal. *Sed qu.* if they can ſupport an Arreſt where neither Party is of the Houſhold. *Vide* 6 Co. 20. But ſee Salk. 439.

† The Death of the Party between Verdict and Judgment, not to be Error, provided the Judgment be entered within two Terms 17 Car. 2. *c.* 8.——The Death of the Party after interlocutory Judgment, not to abate the Suit, 8 & 9 *W.* 3. *c.* 11. *ſ.* 6.——The Death of one Plaintiff or Defendant, where there is another ſurviving, not to abate the Suit. *Id. ſ.* 7.

If one is attainted of Felony, and after, by Relation of a general Pardon, the Felony is pardoned, he ſhall be diſcharged, (*a*) for he hath no Remedy by Writ of Error, or otherwiſe, to reverſe the Attainder. 6 Co. 5. a.

(*a*) So if a Fine impoſed in a Leet be unreaſonable or againſt Law, as joint, where it ſhould be ſeveral, it may be avoided by Plea and Judgment of the Court in which the Suit is depending, for there is no other Remedy. 11 Co. 44. *Godfrey*'s Caſe reſolved. Rol. Rep. 75. S. C. & *vide* 2 Mod. 219. Vern. 170, 175. 12 Mod. 390. Stra. 395, 536, 537, 628. 2 Stra. 1102. †

† *Qu.* If the Party injured, by levying of the Fine, or by Impriſonment, for Non-payment, might not maintain an Action of Treſpaſs, whereby the Validity of the Execution, &c. might be determined?

In Debt upon a Bond againſt an Adminiſtrator, if he pleads a Judgment recovered againſt the Inteſtate, and that he hath not Aſſets *ultra*, &c. the Plaintiff may reply, that an Action was brought againſt the Inteſtate, and that he died before the Judgment; and that after his Death, Judgment was given; for being a Stranger to the Judgment, he can neither bring Error nor Deceit, and has no Way to avoid it but by Plea.* 2 Mod. 308. *Randal*'s Caſe, & *vide* Vaugh. 94. Gilb. Eq. Rep. 308.

* *Qu.* If this could be done now, Since the Statute of 8 & 9 *W.* 3. *c.* 11. *ſ.* 6. if there was an interlocutory Judgment againſt the Inteſtate in his Life-time, and final Judgment after? *vide ante* 189. n.

If a Man is found guilty upon an Indictment of Felony, and prays his Clergy, and it is allowed him, and he is burnt in the Hand, he cannot avoid this by Writ of Error, becauſe he is convicted only, and not attainted; but the Record being removed by *Certiorari* into the Crown-Office, if there be a Fault in the Indictment, it may be diſcharged, and Reſtitution awarded to the Party of his Goods ſeiſed for that Cauſe. Cro. Eliz. 489

If a Man had been indicted upon the Statute of 3 *Jac.* 1. *cap.* 4. for abſenting from his Pariſh Church, and thereupon Proclamations had been made, that he ſhould render his Body, &c. which not being done, he had been convicted according to that Statute yet no Writ of Error would have lain thereupon; for by the Statute, after Proclamations made, and the Default recorded, the ſame was a Conviction of the Offence; as if the Statute * gave Proceſs for the Forfeiture; and if there was a Fault in the Record, the Party's Remedy was in the Exchequer to quaſh it there. Raym. 433. *Phorbes*'s Caſe. *Page 191

By the Common Law, *in favorem vitæ*, an Outlawry of Treaſon or Felony might be avoided by Plea, that the Defendant was in Priſon, or in the King's Service beyond the Sea, &c at the Time of the Outlawry pronounced againſt him; but it ſeems that no Outlawry for any other Crime againſt a Party rightly deſcribed can be avoided by the Plea of any Matter of Fact whatſoever.* Co. Lit. 259. 2 Hawk. P.C. 460. * *Sed qu?*

One who purchaſes Land of a Perſon who afterwards is outlawed of Felony, or condemned upon his own Confeſſion, may falſify the Record, not only as to the Time wherein the Felony is ſuppoſed to have been committed, but alſo as to the Point of the Offence; but where a Man is found guilty by Verdict, a Purchaſer cannot falſify any more than the Party, as to the Point of the Offence, but only as to the Time. 2 Hawk. P.C. 459.

2. On (*b*) what Judgments a Writ of Error will lie.

(*b*) Whether it lies on a Judgment given on a *Habeas Corpus*. Salk. 504. pl. 1. 2 Ld. Raym. 795. 6 Mod. 223. 11 Mod. 7. pl. 1. Co. Lit. 288. b.

No Writ of Error can be brought but on a Judgment, or an Award in Nature of a Judgment, for the Words of the Writ are, *Si Judicium redditum ſit*, &c.

Rol. Abr. 744. (a) Man may assign Errors in Law or Fact, upon a Judgment given against him by Default. 19 Ass. 8. Rol. Abr. 675. S. C. (b) How upon a Bill of Exceptions, *vide* 2 Inst. 427. and Tit. *Bills of Exception.*

If the Plaintiff be (a) nonsuit † at the *Nisi prius*, upon which Costs are taxed by the same Jury, by the Statutes 23 *H.* 8. *c.* 15. 4 *Jac.* 1. *c.* 3. and Judgment given for them against the Plaintiff, the Plaintiff may have a Writ of Error upon (b) this Judgment.

† On a Judgment for Costs, on a Nonsuit, Error lies in the Exchequer Chamber. Stra. 235.

Rol. Abr. 744. If a Man brings a Writ of false Judgment in the *Common Pleas* upon a Judgment given in Antient Demesne, and reverses the Judgment there, a Writ of Error lies upon this Judgment, for this is a Matter of Record.

11 Co. 41. b. cited from the 18 H. 7. Rot. 3. *Eaton*'s Case. Cro. Jac. 357. Rol. Rep. 85. S. C. cited.

If a Man is indicted for Felony, and thereupon a *Capias* and *Exigent* is awarded, but he dies before any Attainder, his Administrators may have Error upon this Award of the Exigent, because by the Award of the *Exigent* his Goods were forfeited; and this is *ad grave Damnum, &c.* though the Principal Judgment can never be given.

3 Inst. 31. (c) upon a Case stated and referred to all the Judges, it was holden by ten of them, that Writs of Error were *ex debito Justitiæ*, and not *ex meræ gratiâ*, except in Treason and Felony; but *Price* and *Smith* held, that the Subject could not of Right demand them in any criminal Case. 2 Salk 504. but for this *vide* Rol. Rep. 175. 3 Bulst. 71. 2 Leon. 194. Sid. 69.—And *note*, that as the Law is now settled, a Person attainted of Treason or Felony, before he can have a Writ of Error to reverse his Attainder, must assign his Errors, and thereupon have Leave from the Court to prosecute his Writ of Error. 2 Hawk. P. C. 461.——Also no Writ of Error for the Reversal of an Attainder of Treason or Felony is to be allowed without an express Warrant from the King or the Consent of the Attorney General. 3 Mod 42. Sid. 69. 2 Hawk. P. C. 461. Ld. Raym. 154. 2 Salk. 495. pl. 5. Vern 170, 175. 2 Vern. 312, 313. 8 Mod. 26. 10 Mod. 188, 357, 380, 409. 11 Mod. 173. pl. 15. 12 Mod. 544, 545, 626, 668. 2 Salk. 500. Comb. 345. Will. Rep. 445. pl. 128. 690. 2 Will. Rep. 269. pl. 68. 270.

If a Writ of Error lies to reverse an Attainder of High Treason, though some have held the contrary, by Reason of 33 *H.* 8. *cap.* 20. that every Attainder of Treason by the Common Law should be as effectual as if by Authority of Parliament; for the Statute is to be intended of lawful Attainders by due Course of Law, and not of erroneous or void Attainders; * and so it was held in a Parliament held the 28 *Eliz.* when it was enacted, that no Attainder of High Treason, where the Party was executed for the same, should be avoided by Plea or Error; but this Act extended only to Attainders before that Time, where the Party had been executed, not to Attainders after.

3 Inst. 215. & *vide* 3 Bulst. 71. Raym. 1, 2.

* Page 192

Cro Car. 504. Marquis of *Winchester*'s Case adjudged, and upon such Error such Judgment

If one be convicted upon an Indictment of Recusancy for absenting from Church for one Month, upon which Judgment is given, that he shall forfeit 20 *l.* but it is not *ideo capiatur*; this Omission being apparently to the Prejudice of the King, it was held a Writ of Error would lie notwithstanding the Words of 3 *Jac. cap.* 4. that no such Indictment shall be avoided, discharged, or reversed, for Want of Form or other Defect whatsoever,

whatſoever, other than by direct Traverſe to the Point of not coming to Church.

reverſed accordingly, the King by his Attorney having ſignified his Pleaſure, that it ſhould be reverſed, if erroneous. Jon. 407. S. C. by the Report of which the Writ of Error was brought by the King, and there held, that a Writ of Error lay for the King, for he was not concluded by the Words of the Statute of 3 *Jac. c.* 4.

If it be entered in an inferior Court, that the Plaintiff *recuperare debeat*, whereas it ought to be *recuperet*; this is (*a*) no Judgment; ſo (*b*) no Writ of Error lies thereupon, for the Words of the Writ are *Si Judicium redditum ſit.*

Style 265.

(*a*) That it is but an Award, *vide* Rol. Abr. 751.

(*b*) Where the Judgment was, that he ſhould recover *ſuper recuperationem*, where it ſhould have been *ſuper recognitionem.* Yelv. 157.

In an Aſſiſe of Darrein Preſentment, if the Parties demur upon the Title, and it is adjudged for the Plaintiff, and that he ſhall have a Writ to the Biſhop; a Writ of Error lies upon this Judgment before the Damages inquired of, becauſe there were no Damages at the Common Law, and then the Writ would lie preſently; and the Addition of Damages given by the Statute, to be inquired of by the Sheriff, ſhall not ſtay the Writ of Error; and if it be affirmed, it may be inquired of the Damages where it is affirmed.

17 E. 3. 5. b. 19. b. Rol. Abr. 749. S. C.

If a Man recovers by Default in a Writ of *Coſenage* or *Aiel*, a Writ of Error lies upon this before the Damages are inquired of, becauſe the Damages are but an Addition to the Common Law given by the Statute; and ſo the Judgment for the Principal continues as it was at Common Law.

17 E. 3. 21, 33. Rol. Abr. 749-50. S. C.

In a Writ of Partition, if the Judgment be given *quod Partitio fiat*, and thereupon a Writ is directed to the Sheriff to make Partition, no Writ of Error lies hereupon, for the Judgment is not compleat till the Sheriff return; and the ſecond Judgment, which the Law requires herein, *viz. quod partitio præd' foret firma & ſtabilis in perpetuum*, for before that the Plaintiff may be nonſuit, or he may, upon the Return of the Sheriff, ſuggeſt to the Court, that the Partition is not equal, and ſo have a new Partition, and may alſo releaſe before the laſt Judgment.

Rol. Abr. 750. Lord *Barkley* and Counteſs of *Warwick.* Cro. Eliz. 635. Moor 643. Noy 71. S. C. adjudged. Cro. Jac. 324. 2 Bulſt. 119.

2 Bulſt. 104. like Caſe adjudged, & *vide* 2 Rol. Rep. 125.

So if in an Action of Account, Judgment is given *quod computet*, and thereupon the Defendant brings a Writ of Error; yet the Record ſhall not be removed till the intire Matter of the Account be determined, *Ne curia Domini Regis deficeret in Juſtitia exhibenda.*

11 Co. 39. b. Cro. Eliz. 636. 2 Leon. 68. 2 Bulſt. 119, 120. 3 Bulſt. 233. Godb. 258.

Cro. Jac. 224. 2 Rol. Rep. 125. Style 290. Cro. Jac. 356. Rol. Rep. 85.

But if a Woman recovers in a Writ of Dower, a Writ of Error lies before the Writ of Inquiry of Damages awarded, and before the third * Part aſſigned by Metes and Bounds, for the Judgment is perfect as to the Realty, and the Damages are given by the Statute by way of Addition.

*Page 193

Rol. Abr. 750. but for this *vide* Brownl. 127. March 88.

11 Co. 40. Rol. Abr. 760. Style 290.

So if the Plaintiff recovers in an *Ejectione firmæ* by Confeſſion, *Nihil dicit Non ſum informatus*, or Demurrer, a Writ of Error lies before a Writ of Inquiry of Damages executed; (*c*) for the Judgment, *quod recuperet Poſſeſſionem*, is perfect, and the Plaintiff may preſently have Execution thereupon; and therefore, if the Defendant were to be hindered from bringing a Writ of

Rol. Abr. 751. Cro. Eliz. 235, 636. Leon. 309. Latch. 212. Noy 95.

Leon. 193. Dyer 291. 3 Bulſt. 233. Palm. 6.

of Error before a Writ of Inquiry executed, it might be in the Plaintiff's Power, by refuſing to bring or execute the Writ of Inquiry, to delay the Plaintiff for ever. *

2 Rol. Rep. 126. Latch, 133. Style 109. And. 145. March 8. Keb. 327. and Carth. 205. S. P. *per Holt* C. Juſt. (*c*) So in Debt,‡ but otherwiſe in Treſpaſs and Caſe, where the Damages are the Principal. Cro. Eliz. 255.

* *Qu.* If Error will lie in Ejectment, where the Judgment is againſt the caſual Ejector? There are not, now any Judgments in Ejectment, on Demurrer, *&c.* If the Tenant appears, he pleads the general Iſſue. If he does not appear, Judgment goes againſt the caſual Ejector, and that being againſt a nominal or fictitious Perſon there is not any one to bring Error.——Error cannot be ſued in the Name of the caſual Ejector. 2 Burr. 756. Barnes 179.——*Vide* alſo *ante* 163. n. & *poſt.* 197. as to a *præcipe quod reddat.*

‡ In Debt a Judgment by Default is final.

Rol. Abr. 750, 751. *vide* March 89. Noy 66.

So if a Man recovers in *Quare impedit* upon a Demurrer, the Defendant may have a Writ of Error before the Writ of Inquiry of Damages returned, for ſuch Writ may be awarded out of the King's Bench, if the Judgment be affirmed there.

Rol. Abr. 751. Godb. 439.

If a Man recovers in a *Quare Impedit*, and after brings a Writ *Quare non admiſit* againſt the Biſhop, a Writ of Error lies on the Judgment in the *Quare Impedit*, and the Record ſhall be removed, though the other Writ of *Quare non admiſit* be not yet diſcuſſed.

11 Co. 39. a.

If a *Quare Impedit* be brought againſt Two, and one pleads to Iſſue, and the other confeſſes the Action upon which Judgment is given, he ſhall not have a Writ of Error till the Matter is determined as to the other; for the Writ of Error muſt rehearſe all that are Parties to the Original, and as to one, Judgment is not given; and if the Record is removed before the intire Matter is determined, there would be a Failure of Right.

11 Co. 39. b. Dyer 291.

If in a *Formedon* the Tenant has Judgment for Part, no Writ of Error lies until the intire Matter in Demand is determined, for the Judgment is, *Si Judicium inde Redditum ſit*, which Word *inde* goes to the intire Demand.

11 Co 41. a. 2 Rol. Rep. 125. Dyer 291. March 89.

If Debt be brought againſt divers by ſeveral *Præcipes*, and Judgment given againſt one, he may have Error before Determination of the Matter as to the others; for there being ſeveral Counts, the Record of his Count and the Pleading ſhall be ſevered from the Original, and removed in *B. R.* and yet the Original ſhall remain in *C. B.* for otherways the Court of Common Pleas could not proceed to determine the Reſidue without the Original; and my Lord *Coke* ſays, it ſeems to him, that in this Caſe, if there be Error in the Original upon a *Certiorari*, the Chief Juſtice ſhall only certify the Tenor of it.

Palm. 1, 2. adjudged upon a Writ of Error upon a Judgment given in a *Quo Warranto* againſt the Corporation of *Dublin*. 2 Rol. Rep. 113. S. C.——Error does not lie on a peremptory *Mandamus*. Stra. 536.——Nor on a *Mandamus* when the Return is allowed. Stra. 625.

If in a *Quo Warranto*, Judgment be given as to Part of the Liberties claimed, that they ſhall be ſeiſed, and that the Defendants *Capiantur pro fine*, and as to the other Part, *Curia adviſare vult*, a Writ of Error lies before any Judgment given for the other Part.

3. In

* 3. In what Court the Judgment muſt be given on which a Writ of Error will lie. * Page 194

No Writ of Error will lie of any Judgment that is not given in a Court of (*a*) Record.

(*a*) Not of a Judgment given in an Inferior Court, as the County-Court, *&c.* Co. Lit. 288. b. Nor of a Decree or Sentence in Chancery proceeding according to Equity. 37 H. 6. 14. Bro. Error 95. Rol. Abr. 744.——But of a Judgment given in the limited Court of Chancery, called the Petty-Bag, which proceeds according to the Common Law, and holds Plea of *Scire facias* for Repeal of the King's Letters Patent, Petitions, *Monſtrans de Droit*, Traverſes of Offices, *Scire facias* upon Recognizances, Executions upon Statutes, and Pleas of all Perſonal Actions by or againſt an Officer or Miniſter of the Court, a Writ of Error lies in *B. R.* Rol. Abr. 744. Dyer 315. 4 Inſt. 80. Plowd. 395. *&* *vide* Rol. Rep. 287. Moor 570. Vern. 131.

The Authority of the Juſtices of *Trailbaſton* was by Act of Parliament and by the General Rule of Law, if they erred in Judgment, a Writ of Error lay in *B. R.* to reverſe their Judgment. 2 Inſt. 540. 4 Inſt. 186.

If a Man be convicted (*b*) upon the Statute of 7 *Jac.* 1. *cap.* 11. by two Juſtices of the Peace, for killing of Partridges, upon Proof or Confeſſion of the Party, without Indictment; this Judgment may be reverſed in *B. R.* being removed there by *Certiorari*, without any Writ of Error; ſo if the Conviction had been on the (*c*) Statute againſt Shooting, or ſuch like. Rol. Abr. 743, 744. *Berry*'s Caſe. 2 Jon. 167. S. C. cited, and a Con-

viction upon the Statute of Hunting in a Park, being removed by *Certiorari*, Exceptions allowed to be taken thereto. (*b*) Vent. 33. Like Point *per Cur'* *vide* Raym. 389. where Error was brought upon a Conviction of a Riot before Juſtices of Peace, and Sheriff, upon the View, upon 13 *H.* 4. 7. (*c*) *Vide* Jon. 171.

But if an erroneous Judgment be given upon an Indictment of Barratry at the Seſſions of Peace, and the Party fined thereupon, and committed till he pays it, and he removes the Indictment and Proceedings by *Certiorari*, and himſelf by *Habeas Corpus*, yet he cannot be relieved, unleſs he brings a Writ of Error. Cro. Jac. 404. *Rice*'s Caſe adjudged.

But a Record of Force made by Juſtices of Peace upon the View, may be quaſhed upon Motion, without a Writ of Error. Lev. 113. agreed *per Cur.*' in the

Caſe of the King and *Chaloner*. Sid. 156. S. C. and S. P. *per Cur.*' and ſaid that a Writ of Error would not lie, becauſe they were not a Court.

Wherever a new Juriſdiction is erected by Act of Parliament, and the Court, or Judge, that exerciſes this Juriſdiction, acts as a Court or Judge of Record, according to the Courſe of the Common Law, a Writ of Error lies on their Judgment; but where they act in a ſummary Method, or in a new Courſe different from the Common Law, there a Writ of Error lies not, but a *Certiorari*. Salk. 263. pl. 5. Ld. Raym. 213, 252, 454. See Salk. 144. pl. 3. 396. pl. 2. Carth. 421, 491. Com. Rep. 76. pl. 50. 12 Mod. 386. *per Holt.* C. J.

* Page 195 * (B) Who may bring a Writ of Error, and against whom; and herein, of the Persons necessary to be made Parties thereto.

Rol. Abr. 747. Dyer 90.

NO Person can bring a Writ of Error to reverse a Judgment, who was not (*a*) Party or (*b*) Privy to the Record, or who was not (*c*) injured by the Judgment, and therefore to receive Advantage by the Reversal thereof.

(*a*) Where in Ejectment, Error may be brought either by Lessor or Lessee. Sid. 317. (*b*) as Heirs and Executors; but if an erroneous Judgment be given against the Parson, the Patron cannot have a Writ of Error. Godb. 377.——That Error and Attaint always descend to such Person to whom the Land should descend, if no such Recovery or false Oath had been. Leon. 261. (*c*) Hence it is, that no Man can have a Writ of Error to reverse a Fine that took any Estate by it. 5 Co. 39 *Fey's* Case.——And for the same Reason the Conusor cannot assign any Error in the Grant and Render, because by that the Estate which passed from him by his Conusance is restored to him; and therefore he shall not be admitted to defeat the Estate which by his own Agreement he accepted. 5 Co. 39. b.

9 H. 6. 46. Br. Error 9. Rol. Abr. 749. S. C.

So a Writ of Error does not lie against any, but him who is Party or Privy to the first Judgment, his (*d*) Heirs, Executors or Administrators.

(*d*) *F. N. B.* 107.——If a Man recovers Land by Judgment, and dies without Heir, against whom the Writ of Error shall be brought, is left a *Quære*. 9 *H.* 6. 49. Rol. Abr. 749.

Rol. Abr. 749. Rol. Rep. 302.

And therefore on a Judgment for Recovery of Land, the Writ must be brought against him who was Party to the Judgment, although he hath nothing in the Land, and not against the Tenant; and on such Writ the Judgment may be reversed; but there must go (*e*) a *Scire facias* against all the Tertenants.

(*e*) That to reverse a Fine or Recovery, there must go a *Scire facias* against all the Tertenants. Carth. 112.

Leon. 261. 2 Sid. 56. & *vide* Owen 68. Godb. 377.

Upon this Rule, that none shall have a Writ of Error to reverse a Judgment, but he who is privy to, and hath some Prejudice thereby; it hath been resolved, that if one hath Lands on the Part of his Mother, and loseth by erroneous Judgment, and dies, the Heir of the Part of the Mother shall have the Writ of Error.

Owen 68. Leon. 261. 4 Leon. 5. adjudged, & *vide* Bridg. 79.

So the younger Son, when intitled to the Land by the Custom of Borough English, shall bring the Writ of Error, and not the Heir at Common Law; for this Remedy descends with the Land. Rol. Rep. 311.

Dyer 90. Leon. 261. Rol. Abr. 747. Dyer 89. Cro. Eliz. 469. 3 Lev. 36.

So if there be an erroneous Judgment, Tenant in Tail female, the Issue female, and not the Son, shall bring a Writ of Error.

So if a Man settles Land to the Use of himself and the Heirs of his Body, the Remainder to his own right Heirs, and dies, leaving Issue only a Daughter, who levies a Fine, and dies without Issue, and *J. S.* brings a Writ of Error as Cousin and collateral Heir of the Daughter, yet he shall never reverse the Fine; for there could no Right descend to him from the Daughter, because she had but an Estate-tail, which determined by her Death without Issue; and does not appear that the Remainder in Fee was in the Daughter as right Heir, wherefore *J. S.* shall not reverse the Fine, *quia de non apparentibus & non existentibus eadem est ratio*, especially in a Court of Judicature, where the Judges cannot take Notice of any Thing that does not come judicially before them, and appear in the Pleading.

* If there be Tenant in Tail, the Remainder in Fee, and in a *Præcipe* brought *(a)* againſt Tenant in Tail, an erroneous Judgment is given againſt Tenant in Tail, and he after dies without Iſſue, he in Remainder * may have a Writ of Error; for when the Statute *De Donis* gave Liberty to limit a Remainder after an Eſtate-tail, the Law gave ſuch Actions to him in Remainder as belonged to Privies in Eſtate.

* Page 196 3 Co. 3. b. agreed in the Marquis of *Wincheſter's* Caſe.

(*a*) So if Tenant in Tail levies a Fine, and before Proclamation paſſes, a *Præcipe* is brought againſt the Conuſee, who vouchees the Tenant in Tail, *&c.* for when the Tenant in Tail comes in as Vouchee, it is as of his old Eſtate; ſo that the Privity between the Tenant in Tail and him in Remainder continues. Bridg. 69. Rol. Rep. 311.

* Tenant in Remainder may bring Error againſt a common Recovery where the Tenant in Tail, *vouchee*, died before the Judgment; and he need not ſet out a complete Title, but only ſhew the Connection and Privity between him and the Perſon againſt whom the Recovery was had. *Sheepſhanks* v. *Lucas*. 1 Burr. 410. In ſuch Caſe *Scire facias*, or any Warning to the *Heir*, is not neceſſary. *Id.*

If Tenant in Tail Male hath Iſſue a Son and a Daughter by one Venter, and a Son by another, and dies, and the eldeſt Son makes a Feoffment, and a Common Recovery is had againſt the Feoffee, in which the eldeſt is vouched, and he vouches over the common Vouchee, and he after the eldeſt dies, the youngeſt Son may have a Writ of Error; for though the eldeſt ſhould have rendered a Fee-ſimple to the Feoffee, according to his Loſs, yet he ſhould have recovered but an Eſtate-tail, *viz.* ſuch an Eſtate as he had when the Warranty was made, which would have deſcended to the youngeſt, and conſequently the Writ of Error ſhall be brought by him. Leon. 261. Owen 68. Godb. 377.

If there be ſeveral Parties to an erroneous Fine, they ſhall all join with the Party that is to enjoy the Land, though they themſelves can have nothing; and this is ſaid to be neceſſary only by way of Conformity. Rol. Abr. 747. Dyer 89.

But if Tenant for Life, and he in Remainder in Fee, (being an Infant) join in a Fine, the Infant alone may bring Error for the Error in reſpect of the Perſon of the Infant, which is the Cauſe of the Action for him, and for no other. Leon. 317. Cro. Eliz. 115. S. P. adjudged, and the Fine reverſed *quoad* the Infant only: For this *vide* Head of *Fines and Recoveries*.

A Writ of Error may be brought by him that is made Party by the Law, though he was not originally Party to the Suit, as he who comes in as Vouchee. Rol. Abr. 748, 755.

If Tenant in Tail within Age comes in as Vouchee by Attorney in a Common Recovery, he in Remainder may aſſign this for Error; for he is Party in Intereſt to the Recovery; and where a Man's Intereſt is bound by another's Act, it is but reaſonable he ſhould be allowed to free himſelf from the Miſchief of it, by taking Advantage of any Error in it. Rol. Abr. 755, 796.

If *A.* be Tenant in Tail, the Remainder to *B.* and *A.* ſuffers an erroneous Recovery, and the common Vouchee releaſes to the Recoverer; yet if *A.* dies without Iſſue, *B.* may, notwithſtanding the Releaſe, reverſe it by Writ of Error; for the common Vouchee is only called in for Form; as he really has no Intereſt in, or Title to the Land, ſo really neither does he make any Recompence to the Perſon that loſes the Land; and therefore it were unreaſonable to carry the Notion of the imaginary Recompence ſo far as to ſuppoſe him a real Sufferer, and thereby give him the Privilege of ſetting aſide a Conveyance by which he is no Way affected. Cro. Eliz. 2. 3 Co. 4.

If he in the Remainder be made privy to the Record by *Aid Prier*, he ſhall have a Writ of Error during the Life of the Tenant for Life; ſo (*b*) if he be received by Default of the Tenant for Life. 3 Co. 4. (*b*) 8 H. 4, 5. Bro. Error 39.

So

49 E. 3. 21. *b.* Rol. Abr. 748. So if a Feme be received by the Default of her Baron, and loſes the Land by Judgment, the Baron and Feme ſhall have a Writ of Error thereupon.

2 Co. 57. *Beckwith's* Caſe. Cro. Eliz 129. Leon. 114. If Baron and Feme levy a Fine, they may, by Error, reverſe the Fine, for Nonage of the Feme, during the Life of the Baron.

* Page 197 18 E. 3. 25. b. Dyer 1. pl. 5. *If the Conuſor of a Statute aliens the Land, and Execution is ſued againſt the Alienee, he may have a Writ of Error upon the Execution.

Rol. Abr. 748. this is made a *Quære*, becauſe, as there ſaid, he is not privy thereto, for the Execution goes of the Land of the Conuſor; but Godb. 377. S C. cited, and ſaid, that otherwiſe there would be no Remedy; for the Conuſor himſelf could not have Error, becauſe the Lands were not extended in his Hands.

Rol. Abr. 749. Co. 111, 112. Cro. Eliz. 204 Palm. 254. S. P. and when he is reſtored, the Alienee ſhall enter upon him. If pending a real Action, the Tenant aliens in Fee, and after a Recovery is had againſt him, he (*a*) himſelf may have a Writ of Error, tho' he hath nothing in the Land, becauſe he is privy to the Judgment after his Alienation and Tenant in Law.

(*a*) But the Alienee cannot have a Writ of Error for Want of Privity. 2 Aſſ. 2. Rol. Abr. 749.

Rol. Abr. 788. Cro. Eliz. 468. Moor 413. But if a Fine be levied of 120 Acres of Land, and he, that has Right to a Writ of Error, makes a Feoffment of the Whole, he ſhall never reverſe the Fine; but if the Feoffment had been made, or a Releaſe had been given of 20 Acres only, he might yet have a Writ of Error to reverſe the Fine as to 100 Acres, becauſe he has not transferred his Right as to thoſe, and therefore may be re-inſtated, if the Fine be erroneous.

Jon. 352. Rol. Abr. 789. Moor 365. So if Tenant in Tail levies a Fine which happens to be erroneous, and after ſuffers a Recovery of Part of the Land only, of which the Fine was levied; if the Iſſue in Tail brings a Writ of Error to reverſe the Fine, the Tenant may plead the Recovery in Bar for that Part, becauſe for ſo much the Recovery is an Alienation, and therefore the Iſſue ſhall never have a Writ of Error for that Part of the Land which he cannot have or enjoy, ſhould the Fine be reverſed.

8 Co. 61. *Beecher's* Caſe. (*b*) 3 Leon. 176. S. P. *per Cur. arguendo*. Rol. Rep. 302. S. P. *arguendo*. (*b*) In a *Præcipe quod reddat*, if the Tenant diſclaims, he ſhall never have a Writ of Error, (*c*) becauſe by his Diſclaimer he has debarred himſelf of all Right in the Land.

(*c*) Otherwiſe where the Tenant departs in Deſpite of the Court, or Judgment is given upon his Confeſſion. 8 Co. 62. a. F. N. B. 21.——So if upon his Default. 2 Rol. Rep. 127. Palm. 56.

Rol. Abr. 749. *Franke* and *Stukely*. In a Writ of Annuity againſt an Heir, upon an Annuity granted by his Anceſtor in Fee; upon *Non eſt factum* pleaded, if a Verdict be found for the Plaintiff, and thereupon Judgment is given, that the Plaintiff ſhall recover his Coſts, Damages and Arrears of the Land deſcended from the ſame Anceſtor, and thereupon a Writ of Execution is awarded to levy it of the Lands deſcended; but no Return thereof appears upon the Record, and after the Heir dies Inteſtate, his Adminiſtrator cannot have a Writ of Error upon this Judgment, in as much as he loſes nothing thereby; for if it be levied, it is of the Lands deſcended, the which, nor the Profits thereof, he cannot have, nor be reſtored to it, if he reverſes the Judgment.

Style 38, 39. *White* and *Thomas*. Per Roll. If *J. S.* binds himſelf and his Heirs in a Bond, and thereupon Judgment is obtained againſt *J. S.* and *J. S.* makes his Will, and his Heir at Law Executor, and dies, leaving Lands, which deſcend to his Heir, yet he ſhall not

not have a Writ of Error as Heir, for he is not privy * to the Judgment; and when an Extent is made upon him, it is as Tertenant; but after the Lands are taken in Execution, he may have a Writ of Error.

* *Qu.* and ſee poſt, 198. *Scroggs* and Lord *Mordant*.

If in a Common Recovery four Huſbands and their Wives are vouched, the Voucher ſhall be intended to have been in, in the Right of their Wives, and the Heir of any one of the Wives may have a Writ of Error; for this Charge in the Realty did not ſurvive, and the Heir of every of them being chargeable, the Heir of any of them, and not of the Survivor only, may have Error; adjudged where Error was brought as Heir to one of the Huſbands; but the Plaintiff relinquiſhed that, and brought a new Writ, and intitled himſelf as Heir to one of the Wives. Leon. 291. *Gravenor* and *Maſſey*.

* If in a *Quare Impedit* Judgment be given againſt the Biſhop and Incumbent, tho' the Biſhop claimed nothing but as Ordinary, and ſo loſt nothing; yet being privy to the Record, he may for Conformity join in Error; for the Plea of the Biſhop is not ſo ſtrong as a Diſclaimer. * Page 198. 3 Leon. 176. the Queen and Biſhop of *Glouceſter*, adjudged,

Cro. Eliz. 65. S. C. adjudged; and *Wray* ſaid, that the Biſhop had a Loſs, for that the Writ ſhall be to the Archbiſhop for Admiſſion and Inſtitution, ſo that the Biſhop having a Loſs may therefore join. *Vide* 3 Mod. 134. Ld. Raym. 71. 2 Ld. Raym. 1403. 8 Mod. 305, 316. 12 Mod. 1, 2, 130, 370. 5 Mod. 16, 69. Carth. 367. Stra. 606.

If Execution upon a Judgment is ſued by *Elegit*, and Lands only extended, and after the Defendant dies, his Adminiſtrator may have a Writ of Error, for he is privy to the Record, and may *in futuro* have Loſs by it. Moor 686. pl. 949. *Scroggs* and Lord *Mordant*, adjudged,

Cro. Eliz. 294. S. C. adjudged, at the End of which a *Nota* is added, that the Execution of the Land may be avoided, and then the Adminiſtrator may be damnified.

If a Man be outlawed for Felony, and dies, his Executors may have a Writ of Error to reverſe it, for they are (*a*) privy to the Judgment, and poſſibly may have all the Loſs, as if the Teſtator had only Goods; and the Objection, that the Teſtator was attainted, and ſo had no Goods, nor could make an Executor, was held not material in this Suit, which is to reverſe the Outlawry, by which the Diſability ariſes. Cro. Eliz. 225. *Marſh*'s Caſe. Owen 147. S. C. debated, Leon. 325. adjudged, and the Outlawry reverſed accordingly; and by all the Books it ſeems to be admitted, that the Heir alſo might have had a Writ of Error in Reſpect of the Prejudice to him. 5 Co. 111. S. C. cited, Cro. Eliz. 558. S. C. cited.

(*a*) *A.* being ſeiſed in Fee, *B.* his eldeſt Son, is outlawed for Felony, *A.* dies, and *B.* enters and deviſes to *C.* and dies, and *C.* enfeoffs *D.* and whether *D.* could have a Writ of Error to reverſe this Outlawry. Godb. 376. debated.

If a Woman recovers her Dower and Damages, and the Tenant brings a Writ of Error, pending which the Woman dies, he may have a Writ of Error againſt her Executor to avoid the Judgment as to the Damages, for that is a Grievance to him as well as the Loſs of the Land. Cro. Eliz. 558. Noy 126.

If in a Real Action the Land and Damages are recovered, and the Tenant dies, and his Heir, who in Reſpect of the Land ought to have a Writ of Error, releaſes all Writs of Error; yet the Executor of the Tenant may bring a Writ of Error to avoid the Judgment as to the Damages, for he that hath a Loſs muſt have a Remedy to redreſs it. Cro. Eliz. 558.

If a Judgment be given againſt *B.* and the Money of *C.* attached by Force of a Foreign Attachment in *London*, *C.* ſhall not have a Writ of Error, becauſe he comes in by Garniſhment by the Cuſtom, and is not Party or Privy. Bro. *Error*. 187. Rol. Abr. 747.

Rol. Abr. 748. *Hayward* and *Williams*, Style 254, 280. S. C. adjudged, tho' it was objected, that the Husband was a Stranger, for he had no other Remedy to prevent the Loss of the Society of his Wife, being taken in Execution. Rol. Abr. 759. S. C. 2 Rol. Rep. 53. S. P. *per Cur.* but because, in the Assignment of Error, it did not appear that she was married when the Original was sued out, the Judgment was affirmed.

If an Action be brought against *A.* as a Feme Sole, where she is a Feme Covert, and she pleads to Issue as a Feme Sole, and Judgment is given against her, and she is taken in Execution, she and her Husband may bring a Writ of Error, for otherwise the Husband may be prejudiced in the Loss of the Society and Comfort of his Wife, and of her Care in his Business and Family, and hath no (*a*) other Means to help himself.

(*a*) But it is otherwise in the Case of a Fine, for the Husband may enter and avoid it. Rol. Abr. 748. *vide* Title *Fines and Recoveries*.

Rol. Abr. 747. So if an Action be brought against a Feme Covert and others, they all with the Husband may join in a Writ of Error.

Style 406. If there be three Defendants, and they all appear by Attorney, whereas one of them is an Infant, and Judgment is given against all; they must all join in a Writ of Error, for the Judgment is intire, and cannot be naught as to the Infant and good as to the Rest ‡.

‡ If an Infant Plaintiff, in Ejectment, or any personal Action, appear by Attorney, and obtain a Verdict, the Judgment shall not be reversed because of such Appearance by Attorney. Stat. 21. Jac. 1. *c.* 13. *s.* 2. ——But if an Infant Defendant appears by Attorney, and Judgment is given against him, Error lies in the same Court. See *Danver's Abr.* 2 Vol. Title *Error*, fo. 12. pl. 13. and the Cases there cited. See also *ante*, Vol. 1. 93.

* Page 199 Carth. 7, 8. *Hacket* and *Herne*. 3 Mod. 134. S. C. Yelv. 208, 209. S. P. Ld. Raym. 71. 2 Ld. Raym. 1403. 8 Mod. 305, 316. 12 Mod. 1, 2, 130.

* So if there be Judgment against Father and Son, the Son alone cannot bring a Writ of Error, for all the Defendants ought to join in the Writ; and if one of them refuses, he must be summoned and severed; for otherwise this Inconvenience would ensue, that every Defendant might bring a Writ of Error by himself, and by that Means delay the Plaintiff from his Execution for a long Time, and from having any Benefit of his Judgment, tho' it might be affirmed once or oftener.

Lev. 210. Hob. 70. & *vide* Style 190. S. P. *cont'*.

But if in Trespass against Three there is Judgment against two of them by Default, and the third justifies, and it is found for him, the Two only may bring a Writ of Error, for he for whom the Judgment is, cannot say, that the Judgment was to his Prejudice; also in this Case, the Verdict and Judgment for the third Defendant will not help the Want of an Original *.

* *Qu.* If the Court will not give Leave to file an Original? Or, if an Original is sued out, whether the Court will take any Notice of the actual Time of suing it? See *post* 205-6.

(*b*) Rol. Abr. 749. 2 Leon. 4. Cro. Car. 408, 481. (*c*) Rol. Abr. 749. Style. 39. Cro. Car. 408. Lev. 137, (*d*) Cro. Car. 300. 408. Jon. 360. Hob. 72. Cro. Jac. 384. Rol. Rep. 294. Cro. Car. 574, 561. Bulst. 125. Lit. Rep. 93. Lev. 137.

If there be Judgment against the Principal, as also Judgment against the Bail, (*b*) the Principal cannot have Error on the Judgment against the Bail, nor (*c*) the Bail on the Judgment against the Principal, nor (*d*) can they join in a Writ of Error any more than Tenant for Life, and he in Remainder can join in such a Writ; for these are several Judgments, and affect distinct Persons.

(*e*) Cro Car. 481.

But in (*e*) *Cro. Car.* it is said, that if the Writ of Error, by the Bail, had recited the first Judgment (as of Necessity it must) and the Judgment in the

Scire facias, and alledged the Error in the ſecond Judgment, it had been well enough; but in (*a*) *Style* it is ſaid, that of late ſuch Writ ought to abate for the Whole §.

(*a*) Style 174.

§ The Doctrine in the preceding Clauſe I conceive is the eſtabliſhed Law.

Where on a *Scire facias* Execution was awarded againſt the Bail, who brought a Writ of Error, which was *tam in redditione Judicii quam in adjudicatione executionis* againſt the Bail, &c. and on Motion to quaſh the Writ the Court agreed, that the Bail was not intitled by Law to a Writ of Error upon a Judgment againſt the Principal in the original Action, and therefore quaſhed the Writ of Error *quoad* all that related to the Judgment in the original Action, and no more; and the Writ was ruled to ſtand good *quoad* the Judgment againſt the Bail upon the *Scire facias*.

Carth. 447. *Burr* and *Atwood*.

(C) Of the Time of bringing a Writ of Error.

IT was (*b*) formerly holden, that a Writ of Error could not be brought before the Judgment given; and if it bore *Teſte* before, it was no *Superſedeas*, for the Words of the Writ are, *Si judicium redditum ſit*, &c.

But it ſeems now agreed, (*c*) that a Writ of Error that bears *Teſte* before the Judgment is good; and this is the uſual Courſe for preventing and ſuperſeding Execution; but (*d*) the Judgment muſt be given before the Return of it *.

(*b*) 22 H. 6. 7. Rol. Abr. 749.
(*c*) March 140. Vent. 255. Moor 461.
(*d*) 3 Keb. 308.

Vent. 96. Latch 133.—It may be returnable the ſame Term Judgment is given. Sid. 104.—The Judgment, when entered, hath Relation to the Day in Bank, ſo that a Writ of Error returnable after in the ſame Term, will remove the Record. Mod. 212.—Where Judgment is not given, the Special Matter may be returned, *viz.* that no Judgment was given. Sid. 466. Vent. 96. & *vide* Sid. 311. See the Note.

* *Qu.* If an Inquiry is executed on an Interlocutory Judgment, or a Verdict is obtained, and the Defendant, before final Judgment is ſigned, ſues forth a Writ of Error, and Plaintiff's Attorney, knowing of it, delays the Signing of his final Judgment, that the Return of the Writ of Error may be ſpent, whether the Court on Motion, or even a Judge at Chambers on Summons, will not order the Plaintiff's Attorney to ſign his final Judgment, that the Party may have the Benefit of his Writ of Error?—If the Plaintiff defers ſigning Judgment till the Writ of Error is ſpent, then ſigns it, and brings Debt thereon, the Court will order a new Writ of Error, at the Expence of Plaintiff's Attorney. Barnes 250.

* But a Writ of Error, that bears *Teſte* before any Plaint entered, is not good.

* Page 200 March. 140.

So where the Defendant, upon an Indictment of Barretry, brought (*e*) a Writ of Error, bearing *Teſte* before the Aſſiſes, and it was diſallowed, becauſe, if ſuch Practice ſhould obtain, it would diſappoint all Proceedings there.

Vent. 255. 3 Keb. 308.
(*e*) Yet when a *Certiorati* is awarded before any Indictment found, but one is found before the Return, it ſhall be removed; but for this *vide* Tit. *Certiorari*.

By the 10 & 11 *W.* 3. *cap.* 14. it is enacted, "That no Fine or Common Recovery, nor any Judgment in any Real or Perſonal Action ſhall, "from and after the firſt Day of *May* 1699. be reverſed or avoided for any "Error or Defect therein, unleſs the Writ of Error, or Suit for the reverſing ſuch Fine, Recovery or Judgment, be commenced or brought, and "proſecuted with Effect, within twenty Years after ſuch Fine levied, or "ſuch

" ſuch Recovery ſuffered, or Judgment ſigned or entered of Record: *Nota*,
" this Statute hath the uſual Savings as to Infants, Feme Coverts, Perſons
" *Non Compos*, in Priſon, or beyond Sea."

(D) Of the Manner of bringing it: And herein,

1. Of the Form of the Writ, and where the Record ſhall be ſaid to be removed.

Cro. Jac. 160. THE Law does not ſeem to require the ſame Exactneſs in Writs of Error as it does in other Writs; therefore it has been holden, that in a Writ of Error to reverſe a Fine as Couſin and Heir of the Conuſor, it need not be ſhewn in the Writ of Error, how he is Couſin, for it is but a Commiſſion to examine the Errors, and needs not ſuch Certainty.

Cro. Jac. 161. Neither need the Plaintiff in Error ſhew a Title in a Writ of Error, unleſs it be in a Special Caſe, varying from the common Courſe; as where a Special Heir in Tail brings Error, or he in Remainder, becauſe he is to intitle himſelf to the Writ.

Rol. Rep. 22. So if a Man brings a Writ of Error, to reverſe an Outlawry, it need not be ſhewn in what Action it was,

Vide Tit. *Amendment and Jeofail.* Carth. 368. But great Certainty was formerly required in making the Writ of Error agree with the Record; for as the Writ was the ſole Authority by which the Judges were impowered to examine, *&c.* they could proceed only on that Record which the Writ or Commiſſion authorized them; nor could the Defects herein, before the 5 *Geo.* 1. *cap.* 13. *(poſt* 202) be amended, becauſe by the former Statutes of Amendment the Judges were only enabled to amend in Affirmance of Judgment.

2 Rol. Rep. 22 *Watſon* and *Bernard.* Therefore, where a Writ of Error was brought upon a Judgment *in quadam loquela* by Writ of certain Land and Paſture, without ſhewing in what Action this Plea was, it was held naught.

2 Rol. Rep. 210 Palm. 152. adjudged, but. *per Dodderidge*, if the Writ of Error had mentioned the Seven only, according to the Record, and concluded *ad damnum* of the Six it had been well.—If one of the Parties is dead, yet he ought to be named in the Writ of Error. If in a Writ of Error, reciting a Record between *George Shirley* Knight and Baronet and *Underhill*, and thereupon the Record and Proceedings are ſent *in B. R.* and a *Mittitur* entered upon the Roll, *(a)* yet the Record is not removed. If an Ejectment is brought againſt Seven, and one dies, and Judgment is given againſt the Six, and laid *Ad damnum* of the Seven, the Writ ſhall abate; tho' it might have been otherwiſe if the Writ had concluded *Ad damnum* of the Six only. 2 Mod. 285. 8 Mod. 108, 330, 343. Ld. Raym. 244. Salk. 319. pl. 3. Comb. 441. 5 Mod. 338. Carth. 404. See 12 Mod. 130. 2 Ld. Raym. 1295. 12 Mod. 494. Stra. 606.

* Page 201 * If in a *Quare Impedit* in *B. George Shirley* Baronet recovers againſt *Underhill*, and he brings a Writ of Error, reciting a Record between *George Shirley* Knight and Baronet and *Underhill*, and thereupon the Record and Proceedings are ſent *in B. R.* and a *Mittitur* entered upon the Roll, *(a)* yet the Record is not removed.

Hob. 327. Hutt. 41. Cro. Jac. 633. S. C.

(a) Style 153.

Like Point *per* Rol. Ch. Juſt. who ſaid the Variance was material, for theſe Additions are made Part of the Name; otherways where one is named Gent. in the Record, and Yeoman in the Writ.---Where a Variance in the Addition ſhall abate the Writ. Sid. 104.——Where it was moved to quaſh a Writ of Error *inter A.* and *B. nuper de Kelſey in Com. Warwici Gent.* and the Record certified was, *inter A.* and *B. nuper de Kelſey in Com. Lincoln Gent.* and it was doubted, whether this Variance in the Addition would vitiate the Writ, for that the Addition was not of Neceſſity; and at one Time it may be, he was of one *Kelſy*, and at another Time

A Writ

A Writ of Error was brought to remove a Record *in curia manerii de Cuttingby*, where the Record was, *in cur' Cuſtod' Libertat' Angliæ Authoritate Parliamenti de Cuttingby*; and ruled by *Roll*, that there was no direct Oppoſition between them, for that both may ſtand together; and tho' *de facto* it is the Court of the Lord of the Manor, yet virtually, and in Dignity, it is the King's Court. Style 344.

If a Writ of Error be directed *Majori & Aldermannis civitatis ſuæ* B. *ac Majori & Conſtabulario Stapulæ* B. *nec non Vicecom' ejuſdem ac Ballivis Majori & Communitati ejuſdem cur. Tolſ. ac Ballivis & Communitati cur. ſuæ Pulveriſat' & eorum cuilibet*, to certify the Record of a Judgment *loquelæ quæ fuit coram vobis in Cur' noſtra civitat' præd' ſine brevi noſtro, &c.* and the Record is certified thus, *viz. Placita in cur. Dom' Regis Tolſ. civitat. præd. &c. coram* A. *&* B. *tam Vicecomitibus com' civitat. præd. quam Ballivis, Majore & Communitate ejuſdem civitatis*; this is a good Writ of Error to remove this Record; for tho' it is not ſaid therein *coram vobis ſeu aliquibus veſtrum*; yet it ſhall be taken *diſtributivè, viz.* the Judgment upon a Plaint before all the ſaid Officers, or any of them. 2 Saund. 291. *Gay* and *Adams.*

If a Writ of Error be (*b*) directed to Sir *Edward Littleton* (he being then Chief Juſtice *de Banco*) to certify a Judgment *in Querela quæ fuit coram vobis & ſociis veſtris*, where it was before Sir *John Finch*, then Chief Juſtice, the Predeceſſor of Sir *Edward Littleton*, this Writ ſhall abate. Rol. Abr. 752. *Lewis* and *Webb.* (*b*) It muſt always be directed to them before whom the Judgment is; *per* Godb. 44. Salk. 264-5.——To him who hath the Cuſtody of the Record wherein any Judgment is given; as of a Judgment in the Common Pleas, to the Chief Juſtice only; ſo upon a Judgment in the Exchequer, to the Treaſurer of the Exchequer and Barons, to have the Record before the Chancellor and Treaſurer of *England*; tho' it happen the Treaſurer of *England* and of the Exchequer to be the ſame Perſon. 4 Inſt. 105.

So if a Writ of Error be directed to *Oliver St. John*, he being Chief Juſtice *de Banco* to certify a Judgment *in Querela quæ fuit coram vobis & ſociis veſtris*, where it was before *Edmund Reeves & ſociis ſuis*, there not being then any Chief Juſtice; this is not good, but the Writ ſhall abate. Rol. Abr. 752

But if a Writ of Error be directed to *Peter Pheaſant*, to certify a Judgment *in loquela quæ fuit coram vobis & ſociis veſtris*, where it appears by the Record, that it was held *coram Edmundo Reeves & Petro Pheaſant*; this is a good Writ, for though in the Return *Edmund Reeves* is firſt named; yet this is well enough, in as much as *Peter Pheaſant* is alſo named; and it does not appear which of them was the eldeſt. Rol. Abr. 752. *Clerk* and *Sprigg.*

If a Writ of Error be directed to the Mayor, Aldermen and Recorder of *Launceſton* in *Cornubia*, and the Record is certified by the Mayor, Aldermen and Deputy-Recorder, the Court being held by Letters Patent; this is not well certified, in as much as this ought to be certified in the Name of the Judges of the Court; and it does not appear, *that the Recorder had Power to make a Deputy by the ſaid Letters Patent. Rol. Abr. 752. *Sprye* and *Mill.* Style 191, 203. S. C. and S. P. adjudged. *Page 202

If an Aſſiſe be ſummoned before Juſtices of Aſſiſe, and they are afterwards removed, and the Chief Juſtice *de B.* and another Juſtice, are made Juſtices of Aſſiſe in the ſame County, and the Aſſiſe is taken before them, *& propter difficultatem* adjourned in *B.* and Judgment there given for the Plaintiff, and a Writ of Error is directed to the ſame Chief Juſtice before whom Yelv. 3. b. Lord *Cromwell* and *Andrews.* Cro. Eliz. 891. Noy 44. S. C. adjudged.

Time of another. Sid. 193. Keb. 17.——But for Variances between the Writ and Record, *vide* Cro. Eliz. 92, 172, 198. Rol. Rep. 16. 2 Bulſt. 167, 174. Style 193, 407. where the Court by Conſent of Parties made a Rule to proceed in the Writ of Error, notwithſtanding a Variance for which it ought to have abated; of which the Reporter makes a *Quære*, the Record not being well removed.

" ſuch Recovery ſuffered, or Judgment ſigned or entered of Record: *Nota*, " this Statute hath the uſual Savings as to Infants, Feme Coverts, Perſons " *Non Compos*, in Priſon, or beyond Sea."

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(a) Style 153.

A Writ

Like Point *per* Rol. Ch. Juſt. who ſaid the Variance was material, for theſe Additions are made Part of the Name; otherways where one is named Gent. in the Record, and Yeoman in the Writ.---Where a Variance in the Addition ſhall abate the Writ. Sid. 104.——Where it was moved to quaſh a Writ of Error *inter A.* and *B. nuper de Kelſey in Com. Warwici Gent.* and the Record certified was, *inter A.* and *B. nuper de Kelſey in Com. Lincoln Gent.* and it was doubted, whether this Variance in the Addition would vitiate the Writ, for that the Addition was not of Neceſſity; and at one Time it may be, he was of one *Kelſy*, and at another Time

A Writ of Error was brought to remove a Record *in curia manerii de Cuttingby*, where the Record was, *in cur' Cuſtod' Libertat' Angliæ Authoritate Parliamenti de Cuttingby*; and ruled by *Roll*, that there was no direct Oppoſition between them, for that both may ſtand together; and tho' *de facto* it is the Court of the Lord of the Manor, yet virtually, and in Dignity, it is the King's Court. Style 344.

If a Writ of Error be directed *Majori & Aldermannis civitatis ſuæ* B. *ac Majori & Conſtabulario Stapulæ* B. *nec non Vicecom' ejuſdem ac Ballivis Majori & Communitati ejuſdem cur. Tolſ. ac Ballivis & Communitati cur. ſuæ Pulveriſat' & eorum cuilibet*, to certify the Record of a Judgment *loquelæ quæ fuit coram vobis in Cur' noſtra civitat' præd' ſine brevi noſtro, &c.* and the Record is certified thus, *viz. Placita in cur. Dom' Regis Tolſ. civitat. præd. &c. coram* A. & B. *tam Vicecomitibus com' civitat. præd. quam Ballivis, Majore & Communitate ejuſdem civitatis*; this is a good Writ of Error to remove this Record; for tho' it is not ſaid therein *coram vobis ſeu aliquibus veſtrum*; yet it ſhall be taken *diſtributivè, viz.* the Judgment upon a Plaint before all the ſaid Officers, or any of them. 2 Saund. 291. Gay and *Adams.*

If a Writ of Error be (*b*) directed to Sir *Edward Littleton* (he being then Chief Juſtice *de Banco*) to certify a Judgment *in Querela quæ fuit coram vobis & ſociis veſtris*, where it was before Sir *John Finch*, then Chief Juſtice, the Predeceſſor of Sir *Edward Littleton*, this Writ ſhall abate. Rol. Abr. 752. *Lewis* and *Webb.*

(*b*) It muſt always be directed to them before whom the Judgment is; *per* Godb. 44. Salk. 264-5. ——To him who hath the Cuſtody of the Record wherein any Judgment is given; as of a Judgment in the Common Pleas, to the Chief Juſtice only; ſo upon a Judgment in the Exchequer, to the Treaſurer of the Exchequer and Barons, to have the Record before the Chancellor and Treaſurer of *England*; tho' it happen the Treaſurer of *England* and of the Exchequer to be the ſame Perſon. 4 Inſt. 105.

So if a Writ of Error be directed to *Oliver St. John*, he being Chief Juſtice *de Banco* to certify a Judgment *in Querela quæ fuit coram vobis & ſociis veſtris*, where it was before *Edmund Reeves & ſociis ſuis*, there not being then any Chief Juſtice; this is not good, but the Writ ſhall abate. Rol. Abr. 752

But if a Writ of Error be directed to *Peter Pheaſant*, to certify a Judgment *in loquela quæ fuit coram vobis & ſociis veſtris*, where it appears by the Record, that it was held *coram Edmundo Reeves & Petro Pheaſant*; this is a good Writ, for though in the Return *Edmund Reeves* is firſt named; yet this is well enough, in as much as *Peter Pheaſant* is alſo named; and it does not appear which of them was the eldeſt. Rol. Abr. 752. *Clerk* and *Sprigg.*

If a Writ of Error be directed to the Mayor, Aldermen and Recorder of *Launceſton* in *Cornubia*, and the Record is certified by the Mayor, Aldermen and Deputy-Recorder, the Court being held by Letters Patent; this is not well certified, in as much as this ought to be certified in the Name of the Judges of the Court; and it does not appear, *that the Recorder had Power to make a Deputy by the ſaid Letters Patent. Rol. Abr. 752. *Sprye* and *Mill.* Style 191, 203. S. C. and S. P. adjudged. *Page 202

If an Aſſiſe be ſummoned before Juſtices of Aſſiſe, and they are afterwards removed, and the Chief Juſtice *de B.* and another Juſtice, are made Juſtices of Aſſiſe in the ſame County, and the Aſſiſe is taken before them, *& propter difficultatem* adjourned in *B.* and Judgment there given for the Plaintiff, and a Writ of Error is directed to the ſame Chief Juſtice before whom Yelv. 3. b. Lord *Cromwell* and *Andrews.* Cro. Eliz. 891. Noy 44. S. C. adjudged.

Time of another. Sid. 193. Keb. 17. ——But for Variances between the Writ and Record, *vide* Cro. Eliz. 92, 172, 198. Rol. Rep. 16. 2 Bulſt. 167, 174. Style 193, 407. where the Court by Conſent of Parties made a Rule to proceed in the Writ of Error, notwithſtanding a Variance for which it ought to have abated; of which the Reporter makes a *Quære*, the Record not being well removed.

Godb. 248. Rol. Rep. 15. S.C. cited.

whom the Aſſiſe paſſed, reciting the Aſſiſe ſummoned before the Juſtices of Aſſiſe by Name, *& poſtmodum capt'* before the Chief Juſtice, *&c.* but does not recite how the Aſſiſe came in *B. viz.* by Adjournment, or otherwiſe; this Writ of Error is not good; for as it took Notice of the Change of the Juſtices, *a fortiori* it ought to take Notice of the Adjournment, for by that both Judges and Court were changed.

(*a*) Dyer 77.

But in the (*a*) 5 *E.* 6. where Judgment in a *Quare Impedit* by the Statute *Weſtm.* 2. was given by Juſtices of *Niſi Prius*, and a Writ of Error thereof brought, without ſhewing where the Judgment was given; it was held good, for the Record beginning and remaining in the Common Pleas, it was held not material where the Judgment was given in (*b*) Lord *Cromwell*'s Caſe, *Cro. Eliz.* 891. *per Cur'*, and *Gawdy* ſaid, when the Record begins in one Place, and is finiſhed in another, there of Neceſſity in a Writ of Error the Proceedings in both Places ought to be mentioned.

(*b*) Yelv. 3. S. C. and a Diverſity taken between the Caſe of an Aſſiſe and a *Quare Impedit*, for the Aſſiſe muſt originally commence before Juſtices of Aſſiſe, and yet by Preſumption Judgment ſhall be there given, and not in *B.* but the *Quare Impedit* muſt begin in *B.* and by Intendment Judgment ſhall be there given, tho' by the Statute to avoid a Lapſe, Judgment may be given before Juſtices of Aſſiſe. 2 Bulſt. 171. S. C. and S. P. cited.

Yelv. 212. Cro. Jac. 254. Sid. 349.

If a Writ of Error be directed to ſeveral Juſtices, and returned by Part of them only; yet if it (*c*) truly recite the Record, it is thereby removed, and a new Writ of Error lies *de recordo quod coram nobis reſidet.*

(*c*) If the Record vary from the Writ of Error, yet the Inferior Court ought to remove it. Vent. 97.

Cro. Jac. 342. adjudged. *cont' Dodderidge*, who ſaid the Addition was Surpluſage. Godb. 248. Rol Rep. 16.

If a Writ of Error be brought upon a Judgment in an Aſſiſe *capt' coram* J. Fleming *nuper Capitol. Juſticiar. ad placita &* J. Dodderidge *uno Juſticiar. ad placita coram nobis tenend' aſſignat' Juſticiar' noſtris ad Aſſiſas*; this Writ is naught, for there was no ſuch Record before *Fleming Juſticiar' ad placita*, the Words *coram nobis tenend' Aſſignat'* being omitted, and thoſe after *Dodderidge* cannot refer to the firſt.

2 Bulſt. 164.

Cro. Jac. 341.

If a Writ of Error be brought *in Recordo & proceſſu Aſſiſæ, &c. inter* A. & B. *ſummonit'*, without ſhewing which was Plaintiff and which Defendant, it is well enough, becauſe the Precedents are both Ways.

And now by the 5 *Geo.* 1. *cap.* 13. it is enacted, "That all Writs of "Error, wherein there ſhall be any Variance from the original Record, or "other Defect, may and ſhall be amended, and made agreeable to ſuch "Record by the reſpective Courts where ſuch Writ or Writs of Error ſhall "be made returnable."

2. What is neceſſary to be removed, and herein of removing the Record or a Tranſcript.

22 E. 3. 6. 40 Aſſ. 29. Rol. Abr. 753. 5 Co. 39.

On a Writ of Error of a Judgment in the Common Pleas, or other inferior Court, in every Adverſaries Suit the Record itſelf ſhall be removed, that it may remain as a Precedent and Evidence of the Law in the like Caſes.

* Page 203 Bendl. 51. Rol. Abr. 752

* But in the Caſe of a Fine the Tranſcript only is removed, for Fines are only a more ſolemn Acknowledgment or Contract of the Parties, and therefore are no Memorials of the Law, and need only be affirmed or vacated; if

if the former, the Contract ſtands as it was; if the latter, the Juſtices of *B. R.* may ſend for the Fine itſelf, and reverſe it, or they may ſend a Writ to the Treaſurer and Chamberlain to take it off the File; beſides, ſhould the Record itſelf be removed and affirmed, it could not be ingroſſed for Want of a Chirographer in *B. R.*

Dyer 89. Godb. 248. 2 Rol. Rep. 233. F. N. B. 20.

Alſo if a Writ of Error be brought in Parliament of a Judgment in *B. R.* the Chief Juſtice muſt go in Perſon into the Houſe with the Record itſelf, and a Tranſcript, which is to be examined and left there, and then the Record to be brought back again in *B. R.* and if the Judgment be affirmed, the Court of *B. R.* may proceed on the Record to grant Execution; and therefore if the Record itſelf ſhould be removed, and Judgment affirmed, and the Parliament diſſolved, there could not be any Proceedings thereupon to have Execution.

4 Inſt. 21. Cro. Jac. 341. Bulſt. 166. Rol. Abr. 753. Godb. 249. in which laſt Book it is ſaid to be at the Pleaſure of the Parliament, to have either the Record or Tranſcript.

So if a Writ of Error be brought in *B. R.* here, of a Judgment in *B. R.* in *Ireland*, the Record itſelf is not ſent, but a Tranſcript only, by Reaſon of the Danger of the Seas; but when it is come ſafe and entered in the Rolls here, then it ceaſes to be a Record in *Ireland*, and is a perfect Record here; yet if the Judgment be affirmed, the King's Bench in *England* ſhall not award Execution, but ſhall ſend a ſpecial Mandate to the Chief Juſtice in *Ireland* to do it.

If a Writ of Error be brought in *B. R.* to reverſe a Judgment given in *B.* the (*a*) Original ſhall not be removed, if it be not by ſpecial Matter, as if Error aſſigned in the Original.

24 E. 3. 24. Rol. Abr. 753.

(*a*) Tho' the Command of the Writ is to certify *Recordum & Proceſſum*, yet the Courſe is only to certify the Declaration and Pleas, omitting the Writs. Bridg. 57.——All is certified which is with the Chief Juſtice; but the original and judicial Writs remain with the *Cuſtos Brevium* and other Officers, and are never certified, but where Error is aſſigned for Want of them. Cro. Eliz. 84. *vide* Leon. 22. Cro. Jac. 479. Rol. Abr. 790. pl. 6.*——The Writ is directed to the Chief Juſtice, who only certifies the Body of the Record, which remains with his Clerk.

* And a *Certiorari* prayed and awarded, to the *Cuſtos Brevium*, &c. *vide poſt* 204.

If a Writ of Error be brought in *B. R.* upon a Judgment in an Inferior Court againſt the Plaintiff, there the Court may reverſe the Judgment, tho' the Original be not removed, no Error being aſſigned in the Original; for this is removed but to ſue here upon the ſame Original.

37 Aſſ. 5. Rol. Abr. 753.

In an Action of Waſte brought in the *Huſtings* in *London*, there was a Verdict for the Plaintiff, which being after quaſhed for the Inſufficiency, and a new *Venire* awarded, whereupon a Verdict was given for the Defendant, and Judgment for him, and a Writ of Error being thereupon brought before ſpecial Commiſſioners, it was reſolved, that the firſt Verdict ſhould be certified in the Record, becauſe it was not ſet aſide, for that the Jurors had found againſt Evidence, or for any undue Practice or Misfeaſance of the Parties, but only for the Inſufficiency thereof in Point of Law, which the Court had adjudged upon the Verdict appearing before them upon Record.*

2 Saund. 254. *Green* and *Cole*. Lev. 309. S. C.

* So where a Defendant pleads in Abatement, a Demurrer, &c. and Judgment of *Reſpondeas ouſter*; the whole of theſe Proceedings muſt be entered on Record and certified.

If

50 Aſſ. 9. Rol. Abr. 753.

If a Writ of Error be brought in *B. R.* upon a Fine levied in the *Huſtings* of *Oxford*, the Record (*b*) itſelf ſhall be removed.

(*b*) Where upon a Writ of Error to reverſe an Outlawry upon an Indictment of Felony, the Record itſelf, or a Tranſcript only, ſhall be removed. Bulſt. 181.

Vent. 96. Sid. 466. Raym. 189. 2 Keb. 684.

If there be ſeveral Records between the ſame Parties with which the Deſcription in the Writ of Error agrees, the inferior Court may remove which of the Records they pleaſe.

* Page 204 * (E) Of alledging Diminution and granting a Certiorari.

F. N. B. 25. a.

IF the Judges of the Common Pleas, or other Judges, upon a Writ of Error, will not certify all the Record, the Party that ſues the Writ of Error may alledge Diminution of the Record, and pray a Writ to the Juſtices that certified the Record before, to certify the whole Record.

Sid. 40. Sid. 147.

But Diminution cannot be alledged upon a Writ of Error brought upon a Judgment (*c*) in any inferior Court.

(*c*) As *Ely* ——The Seſſions of Peace. Sid. 364.——But may in Error upon a Judgment in *Wales* and Counties Palatine. Sid. 147, 364.——So it may in Error upon a Judgment before Juſtices of *Oyer* and *Terminer*. Sid. 40.

Salk. 266. pl. 11. *Hale* and *Clare*.

And therefore where in a Borough-Court a Plaint was entered, as the Plaint of *A.* and *B.* and the Declaration was by *A. B.* Executor of *J. S.* and on a Writ of Error in *B. R.* this Variance was aſſigned for Error: And the Court held, 1. That Want of a Plaint in an Inferior Court is the ſame as Want of an Original in the Court of *Common Pleas*, and that this could not be a Plaint in this Action. *2dly*, If ſuch Variance had been in a Record of the Common Pleas, Diminution might have been alledged, and a good Writ certified; but in Records out of inferior Courts, no Diminution can be alledged, and the Court muſt take them as they find them.

Rol. Abr. 764.

A Man cannot alledge Diminution (*d*) contrary to the Record which is certified.

(*d*) In Error to reverſe an Outlawry upon an Indictment for Murder, it being aſſigned for Error, that the *Exactus* was *ad Comitatum*, without ſaying *meum*, the Court, upon the Prayer of the Attorney General, ſhewing the King had ſeiſed his Lands, *&c.* awarded a *Certiorari* to the Coroners to certify where the *Exact'* was, in order to amend the Return. Latch. 210.——Upon a Writ of Error upon a Bill of Exceptions, Diminution cannot be alledged, for he muſt hold himſelf to the Matter in the Bill ſealed; and if it is not there, it was his Folly to omit it. 2 Inſt. 427.—Where the Record is not rightly certified upon a Writ of Error upon an Outlawry upon an Indictment for Felony. Bulſt. 181. but for this *vide* Godb. 267. 2 Rol. Rep, 353. Cro. Jac. 369.

Rol. Abr 764.

As if in a Writ of Error it be certified, that the Judgment was *quod Defend. ſit in Miſericordia*, the Defendant in the Writ of Error cannot alledge Diminution: *ſſ.* That the Record is *quod Capiatur*, becauſe this is contrary to the Record certified.

Rol. Abr 764. Rol. Rep. 200. *Floyd* and *Bethel*.

If upon a Writ of Error the Record be certified, that a Challenge was to the Sheriff for Coſenage, and after thereupon a *Venire facias* was awarded to

to the Coroner upon Diminution, it cannot be certified, that the Challenge was after the Return of the *Venire facias*, becauſe this is contrary to the Record before certified, for nothing can be certified but that which ſtands with the firſt Record.

In a Writ of Error brought in *B. R.* upon a Judgment in the Common Pleas, the Want of a Warrant of Attorney being aſſigned for Error, the Plaintiff prayed one *Certiorari* to the Chief Juſtice, and another to the *Cuſtos Brevium*, both which returned *Non inveni aliquod Warrant'*, and the Defendant dying, the Plaintiff by Journeys Accounts brought a new Writ of Error againſt the Son and Heir of the Defendant, who appearing alledged Diminution, in that the Warrant of Attorney was not certified, and prayed another *Certiorari* to the *Cuſtos Brevium*; and it was urged, the Return was not *Quod non habetur aliquod Warran'*, but (*a*) *quod* **non inveni, &c.* ſo that if upon the ſecond a Warrant ſhould be returned, it would not be repugnant; but it ſeemed to *Wray* Chief Juſtice, that it would be hard to grant a new *Certiorari* in this Caſe; for though, if any Variance could be alledged, it would be otherwiſe, as adjudged in the Caſe of one *Laſſels*, where it was certified there was no Warrant of Attorney; and becauſe the Original was *inter Laſſels Executor' Teſtamenti, &c.* where he was not named Executor in the firſt *Certiorari*; and upon the Matter a new *Certiorari* was granted. Leon. 22. *Dayrell* and *Thinn.* *Page 205 (*a*) *Vide* Cro. Jac. 277.

Bulſt. 21. Where upon the firſt *Certiorari* it was returned, there was no Warrant of Attorney in that Term wherein the Action was commenced, and another *Certiorari* was awarded.

After *In nullo eſt erratum*, the Court, to inform their Conſciences, may award a *Certiorari* to (*b*) amend the Record, Rol Abr. 764. Style 352.

2 Rol. Rep. 471. (*b*) So they may award a *Certiorari* to reverſe the Judgment. Rol. Abr. 764. Cro. Eliz. 155, 281, 836. 2 Leon 3. Cro. Jac. 6, 141, 445.

If after *In nullo eſt erratum* pleaded, another Part of the Record is brought in by *Certiorari*, and made of Record there, the Court ought to reverſe the Judgment, if the Matter ſo requires. 5 Co. 37. Rol. Abr. 764.

After *In nullo eſt erratum* pleaded, if one Party alledge upon Record, a Diminution of the Record to reverſe it, and prays a *Certiorari* to certify it, and thereupon a Writ of *Certiorari* is ſued out, and the Record thereupon is certified; but before it is entered of Record, the Court is informed of this Matter, this ſhall not be received, becauſe it comes in by the Prayer of the Party after *In nullo eſt erratum* pleaded, which is not to be allowed; but upon Information to the Court, the Court may grant it. Rol. Abr. 764-5. *Weaver* and *Felton.* Jon. 139. S. C.

In Treſpaſs in *B. R.* Judgment was given for the Plaintiff by Default, and a Writ of Error brought *in Camera Scaccarii*, and there aſſigned for Error, that there was not any Writ of Inquiry of Damages filed; and upon a Writ of *Certiorari* certified, that there was not any ſuch Writ; yet after another *Certiorari* granted, and upon this the Writ of Inquiry was certified,† upon which the Judgment was affirmed. Rol. Abr. 765. *Roror* and *Eſcort.*

† And probably filed after the firſt, and before the ſecond *Certiorari.*

So where in a Writ of Right in *B. R.* after Judgment, a Writ of Error was brought in *Camera Scaccarii*, and the Want of Continuances aſſigned for Error; and upon a *Certiorari*, the Want of Continuances certified; yet after, upon another *Certiorari*, the Continuances were certified, and upon this the Judgment affirmed. Rol. Abr. 765. *Trevis* and *Scott.*

Of Error be aſſigned in the Original, and upon a *Certiorari* granted an erroneous Original is returned; and upon this *In nullo eſt erratum* is pleaded, Rol Abr. 765. Godb. 407.

2 Rol. Rep. 352. Cro. Car. 91. Style 176.

pleaded, and after the Court *ad informandam Conſcientiam* grant another *Certiorari* for another Original; and upon this a good Original is certified; the Court ought to intend that this is the Original, upon which the Judgment was given in Favour of Judgments, which ought to be intended to be good.

3 Leon. 106. *Ray* and *Boaly.*

If in a Writ of Error, upon a Fine, an Error be aſſigned in the Proclamations, upon which a *Certiorari* goes to the *Cuſtos Brevium*, and upon his Certificate it appears, that two of the Proclamations were made in one Day; but it appears in the Chirograph-Office, that the Proclamations were duly made; and he making and being the principal Officer as to them, and the *Cuſtos Brevium* having only an Abſtract thereof; upon the Prayer of the Defendant a new *Certiorari* was directed to the Chirographer, who having certified the Proclamations duly made, after Examination of the Clerks of the Common Pleas by the Juſtices in *B. R.* they awarded that the Proclamations with the *Cuſtos Brevium* ſhould be amended according to thoſe in Cuſtody of the Chirographer.

Palm. 285. *Baniſter* and *Kennedy.*

If a Writ of Error be brought upon a Judgment in *B. R.* in *Ireland* in a Writ of falſe Judgment, upon a Judgment in the *Toulſel*, (which is the Court of the Mayor and Aldermen of *Dublin*); and it is aſſigned for Error, that there was no Plaint entered in the *Toulſel*, and that theſe Words *per quod actio accrevit* were omitted in the Concluſion of the Declaration; * if the Defendant alledges Diminution, yet he ſhall not have a *Certiorari* to the Chief Juſtice *de B. R.* in *Ireland*, to certify the Reſidue of the Record, *&c.* and that if any Part of the Record be not before him, that he ſhould write to the Mayor and Aldermen to certify it, and that he ſhould certify it to this Court; for by this Plea of *In nullo eſt erratum* in *B. R.* in *Ireland*, he hath admitted the Record well certified by the Mayor and Aldermen; and this Court hath no Authority to require the Court *de B. R.* in *Ireland* to write to the Mayor, *&c.* and the Judgment *de B. R.* in *Ireland* is only here in Queſtion; and ſuch Writ being iſſued, a *Superſedeas* was granted to the whole, though it was prayed that the *Superſedeas* ſhould be as to the inferior Court only; but at another Day it being moved, that there might be a *Certiorari* as to the Words *per quod*, *&c.* it was granted.

* Page 206

Cro. Car. 91. between *Howell John* and *Thomas.*

In a Writ of Error in the Exchequer Chamber upon a Judgment in *B. R.* it was aſſigned for Error, that in the Bill, the Plaintiff declared on a Leaſe for three Years; but in the Plea-Roll, upon which the Iſſue was joined, and the Record of *Niſi prius*, it was upon a Leaſe for five Years, ſo that the Bill and Declaration vary; and Diminution being alledged by the Plaintiff, a Bill was certified, in which it was only for three Years; upon which the Defendant had another *Certiorari*, and thereupon a Bill was certified, wherein he declared upon a Leaſe for five Years, which warranted the Declaration upon the Roll, and the *Niſi prius*; and it was held by all the Juſtices and Barons, that the ſecond Certificate, upon Diminution alledged by the Defendant, ſhould be received, for that warranting the Roll and the Record of *Niſi prius* ſhall be intended the true Bill, and the other a fictitious one.†

† This right Bill probably filed after the firſt and before the ſecond *Certiorari*. And *qu.* If it is not frequently done; the Courts not taking Notice when the Bill is filed, it being in Furtherance of Juſtice to ſupport Judgments, where the Plaintiff in Error hath not any real Merits.

Salk. 268. pl. 15. 3 Salk. 399. pl. 3. *Carlton* and *Mortagh.* 6 Mod. 113, 206. S. C.

A Writ of Error was brought upon a Judgment in Debt by Confeſſion in *C. B.* and the Want of an Original was aſſigned for Error; the Defendant, before a *Certiorari* returned, came in *gratis*, and pleaded a Releaſe in Bar, to which there was a Demurrer; and it being agreed that the Plea was ill for Want of a *Venue*, the Queſtion was, whether the Court *ex Officio* might award a *Certiorari*; and it was held by three Judges, that though the Party had

had (*a*) concluded himſelf by relying on his Releaſe, yet the Court was not bound thereby, but may award a *Certiorari*; and if upon the Return thereof it appeared that all the Proceedings were right, they were obliged to give Judgment on the whole Record, according to Conſcience and Right; but *Holt* Chief Juſtice held, that the Court in this Caſe could not award a *Certiorari*, becauſe the Queſtion was not, whether Error or not, but whether barred or not by the Releaſe; which being the Point referred to their Judgment, they were not at Liberty to depart from it.

2 Ld. Raym. 1005.

(*a*) Where the Defendant had concluded himſelf by Pleading *In nullo eſt erratum*, yet the Court granted a *Certiorari* to remove the whole Record, a Line being omitted in the Tranſcript, on Affidavit that the Record was right below. Salk. 270. upon a Writ of Error of a Judgment in Ejectment in the Grand Seſſions in *Wales*.

* Of the Scire Facias. *Page 207

AFTER the Record is (*b*) removed, and the Plaintiff in Error (*c*) has aſſigned his Errors, which (*d*) may be either Errors in Fact or in Law, he ſhall have a *Scire facias ad audiendum errores* againſt the Defendant, who thereupon may plead *In nullo eſt erratum*, a Releaſe, *&c.*

F. N. B. 44.

(*b*) Muſt aſſign his Errors, and ſue out a *Scire facias ad audiendum errores* the ſame Term, or the Term next after the Record is removed; otherwiſe the whole Matter is diſcontinued, and he will be obliged to ſue a new Writ upon the Record directed to the Juſtices before whom the Record is removed, to proceed upon the Record *quæ coram vobis reſidet*. F. N. B. 44-5. But ſuch Diſcontinuance is ſaved by the Defendant's appearing, which he may do *gratis*. Sid. 173. Keb. 642. (*c*) Muſt aſſign his Errors before he can have a *Scire facias*, *&c.* F. N. B. 44. *Vide* Rol. Abr. 762 (*d*) If theſe Matters which are aſſigned for Error appear to the Court to be no Error, nor Colour of Error, it ſhall not grant any *Scire facias*. 18 H. 6. 18. Rol. Abr. 763.—The uſual Practice is, that the Defendant in the Writ of Error by Conſent doth voluntarily take Notice of the Aſſignment of Errors; and this Conſent is teſtified by his pleading *In Nullo eſt erratum*, and then there is no Occaſion for a *Scire facias ad audiendum errores*. Carth. 41.†——If he does not, there muſt be a *Scire facias*.

The Exchequer-Chamber doth not award a *Scire facias ad audiendum errores*, but Notice is given to the Parties concerned.

Vent. 34. *Vide* Palm. 186.

If after a Writ of Error brought the Defendant dies, yet the Plaintiff in Error may ſue out a *Scire facias*, *&c.* againſt the (*e*) Executor.

Vent. 34. ſaid by the Secondary to be ſo ruled in the Caſe of Sir *H. Thyn.* and *Corie*.—But in Rol. Abr 763. taken from the Year-Book of 9 *H.* 4. 3. it is ſaid, that if a Man be outlawed upon a Proceſs at the Suit of *A.* who dies, and he brings Error to reverſe the Outlawry, he ſhall not ſue a *Scire facias* againſt the Executor, becauſe he cannot proceed upon this Original, which is abated by the Death of the Teſtator. Bro. Error 44. S. C. (*e*) May be againſt an Adminiſtrator generally, or by his particular Name. Rol. Rep. 23. 2 Bulſt. 231.

If a Man condemned in an Aſſiſe be outlawed for the Fine of the King, and he brings a Writ of Error to reverſe the Outlawry only, there ſhall not be any *Scire facias* againſt the Recoverer, becauſe the Outlawry is at the Suit of the King (*f*) only.

7 H. 4. 40. Rol. Abr. 763.

(*f*) But if the Writ of Error had been brought of the Judgment and Outlawry alſo, it had been otherwiſe. 7 H. 4. 4. Rol. Abr. 763.

The Attainder of Felony of a Perſon who had any Lands ſhall never be reverſed by Writ of Error (*g*) without a *Scire facias* againſt all the Tertenants and Lords mediate and immediate; but it is (*h*) ſettled, that ſuch *Scire facias* is not neceſſary in the Caſe of High Treaſon; alſo it is (*i*) ſaid, that it is not neceſſary in the Caſe of Felony, when it is ſuggeſted on

(*g*) Dyer 34. pl. 20. Keb. 121. Sid. 316. Hard. 164. (*h*) 2 Hawk. P. C. 461. (*i*) 2 Salk.

495. pl. 5. Ld. Raym. 154. 12 Mod. 545, 668. *vide* 3 Keb. 29.

on the Roll, that the Party had no Lands, and the Attorney General confeſſes it.

8 H. 4. 17. 2 Rol. Abr. 763

Upon a Writ of Error againſt the Heir of him that recovers, a *Scire facias* lies (*a*) againſt the Heir and Tertenants.

(*a*) Anciently the Writ againſt the Tertenants was Special, naming them; but of late the Courſe hath been to word the Writ generally. Bridg 72.—The *Scire facias* againſt the Tertenants is not *ad audiend. errores*, but *ad audiend. proceſſum & record.* Lev. 72. *per Cur.* Keb. 352.—An Attaint lies againſt him who recovered, and againſt the Tertenant. 2 Bulſt. 244. Rol. Rep 37, 302. Bridgm. 72. And the Judgment may be reverſed againſt the Parties to the Judgment and their Heirs, though they have nothing in the Land.

(*b*) Leon. 290. Like Point. In a Writ of Diſceit to annul a Fine of Antient Demeſne Lands and that the Tertenant is not bound thereby till, &c.

* (*b*) If a Writ of Error is brought to reverſe a Common Recovery, the Court (*c*) before the Reverſal thereof, ought to award a *Scire facias* againſt the Tertenants; and this is not merely diſcretionary, but *ex neceſſitate juris*; for they may have Matter to plead in Bar as a Releaſe, &c. *Hil.* 2 & 3 *Jac.* 2. between *Kingſton* and *Herbert*, 3 *Mod.* 119. *per Cur.* but *adjornatur.*

(*c*) It is the beſt Way to award a *Scire facias* againſt the Tertenant, before the Court proceeds to the Examination of the Errors, for he may have ſomething to plead in Bar, and ſo ſave the Court the Trouble of examining the Errors; and if the Judgment ſhould be reverſed againſt the Party and Privy, yet the Plaintiff could not have Reſtitution till a *Scire facias*, &c. Dyer 321.—That ſuch *Scire facias* may be granted before or after, at Diſcretion. Hard. 163.

(*d*) Lev. 72. 130, 146. Sid. 213. Keb. 54, 351, 388, 459, 717, 748. Raym. 16, 55, 70, 96. S. C. upon a Judgment had in the Grand Seſſions in *Wales*.

But this Matter was fully debated in the Caſe of (*d*) *Wynn* and *Lloyd*, where in a Writ of Error to reverſe a Judgment given in a Common Recovery againſt the Vouchee after *In nullo eſt errat.* pleaded, the Court awarded a *Scire facias* (upon a Surmiſe of the Defendant, that there were Tertenants) to the Tertenants; the Sheriff returned, that *A.* is Tertenant, and a *Scire feci*, and *A.* comes in and ſays that there are other Tertenants, and prayed a *Scire facias* to them, and had it; the Sheriff returned, that *B.* is Tertenant, and *Scire feci*, and *B.* coming in, ſays there are other Tertenants, and prayed a *Scire facias* to them. It was inſiſted, that the Tertenant was not a Party concerned in the Reverſal of the Judgment, but only as to his Poſſeſſion, and therefore could not otherwiſe plead than as concerning his Poſſeſſion; that by this Means the Delay might be infinite, for he that comes in upon this *Scire facias* might as well plead that there is another Tertenant, and ſo the Plaintiff might be ſtaved off from ever having the Benefit of his Writ of Error; beſides, this Surmiſe is contrary to the Return of the Sheriff. On the other Side it was urged, 1. That the *Scire facias* ought to go out againſt the Tertenants, and had in all Caſes, where it ever was controverted, been awarded, as appears by the (*e*) Books cited in the Margin. 2. That it ought to go out againſt them all, becauſe any one of them may have a Releaſe to plead, which may diſcharge or advantage the other. 3. That if it cannot be pleaded by the Tertenant, yet it may be ſuggeſted to the Court as *Amicus Curiæ*, and awarded *ex Officio*, for it may be that he who is not ſummoned, can plead in Bar of the Writ of Error, which will go to the whole, and eaſe the Court of examining Errors; and in that Reſpect it may be awarded, and the Proceedings ſtay; but the Court held, that the awarding a *Scire facias* to the Tertenants was not *ex neceſſitate juris*; and therefore when it is once out, and the Tertenants are warned, there is no Reaſon to grant it a third Time; that here the Delay was apparent; but if he could make it out, that he that is

(*e*) Dyer 321. Cro. Jac. 392. Owen 157. Bridg. 69, 70. 21 E. 3. 56. Cro. Car. 295. 313. Moor 524. Cro. Eliz 739. Co. Ent. 233.

no

not warned had a Releaſe of Errors to plead, it being in their Breaſts and Diſcretion, it ſhould be granted, otherwiſe not.

But where a Writ of Error was brought to reverſe a Common Recovery, and a *Scire facias* ſued out againſt him that was the nominal Demandant in the Writ of Entry, and a *Scire facias* was moved for to the Tertenants, but oppoſed, becauſe the Tertenant was an Infant, and therefore the Parol may demur during her Nonage, which would greatly delay the Plaintiff; beſides, if this Infant ſhould die, the Lands may remain to another; notwithſtanding this the Court awarded a *Scire facias*; and it was held by *Holt* Ch. J. that though the granting a *Scire facias* in ſuch Caſes againſt the Tertenants is diſcretionary, and not *ſtricti juris*, yet it hath been the conſtant Courſe of this Court to grant it; therefore he was of Opinion not to depart from that which had been the uſual Courſe of the Court. Carth. 111. Earl of *Pembroke's* Caſe.

* (G) Of the Proceedings after the Record removed, and herein of the Abatement of the Writ of Error. * Page 209

IF the Plaintiff in Error aſſigns an Error in Fact, if the Defendant will put in Iſſue the Truth of the Fact, he ought to rejoin by Denial of the Fact, and ſo join Iſſue thereupon, and ſhall not ſay (*a*) *In nullo eſt erratum*, for by this he acknowledges the Fact alledged to be true. Rol. Abr. 763. Bro. Error 93. (*a*) This is in Nature of a Demurrer.

Cro. Jac. 29. Cro. Car. 53. Lev. 311.——It is a Confeſſion of an Error in Fact well aſſigned. Lev. 294. but not of a Matter aſſigned contrary to the Record. Cro. Jac. 12, 521. Raym. 231. Raym. 231.

But when an Error in Fact is aſſigned, if the Defendant will acknowledge the Fact to be ſo as alledged, and yet that by Law this is not Error, he ought to rejoin *In nullo eſt erratum*, for by this he acknowledges the Fact, and yet that by Law it is not Error. Rol. Abr. 763.

Alſo if a Man who is outlawed brings a Writ of Error to reverſe the Outlawry, and aſſigns his Errors, the King's Attorney ſhall not plead *In nullo eſt erratum*, which amounts to a Demurrer, as is done between common Perſons; but upon the Aſſignment of the Error, the Court ſhall give a Day to the King's Counſel to maintain the Outlawry; and it is entered *Curia adviſare vult* till the Outlawry is reverſed or affirmed. Rol. Abr. 763.

If Error be alledged in the Body of the Record, *In nullo eſt erratum* is a good Rejoinder, for this ſhall put the Matter in the Judgment of the Court, the Record being agreed to be ſo. Rol. Abr. 763.

So if Error be alledged in a Matter of Record, which is not of the Body of the Record, but in a collateral Thing, as *quod non habetur aliquod Recordum* of Reſummons, *In nullo eſt erratum* is a good Rejoinder; for if the Plaintiff in the Writ of Error does not pray Diminution, and thereupon procure a Certificate from the inferior Court, that there is not any Reſummons before the Rejoinder entered, this Aſſignment is of no Effect, but void, in as much as this is to be tried by the Record itſelf, and no Diminution can be alledged after Rejoinder entred; for if the Defendant will confeſs the Error, yet the Court ought not to reverſe the Judgment, till they are aſcertained of the Error by the Record itſelf. Rol. Abr. 764. Leon. 22.

Keb. 658. (*b*) As if a Plaintiff in Error be non-ſuit, he ſhall not have a Writ of Error again. Salk. 263. pl. 4. Ld. Raym. 91. 5 Mod. 228. Comb. 393. 12 Mod. 105. Comb. 19. S. P. ‡ (*c*) A Writ of Error abated by the Death of the Lord Chief Juſtice *Foſter*, and a ſecond Writ was ſued out and allowed; and it was held a *Superſedeas*. Keb. 658, 686.——A Writ of Error does not abate by the Death of the Defendant in Error; but a *Scire facias ad audiendum errores* may be taken out againſt his Executor. Vent. 34. Salk. 264. *Secus* if the Plaintiff in Error dies. Yelv. 208. but for this *vide* Moor 701. Sid. 419. Carth. 236. and Godb. 68. A Diverſity where a Writ of Error ſhall abate in a Real Action, though not in a Perſonal Action.--Three join in bringing a Writ of Error, the Defendant pleads Outlawry in Abatement as to one of them; but the Court held this no good Plea, becauſe they are all compellable to join. Palm. 151.

If a Writ of Error abates † or diſcontinues by the Act and Default of (*b*) the Party, a ſecond Writ of Error ſhall be no *Superſedeas*; otherwiſe if it abates or diſcontinues by (*c*) the Act of God or the Law.

† Writs of Error may be amended. 5 Geo. 1. c. 13. See *ante* 202.

‡ But *qu.* If the Party may not have a ſecond Writ of Error in the ſame, or in a Superior Court, tho' it may not be a *Superſedeas*?

*Page 210 (H) How far the Writ of Error is a Superſedeas.

2 Keb. 129. (*d*) By the Clerk by Indorſing a *Recepi* thereon. Vent. 255. Mod. 112. S. P. and that he muſt not keep the Writ in his Pocket. is a *Superſedeas* to the Execution. Mod. 28. *per* Kelynge. it is no *ſuperſedeas*, but the Party may take out Execution. 405. See Salk. 145. pl. 4. 4 Mod. 247.

AFTER a Writ of Error ſhewn, the Plaintiff ought not to take out Execution, but the Defendant ſhall have four Days Time to get it (*d*) allowed, and four Days Time more to put in Bail, if the Caſe require it; and if he (*e*) paſſes that Time, the Writ of Error ſhall be no farther a (*f*) *Superſedeas* ‖.

(*e*) That the very Sealing of the Writ of Error

(*f*) That if the Writ of Error hath a long Return, Sid. 44-5. & *vide* 6 Mod. 130. Ld. Raym. 47.

‖ It is a *Superſedeas* only from the Allowance. Barnes 376.—No Contempt is incurred by taking out Execution, 'till after Notice of the Writ of Error. *Id.*——But, if Execution is executed, after the Allowance, tho' no Notice thereof to the Attorney of the Defendant in Error, the Court, on Motion, will ſet it aſide.

Hob. 329. *Clanrickard* verſ. *Liſle*, and *vide* 3 Lev. 312.

If Judgment in a *Formedon* be pronounced 16 *Novemb.* and a Writ of Error is brought by the Tenant bearing *Teſte* 27 *Novemb.* and then allowed, and *in majorem Cautelam* a *Superſedeas* made out againſt Executions, and the Demandant obtains a Writ of Seiſin, bearing *Teſte* 9 *Octob.* before, by Warrant of the Judgment, which was afterwards entered but as of *Octob. Mich.* being the laſt Continuance, which being made appear to the Court, and they being ſatisfied that the Judgment was pronounced 16 *Novemb* before which Time the Defendant could not have a Writ of Seiſin, nor the Plaintiff a Writ of Error, they held this ſuch a Trick as would defeat any Writ of Error; and therefore a new *Superſedeas* was awarded againſt that Writ of Execution, *quia erronice.*

Mod. 28. *Hughes* and *Underwood.*

If a Writ of Error is taken out to remove a Record between ſuch and ſuch Perſons, and ſome of the Parties are omitted; ſo that in Strictneſs the Writ does not agree with the Record, yet it is notwithſtanding a *Superſedeas*, and no Execution can be taken out, for the Court below (*g*) cannot judge of the Fitneſs of it, though it may be quaſhed in the Court out of which it iſſues.

(*g*) That if the Record vary from the Writ of Error, yet the Inferior Court ought to remove it. Vent. 97.

If

If *A.* recovers in Debt or Damages againſt *B.* and ſues out a *Capias ad Satisfaciendum* againſt *B.* which is returned *Non eſt Inventus*, upon which a *Scire facias* is awarded againſt the Bail and returned, and after a ſecond *Scire facias* awarded, but not returned, *B.* brings a Writ of Error on the Principal Judgment; this is no *Superſedeas* as to the Proceedings againſt the Bail, but the ſecond *Scire facias* may well be returned, and the Plaintiff may proceed thereon, notwithſtanding the Writ of Error, which affecting only the Principal Judgment, is diſtinct from the Proceedings againſt the Bail.†

Rol. Abr. 491. *Lock* and *Tillard*, *per Croke* and *Jones*, *cont'* the Opinion of *Brampſton*.

† But the Court, on Motion, will ſtay Proceedings againſt the Bail.

So if a Man recovers againſt *J. S.* and on a *Scire facias* hath Judgment againſt the Bail, and the Bail bring a Writ of Error of the Judgment on the *Scire facias*; this ſhall be no *Superſedeas* as to the principal Judgment, and therefore the Plaintiff may take out Execution againſt the Principal.

2 Rol. Abr. 491.

If a Man brings a Writ of Error on a Judgment, but does not remove the Record within ſix Days, this ſhall be no *Superſedeas*, but Execution may well be taken out, for it appears that the Writ of Error is merely for Delay.‡

2 Rol. Abr. 491. *Marſh* and *Whetſtone*, adjudged *per Cur'*.

‡ *Qu.* If Execution can be taken out, whilſt the Writ of Error is in Force, and if the Defendant in Error ought not firſt to *Non pros* Plaintiff in Error. See *poſt* 216. R. 217. When the Tranſcript is brought in, Defendant in Error may make out a *Scire facias quare executionem non.* See *Harriſon's Pract. in B. R.* 412.

If upon a *Fieri facias* on a Judgment againſt *B.* the Sheriff takes the Goods of *B.* into his Hands; but before any Sale of them, *B.* delivers to the * Sheriff a *Superſedeas* on a Writ of Error, *B.* ſhall have the Goods again, for by this Seizure no Property is altered.

* Page 211

2 Rol. Abr. 491. *Sare* and *Shelton*, Sheriff, and

per Cur'.——If the Sheriff makes a Warrant to his Bailiff, and after comes a *Superſedeas* to the Bailiff, before Notice of it, makes Execution, 'tis not good; for the *Superſedeas* to the Sheriff determines the Warrant of his Bailiff.——If Execution iſſues, and the Sheriff executes it, and after a *Superſedeas* comes to him *quia executio erronice emanavit*, the Sheriff ſhall have his Fees for the Execution; *vide* Tit. *Sheriff.*

If a Writ of Error be brought returnable into the Exchequer-Chamber, which is allowed by the Clerk of the Errors, and a *Superſedeas* granted thereupon; but the Record is not marked by the Clerk of the Errors, as the Uſage is, nor Notice thereof given to the Attorney of the other Side; but theſe Matters are omitted, becauſe the Attorney was not known, nor the Number-Roll of the Record; yet this is a good *Superſedeas* in Law, ſo that if Execution be awarded and executed, it is erroneous, and a *Superſedeas* ſhall be awarded *quia erronice emanavit*; but it is no Contempt in the Attorney in taking out Execution, he having no Notice of the Writ of Error, and the Roll not being marked.

Rol. Abr. 492. Mich. 1649. *Methwold* and *Bawd.* See Bur. Rep. 340.

It ſeems clearly agreed, that an Action of Debt may be brought upon a Judgment in *B. R.* notwithſtanding a Writ of Error brought in the Exchequer-Chamber; for though ſuch a Writ of Error be a *Superſedeas* to the Execution, yet the Duty remains upon Record; and it is but reaſonable the Party ſhould have this Remedy for his Damages for Forbearance.

10 H. 6. 6. 2 Rol. Abr. 490. Dyer 32. pl 5. *Adams* and *Tomlinſon* Sid. 236. 3 Keb. 129, 239.

To

Lev. 153. Keb. 127. Raym. 100. S. P. adjudged, *Draper* and *Brightwell.* Mod. 121.

Error.

(I) To what Court a Writ of Error lies.

And herein,

1. Of Writs of Error into Parliament.

THE Court of Parliament is the Supreme Court, where anciently Cauſes of great Conſequence, as between the *Magnates Regni*, were heard and determined. Hence the Houſe of Lords is the *dernier* Reſort, to which a Writ of Error lies; and therefore *(a)* if a Writ of Error be brought of a Judgment in the King's Bench into the Exchequer-Chamber, and there the Judgment is reverſed; yet a Writ of Error lies of ſuch Judgment into (*b*) Parliament, and the Lords may reverſe ſuch ſecond Judgment.

(*a*) Show. Parl. Caſes 24, 110. Vent. 334. Raym. 330. 2 Jon. 99. 2 Lev. 232.

(*b*) When a Record comes into Parliament upon a Writ of Error, the King may aſſign certain Earls and Barons, and with them the Juſtices, to determine the Matter. 22 E. 3. 3. Rol. Abr. 789 2 Bulſt. 164. For the Form of the Writ, *vide* Show. pl. 12. and for the Manner of Proceeding thereon. *Vide* Moor 834. Cro. Jac. 341. Godb. 250. Rol. Rep. 14, 15. Noy 76. Raym. 5. 383.

37 H. 6. 13. 11 E. 4. 9. Rol.Abr.745. for the Manner of obtaining and proceeding upon ſuch Writ of Error, *vide* 4 Inſt. 21. Godb. 247. Bulſt. 162, 166. Moor 834. *p.* 1122.——That a Writ of Error may be returnable *ad proximum Seſſionem Parliament'*. Dyer 375. Raſt. Ent. 805.—But no *Superſedeas* ought to be granted upon a Writ of Error returnable *ad proximum Parliamentum*. Vent. 31. Sid. 413.——If the Parliament is diſſolved, the Writ of Error is abated; the Court of King's Bench may proceed to Execution afterwards without any *Remittitur*, Carth. 237. but it ſeems that this is altered by a late Order in the Lords Houſe ‡.

So a Writ of Error lies into Parliament upon a Judgment given in *B. R.* either in a Cauſe brought there by Writ of Error, or originally commenced there.

‡ Writ of Error in Parliament is no *Superſedeas*, if it be not tranſcribed in fourteen Days, and the Parliament be diſſolved. Bunb. 64.——If Error is brought in Parliament, tho' the Houſe is prorogued, and the Record has not been tranſcribed, the Court will not on Motion grant Leave to take out Execution. Bunb. 131.——If Error in Parliament is not tranſcribed in fourteen Days, the Defendant in Error, on Motion, ſhall be at Liberty to take out Execution if it is not tranſcribed and certified in eight Days. Bunb. 69. See *Harriſon's Pract. in B. R.* 420.

* Page 212 * And though upon a Judgment in the King's Bench, ſince the 27 *Eliz. cap.* 8. the Party may elect either to bring a Writ of Error in the Exchequer-Chamber, or in Parliament; yet if the Cauſe commenced in the King's Bench by (*c*) original Writ, there lies no Writ of Error but into Parliament; alſo if he elects to bring Error in the Exchequer-Chamber, regularly he cannot after bring Error in Parliament upon the firſt Judgment †.

(*c*) Saund. 346. Carth. 180. S. P.

† But he may on the Affirmance of the Judgment, *vide* next Caſe, and the Stat. *infra* 213.

239, 316. Vent. 372. S. P. 4 Mod. 247. *Dighton* and *Granvil*, S. P. To a *Scire facias Quare executionem habere non debet*, a Writ of Error pending may be pleaded in Bar of the Execution. Skin. 591 *.

* Where a Writ of Error is depending, the Court on Motion will ſtay Proceedings in an Action on the Judgment, upon Terms. The ſame, if Proceedings are againſt the Bail, where Error of the Principal Judgment is depending. And the eaſieſt Method, to obtain Relief, is by Motion.

And therefore it ſeems, that if a Writ of Error be brought upon a Judgment in the Exchequer-Chamber, where the Judgment is affirmed, and after Error is brought upon the ſame Judgment in the Parliament; this Writ of Error is no *Superſedeas*; but if the Writ of Error be brought upon the Judgment in the Exchequer-Chamber, it is a *Superſedeas*. *Vide* 2 Rol. Abr. 492. 2 Lev. 232.

2. Of Writs of Error into the Exchequer-Chamber.

As no Writ of Error lay of a Judgment in the King's Bench, but in Parliament, and as the Subjects were often diſappointed of their Writ of Error by the not Sitting of Parliament, or by their being employed in publick Buſineſs when they did ſit; therefore,

By the 27 *Eliz. cap.* 8. reciting, that erroneous Judgments in *B. R.* were (*b*) only to be reformed in Parliament, it was enacted, "That "where Judgment ſhould thereafter be given in *B. R.* in (*c*) (*d*) Debt, "(*e*) Detinue, Covenant, Account, Caſe, Ejectment, or (*f*) Treſpaſs "(*g*) firſt commenced there, (*h*) other than ſuch where the Queen ſhall "be Party, (*i*) the Plaintiff or Defendant, againſt whom ſuch Judgment "ſhall be given, may at his Election ſue out a Writ of Error directed "to the Chief Juſtice, commanding him to cauſe the Record, and all "Things concerning the ſaid Judgment to be brought before the Judges "of the Common Pleas and Barons of the Exchequer, which being of "the Degree of the Coif, or Six of them, ſhall examine the Errors aſ-"ſigned or found, and thereupon reverſe or affirm the Judgment, other "than

(*b*) Therefore this Act extends only to ſuch Caſes in which there is no Remedy but in Parliament, but not to Errors in Fact, for theſe might before have been examined in *B. R.* 2 Lev. 38. adjudged, Vent. 207, 208. adjudged, Cro. Jac. 5. ſo adjudged in *B. R.* contrary to the Opinion of the Judges in the Exchequer Chamber.--But that Errors in Fact may be aſſigned in the Exchequer Chamber, and if denied, tried by *Niſi prius*, and how, *vide* Cro. Eliz. 731. Hob. 5. Cro. Car. 514. 1 Jon. 410, 411. * (*c*) Not Replevin, 2 Rol. Rep. 434. agreed *per Cur'*. (*d*) Extends to their Heirs, Executors or Adminiſtrators. Cro. Eliz. 294, 295. 6 Co. 80. a. (*e*) Error lies not upon a Judgment in a *Scire facias* againſt Bail. Yelv. 157. Cro. Jac. 171. *Lancaſter* and *Keyleigh*. Cro. Car. 300. adjudged, Jon. 325. adjudged.——Yet Cro. Eliz. 730. it was adjudged contrary by all the Judges and Barons except Two, for that it was within the Intent of the Statute, and in Nature of an Action of Debt †. ——That Error lies upon a Judgment in a *Scire facias* againſt Executors, upon a Judgment in Debt, within the Equity of the Statute. Cro. Car. 286. *per Curiam dubitatur*.——The *Scire faciat* is but to have Execution of the former Judgment. Cro. Car 464.——'Tis in effect a Piece of the Action. Mod. 79. *per Hale*. Vent. 168. 2 Keb. 833. Fitzgib. 67. 8 Mod. 27. 10 Mod. 17, 142, 275, 282. 12 Mod. 105. Ld. Raym. 97. 2 Ld. Raym. 954. Will. Rep. 348. pl. 93, 351. 2 Stra. 1102. Comb. 393. 5 Mod. 229. Salk. 263. pl. 4. Yelv. 157.—But *vide* Cro. Jac. 384. Cro. Car. 143. Hob. 72. Mod. 297. (*f*) Not in Reſcous, becauſe more than Treſpaſs, and Treſpaſs would not have lain, becauſe the Cattle reſcued were the Cattle of the Defendant himſelf; and there is a Writ of Reſcous in the Regiſter diſtinct from Treſpaſs. *Ody* and *Yeates*, Moor 694. pl. 963. by all the Juſtices held clearly. Cro. Jac. 171. cited. (*g*) It lies not upon any Judgment affirmed upon Error brought in *B. R.* 2 Bulſt. 162. nor upon a Judgment in a *Scire facias* upon ſuch Judgment affirmed in *B. R.* Rol. Rep. 264. Salk. 263. pl. 4. S. P. adjudged.——Nor upon a Suit by Original. Saund. 346. Carth. 180. S. P. admitted. (*h*) It lies in Debt upon the Statute of Tithes. Sid. 240. ſaid to have been adjudged.——But whether it lies in Debt upon the Statute of Uſury, Sid. 240. *dubitatur*, and *vide* Vent. 49.——It lies in Debt *qui tam*, upon the Statute for abſenting from Church, for the King is not properly Party, tho' to have Part of the Penalty. Raym. 275. adjudged ‡. (*i*) Not in an Action of *Scandalum Magnatum*, Lord *Say* and *Seal* and *Stephens*. Jon.

* Error *coram vobis* lies not on a Judgment after Affirmance in the Exchequer Chamber. Stra. 690. But if Writ of Error be quaſhed for any Fault but Variance, Error *coram vobis* lies Stra. 606. L. Raym. 1403.

† Error does not lie in the Exchequer upon an Award of Execution in a *Scire facias* only, but the Writ muſt alſo include the Judgment in the former Action; for a Judgment not founded on the Merits of the Cauſe is not within the Stat. Andr. 287. Stra. 1102.

‡ *Qu.* If Error lies in the Exchequer, on any Judgment in *B. R.* where the Plaintiff ſues as well for the King as for himſelf?

* Page 213 Jon. 194. adjudged by three Judges againſt one. Ley 82. adjudged.

" * than for Errors concerning the Juriſdiction of the Court of King's Bench,
" or for Want of (*k*) Form in any Writ, *&c.* or Proceeding, and (*l*) after
" the ſame (*m*) ſhall be brought back in *B. R.* that (*n*) further Proceedings
" may be had thereupon, as well for Execution as otherways."

Cro. Car. 142. Earl of *Stamford* and *Needham*. Sid. 143. Vent. 49 ‖. (*k*) Sid. 253. (*l*) So if the Plaintiff in Error be nonſuit, or the Suit be diſcontinued. And. 144. 2 And 123. (*m*) So that no Execution can be granted out of the Exchequer Chamber. Style 238. (*n*) Where after Reverſal and Judgment *quod recuperet*, and the Record remanded, a Writ of Inquiry may be awarded, *&c.* *Foldoe* and *Ridge*, Cro. Jac. 206. Noy 129. Yelv. 74.

‖ See the Caſes, *pro & con*, on moſt of the Points in the above Notes, in Com. Dig. 5 V. 255, *&c.*

And by the ſaid Act it is further enacted, " That ſuch Reverſal or " Affirmation ſhall not be final, but the Party grieved may bring Error " in Parliament."

3. Of reverſing Judgments in the Court of Exchequer.

4 Inſt. 72. Moor 566. (*e*) Writs of Error upon Judgments were there ſeldom brought. Sav. 31. (*f*) Rol. Rep. 14, 15.

Before the Statute of 31 *E.* 3. *c.* 12. (*e*) Errors in the Exchequer were ſometimes examined in (*f*) Parliament, and ſometimes before Commiſſioners, by Force of the King's Writ under the Great Seal.

(*g*) The King may have Error here. *Vide* Co. 42. a. 3 Co. 1. (*b*) By 31 Eliz. c. 1. the not coming of the Lord Chancellor or Lord Treaſurer, or either of them, at any Day of Adjournment, ſhall be no Diſcontinuance, ſo as one of them, or both Chief Juſtices come, and are preſent.——But this Statute not providing Remedy where they came not at the Return of the Writ of Error, *vide* 2 Leon. 59. it was enacted by 16 Car. 2. c. 2. that if the Chief Juſtices, or either of them, or the Chancellor or Treaſurer ſhall not come at the Return of the Writ of Error, it ſhall be no Abatement or Diſcontinuance; but no Judgment ſhall be given, unleſs both Chancellor and Treaſurer ſhall be preſent. (*i*) Intended of the Treaſurer of *England*; and at the Time of making this Statute, the Offices of Treaſurer of *England* and of the Exchequer were in ſeveral Hands. (*k*) Tho' the Barons only are Judges, yet the Treaſurer together with them hath the Cuſtody of the Records, and therefore the Writ of Error is to be directed to him and the Barons, and it is, tho' the Lord Treaſurer and Treaſurer of the Exchequer are the ſame Perſon. 4 Inſt. 105. Sav. 35, 36.

By 31 *E.* 3. *cap.* 12. in all Caſes touching the (*g*) King, or other Perſon, upon Complaint of Error in Proceſs in the Exchequer, the (*b*) Chancellor and (*i*) Treaſurer ſhall (*k*) cauſe the Record to be brought before them, and taking to them the Judges* and other ſage Perſons, ſhall call before them the Barons to hear the Cauſe of their Judgment; and, if upon Examination Error be found, ſhall amend the Rolls, and ſend them into the Exchequer to have Execution.

* If the Chancellor and Treaſurer do not call in the other Juſtices it ſeems to be Error. 8 H. 7-13.

Carth. 388. *Vide* the *Banker's Caſe*.

In the *Banker's Caſe* adjudged in the Exchequer, which came before the Lord Keeper, *&c.* purſuant to the above Statute, the Lord Chancellor and three of the Judges were of Opinion, that the Judgment of the Exchequer ſhould be reverſed; and then the Queſtion was, whether the Judgment of the Court ſhould purſue the Opinion of the Majority of the Judges, or that of the Lord Keeper and the three Judges; and three of the Judges were of Opinion, that the Majority of the Judges ſhould govern this Judgment; but the others being of a contrary Opinion, the Judgment was reverſed, which was pronounced by my Lord Keeper *Sommers*.

4. Of Writs of Error into the King's Bench.

The Court of King's Bench ſuperintends the Proceedings of all other Inferior Courts, and being the King's own Court in which he formerly ſat in Perſon, by the Plenitude of its Power corrects the Errors of * thoſe Courts; hence it is, that *(a)* a Writ of Error lies in this Court of a Judgment given in the (*b*) King's Bench in (*c*) *Ireland*.

* Page 214

(*a*) 34 Aſſ. 7. 37 Aſſ. 5. Rol. Abr. 745. F. N. B. 22. but for this *vide* 4 Inſt. 356. Keilw. 202. 5 Co. 18. *a. Calvin*'s Caſe, Leon. 55. Yelv. 118. Style 386. Vaugh. 290, 402. and *per* Rol. Rep. 17. it is ſaid *per Coke*, that *Ireland* was annexed to the Crown of *England* by Conqueſt, and therefore, *&c.* but *Q.* 2 Bulſt. 163.—It lies not in the Parliament of *Ireland*. Rol. Rep. 17. *per Coke*. (*b*) Upon a Judgment *in Banco* there, it muſt be brought *in Banco Regis* here, *&c*, F. N. B. 22. Yelv. 118. (*c*) Upon a Judgment in *Calais*, when under the Subjection of the King of *England*, a Writ of Error lay in *B. R.* 4 Inſt. 282. Raym. 174. S. P. cited. Vaugh. 290, 402. S. P. cited; but yet *vide* Keilw. 202. S. P. *cont'*.———But it lies not upon any Judgment in *Scotland*, becauſe a diſtinct Kingdom, and governed by diſtinct Laws. Show. Par. Caſes 33 †.

† As to Error from *Ireland*, ſee *Harriſon's Pract. in B. R.* 422. *&c.*

So a Writ of Error will lie of a Judgment given in Chancery on the Common Law Side, called the *Petty-Bagg*, as upon a *Scire facias* upon a Recognizance, altho' both Courts were before the King himſelf, and to *(d)* ſome Purpoſes are the ſame.

Rol. Abr. 744-5. Rol. Rep. 287. 29 Aſſ. 47.

4 Inſt. 80. Dyer 315; & *vide* Moor 570. pl. 778. (*d*) As if Iſſue be joined in Chancery, it muſt be tried in the King's Bench, and the Record delivered over *per Proprias Manus* of the Chancellor. 2 Saund. 23. 2 Keb. 621. Lev. 283. Sid. 436. Mod. 29. *Jefferſon* and *Dawſon*, & *vide* Abr. Eq. 128-9.

If a Peer be attainted before the Lord High Steward, a Writ of Error lies in the King's Bench of ſuch Attainder, and the Party has no other Remedy †.

Sid. 208. Lev. 149. *per Twiſden.*

† Error lies in Parliament, upon an Attainder for Treaſon; for though the Stat. 33. H. 8. 20. ſays, that Judgment of Attainder by Common Law, ſhall be of as good Force, as if done by Authority of Parliament, this ſhall be intended of a lawful Attainder. *Hale's Hiſt. Pow. & Juriſd. of Parliament.* 19. 4 *Inſt.* 21.

A Writ of Error lies of a Judgment in the Common Pleas into the King's Bench, which only can correct the Errors of that Court, and from thence into Parliament. 4 Inſt. 22.

A Writ of Error lies into the King's Bench of a Judgment in a County Palatine, for tho' theſe are Superior Courts and have *Jura Regalia*, yet their Juriſdiction is derived from the Crown. 4 Inſt. 214, 223. Rol. Abr. 745.

If an erroneous Judgment be given in *Durham* in the Chancery, upon Proceedings according to the Common Law, or before the Juſtices of the Biſhop, a Writ of Error lies before the Biſhop himſelf, and if he gives an erroneous Judgment, Error lies in *B. R.* 4 Inſt. 218.

If the Juſtice in Eyre gives an erroneous Judgment at a Juſtice-Seat in a Foreſt, a Writ of Error lies thereupon in *B. R.* 4 Inſt. 297.

By the 34 & 35 *H.* 8. *cap.* 26. *par.* 113. Errors in Judgments in Pleas real and (*e*) mixt, before the Juſtices in their Great Seſſions in *Wales*, ſhall be redreſſed by Error in *B. R.* in *England*; but Errors in Pleas Perſonal ſhall be reformed before the (*f*) Preſident and Council.

(*e*) In Ejectment, *Griffith*'s Caſe, Moor 248. pl. 391. adjudged. Cro. Eliz. 104. adjudged. (*f*) This Court is diſſolved by the Statute of 1 *W.* & *M.* Stat. 1. c. 27. and by the ſame Act, Errors in Pleas Perſonal are to be redreſſed as Errors in Pleas real and mixed were by 34 & 35. H. 8. c. 26.

5. Of

5. Of Writs of Error into the Common Pleas and Inferior Courts.

F. N. B. 44. (a) Tho' Error lies not in *B. R.* upon a Judgment given in *London*, yet it lies upon a Judgment given at *Newgate*, which is upon Commiſſion in their Seſſions. 2 Leon. 107. ſo held, and *vide* 2 Rol. Rep. 97. 2 Lev. 223. §

If an erroneous Judgment be given in (a) *London*, or other Place, which is a Court of Record, the Party grieved ſhall have a Writ of Error, and this Writ may be returned into the Common Pleas, or into the *King's Bench*, at the Pleaſure of him who ſueth the ſame.

§ If Error be of a Judgment in the Sheriff's Court in *London*, it ſhall be, before the Mayor and Sheriffs in the *Huſtings*. 4 Inſt. 248. F. N. B. 22. H. *Vid: Priv. Lond.* 164, 168.——Error of a Judgment in the *Huſtings*, lies before Commiſſioners at St. Martin's. F. N. B. 23 E. 1 Rol. 745. l. 50. 4 Inſt. 247. 1 Lev. 309. 2 Saund. 228.——Error of a Judgment before thoſe Commiſſioners, lies in Parliament. 2 Saund. 228.——See *infra* 215. n.

4 Inſt. 224. See of the Courts of *Cinque Ports*. * Page 215

No Writ of Error lies *in Banco* or *Banco Regis*, upon a Judgment given within the Five Ports; but by Cuſtom ſuch Judgment is examinable by Bill in Nature of a Writ of Error *coram Domino Cuſtode ſeu Guardiano quinque Portuum apud curiam ſuam de Shepway*.

Rol. Abr. 745. l. 20. (b) That is for any Matters touching the Stannaries, otherways upon a Judgment there given upon collateral Matters. 3 Bulſt. 183. *per Coke* Chief Juſtice, ſaid to have been ſo reſolved upon a Conference by all the Judges, as is ſeen recorded in Chancery in the Petty-Bag Office. Q. Owen 8. Sid. 233.

* If a Judgment be given in the Court of Stannaries of the Duchy of *Cornwal*, (b) no Writ of Error lies upon this *in Banco* or *Banco Regis*, becauſe it hath not been uſed; but of this there may be an Appeal to the Guardian of the Stannaries, and from him to the Prince; and when there is no Prince, to the King's Council.

Rol. Abr. 745. but *vide* Leon. 55. 3 Leon. 159.

A Writ of Error lies in the *Common Pleas* upon a Judgment given before the Judges of Aſſiſe.

Dyer 250. Moor 78. And. 12. N. Bendl. 153. Cro. Eliz. 26. Carter 222.

18 E. 3. 14. Rol. Abr. 745. Lev. 309.

Upon a Judgment given in the *Huſtings* in *London*, a Writ of Error lies at *St. Martins* before certain Juſtices ‡.

2 Saund. 253. S. P. and that upon a Judgment of the ſaid Juſtices, a Writ of Error lies in Parliament, *vide* 2 Leon. 107. lies not from the Courts of the City of *London* to *B. R.* tho' it does lie thither, from all other Corporation Courts. 2 Bur. Rep. 777. * ——An Appeal lies to the Houſe of Peers, from a Decree in the Mayor's Court. See the Caſe of *Littlebury* and *Buckley*, *poſt* 310.

‡ See *ante* 214. n. under Div. 5.

6. Where a Writ of Error lies in the ſame Court in which the Record is.

F. N. B. 21. Poph. 181. Rol. Abr. 746. (c) And therefore the 27 Eliz. c. 8. which gives a Writ of Error into the Exchequer-Chamber, extends not to Errors in Fact, for theſe might have been examined in *B. R.* 2 Lev. 38. Vent. 207. Cro. Jac. 5. S. P. adjudged.

If upon a Judgment in *B. R.* there be Error in (c) the Proceſs, or thro' the Default of the Clerks, it ſhall be reverſed in the ſame Court by Writ of Error ſued there before the ſame Juſtices.

So

So if one is indicted of Treaſon or Felony in *B. R.* or, being indicted elſewhere, the Indictment is removed in *B. R.* and by Proceſs of that Court he is erroneouſly outlawed, and ſo returned; a Writ of Error may be brought in *B. R.* for the Reverſal thereof. 3 Inſt. 214.

Alſo if an erroneous Judgment in Point of Law be given in *B. R.* upon an Indictment in *London*, a Writ of Error may be brought in the ſame Court; for though in Civil Caſes Error does not lie in the ſame Court, unleſs for a Matter of Fact; yet in Criminal Caſes it lies as well for an Error in Law as Fact. Sid. 208. *Cornbill*'s Caſe, adjudged. Lev. 149. S. C. adjudged, and ſaid,

tho' it may be brought in Parliament, that does not prove but it may be brought here alſo.§ ——But according to 1 Sid. 208. it ſeems that this was only for Error in Fact. And *qu.* If it could be for Error in Law? And ſee *infra*.

In (*a*) *Fitz. N. B.* it is ſaid, that a Judgment cannot the ſame Term it is given be reverſed in *B. R.* without a Writ of Error, though ſuch Judgment may in the Common Pleas; but it does not ſeem that there is any Foundation for this Diſtinction, (*b*) for during the Term, in which any judicial Act is done, the Record remains in the Breaſt of the Judges of the Court; and therefore the Roll is alterable during the Term, as they ſhall direct †. (*a*) Fitz. *N.B.* 21. (*b*) Moor 186. pl. 332. Yelv. 157. Poph. 181. But when

the Term is paſt, the Roll is the Record, and admits of no Alteration. Co. Lit. 260. a. *vide* Tit. *Amendment* 108.

† An Erroneous Judgment may be ſtayed, by moving in Arreſt of Judgment, within four Days.

But if an erroneous Judgment be given, and the Error lies in the Judgment itſelf, and not in the (*c*) Proceſs, a Writ of Error does not lie in *B. R.* of ſuch Judgment. Rol. Abr. 749. 7 H. 6. 30. (*c*) As if the

Court awards an Exigent where they ought to award a *Pluries Capias*. Rol. Abr. 746.---They may reverſe their own Judgment for falſe *Latin*, becauſe this is not the Default of the Court, but of the Clerks. 7 H. 6. 30. Rol. Abr. 746.——Where by Reaſon of Fraud, &c. a Judgment may be vacated after the Term in which entered, *vide* 2 Rol. Abr. 724.——If Judgment be given in an Action in *B. R.* and there alſo Execution is awarded, a Writ of Error *quod coram vobis reſidet* does not lie in *B. R. in Adjudicatione executionis*. Rol. Abr. 746-7. Rol. Rep. 65. S. C.

* If two bring a Writ of Error in *B. R.* upon a Judgment in an Aſſiſe, and pending the Writ one of the Plaintiffs dies, and after, the Court, not knowing of the Death of one of them, reverſes the Judgment; and after he, againſt whom the Judgment was reverſed, brings a Writ of Error in the ſame Court *de B. R.* and aſſigns the Death of one of the Plaintiffs in the firſt Writ of Error, which was the Act of God, not the Error of the Court, it ſeems the Writ well lies. *Page 216 Rol. Abr. 747. Cro. Eliz. 105. Like Point adjudged. 4 Leon. 60. S. P.

If a Record is removed by Writ of Error out of the Common Pleas into the King's Bench, and the Writ of Error for Inſufficiency is quaſhed in the King's Bench, the Plaintiff in Error may have a new Writ *coram vobis reſiden.* but ſuch new Writ is not a *Superſedeas* in itſelf as the firſt Writ was, and therefore he muſt move the Court for a *Superſedeas*, and put in Bail thereon ‡. Carth. 368 9.

‡ Writs of Error may be amended. Stat. 5 Geo. 1. c. 13. See *ante* 202.

So if ſuch ſecond Writ be quaſhed for Inſufficiency, yet the Court will grant a new or ſecond Writ of Error *coram vobis reſiden.* as alſo a *Superſedeas* on putting in Bail; for ſuch ſecond Writ being void is as if there had been none before. Carth. 369, 370.

Of assigning Errors: And herein,

1. Of the Manner of assigning Errors.

Sid. 294. *Cowper* and *Price.* 2 Keb. 52, 71, 75. S. C.

UPON a Writ of Error for Want of (*a*) assigning Errors, Judgment is not affirmed, (*b*) but Execution goes upon the first Judgment, so that the Party can have no Costs; but his Remedy must be upon the Recognizance, by which he is bound to prosecute with Effect.*

(*a*) Error cannot be assigned in a Record which is not in the Court where the Writ of Error is brought. 11 H. 4. 47. b. Rol. Abr. 760, 769 —— Assignment of Error is in the Place of a Declaration. 9 E. 4 32. —— Error may be assigned in every Part of the Record. Rol. Abr. 760 —— May be moved to the Court, tho' not particularly assigned. 5 Co. 37. b. Error in Fact or in Law may be assigned on a Judgment by Default. Rol. Abr. 756. Style 122 (*b*) If a Record be removed out of the Common Pleas into the King's Bench by Writ of Error, and the Plaintiff will not assign his Error, then a *Scire facias* shall issue forth *quare executionem habere non debet*; and, upon Summons and two *Nihils* returned, the Plaintiff shall have Execution. 2 Leon. 107.

* See *infra*, the next Clause but one.

Carth 40, 41, *per Holt* Chief Justice, where the Errors were assigned in a private Manner without giving Notice to the Defendant in Error

The Parties, upon the Removal of the Record by the Writ of Error, have no Day in Court given to either of them; wherefore if the Plaintiff in Error delay to sue forth his *Scire facias ad audiendum errores*, the Defendant hath no Way to compel him, but by suing out a *Scire facias quare executionem non*, &c. and if, upon such *Scire facias*, the Plaintiff in Error doth not plead, that his Errors are assigned, but suffers Judgment to pass upon two *Nihils*, no Errors afterwards assigned shall prevent Execution.

And by a Rule of the Court of *King's Bench*, if the Plaintiff in Error doth not assign his Errors, and give a Copy of them to the Defendant's Attorney in Error, by or before the Time given by the Rule on the *Scire facias* is out, the Defendant's Attorney in Error may enter Judgment on the *Scire facias*, and take out Execution thereon, but can have no Costs, unless he gives a Rule for the Plaintiff to assign Error on Record; which if he doth not do, he may be nonprossed, and then the Defendant in Error shall have his Costs.

Also by another Rule of the same Court, when the Plaintiff in Error hath assigned the General Errors, he must give a Copy of them to the Defendant's Attorney, who may plead *In nullo est erratum* to it immediately,

* Page 217 * and enter both on the Roll, paying the Plaintiff's Attorney 2*s.* 4*d.* for the same.

Yelv. 6, 7.

If the Defendant in Error sues out a *Scire facias quare executionem non debet*; this is merely collateral to the Record removed, and yet by Matter *ex post facto* may become a Record; as if the Plaintiff upon the Return of the *Scire facias* appears, and pleads a Release, or other Matter, as he well may, then this is a Record annexed to the first Record removed; but if upon the Return of the *Scire facias*, the Plaintiff appears, and assigns Errors, or hath a Day given him to assign them, and upon this Record assigns his Errors insufficiently; this *Scire facias* is but a Piece of Paper filed to the Record, no Proceedings being thereupon.

6 E. 4, 6. Rol. Abr. 761. Bro. Attaint. 86.

In a Writ of Error it is no good Assignment of Error, *quod in omnibus erratum est*; for the Court is not bound to inquire of the Errors, if the Party does not shew them.

Error.

In a Writ of Error to reverſe an (*a*) Outlawry, Errors cannot be aſſigned by *Attornatum*, but the Party muſt appear in Perſon. 2 Leon. 87. Cro. Eliz. 611. S. P. *Wade & Ux'* verſus *Smith*. Where the Huſband and Wife being outlawed, and the Wife refuſing to appear, the Outlawry could not be reverſed, & *vide* Carth. 7. S. P. where a Difference was taken, that where the Error appears on the Face of the Record it may be aſſigned *per Attornatum*, but no Opinion given thereon. (*a*) A Perſon attainted of Treaſon or Felony, before he can have a Writ of Error to reverſe the Attainder, muſt aſſign his Errors, and thereupon have Leave from the Court to proſecute his Writ of Error. 2 Hawk. P. C. 461.——And no ſuch Writ of Error is to be allowed without an expreſs Warrant from the King, or the Conſent of the Attorney General. Sid. 69. Bulſt. 71. 3 Mod. 42. Rol. Rep. 175.

If Two bring ſeveral Writs of Error, and ſeveral *Scire facias's* to reverſe a Judgment in an Aſſiſe againſt them, they may aſſign Errors jointly. 11 H. 4. 92. b. Bro. Error 50. Rol. Abr. 761, S. C.

If a Writ of Error upon a Judgment in an Aſſiſe be brought by Four, and only one appears, and the others make Default, he cannot aſſign Errors alone, till the other is ſummoned and ſevered. Yelv. 3, 4. *Cromwell* and *Andrews*. Cro Eliz. 891. S. C. adjudged.

So if upon a Judgment in a *Quare Impedit*, a Writ of Error be brought by the Biſhop and Incumbent, the Incumbent only without Summons and Severance, cannot aſſign Errors. Cro. Jac. 94. *Lancaſter* and *Law*, adjudged.

If two are outlawed in an Appeal of Murder, and they bring a Writ of Error to reverſe it, and one appears, but the other does not, he ſhall not aſſign Errors till the other does; becauſe he hath joined with him in the Writ of Error. Sid. 316. *The King* and *Tothill*, adjudged; but *vide* 2 Rol. Rep. 490.

Two brought a Writ of Error, and made two Attornies; upon the *Scire facias*, the one Attorney aſſigned Error, to which the Defendant took Iſſue, and then the other would plead in Abatement of the Writ; and it was held *per Cur'*, if one of the Plaintiffs had made Default, he ſhould be ſevered; but if they go on, they muſt proceed jointly; and if one Attorney will aſſign Error, &c. without Authority from both, we cannot help him, let him take his Remedy againſt the Attorney. 6 Mod. 40. *Shepherd* and *Baily* verſus *Orchard*. Lev. 146. See Salk. 86, pl. 3. 88. pl. 7. 2 Stra. 783. Barnard *K. B.* 4. Fitzgib. 1.

2. Of aſſigning Errors in Fact and in Law.

The Plaintiff in Error cannot aſſign Error in (*b*) Fact and Error in Law together; for theſe are diſtinct Things, and require (*c*) different Trials. Rol. Abr. 761. Sid. 147. Leon. 105.

(*b*) As that he was under Age when he levied a Fine. Raym. 231. Vent. 252.——That the Plaintiff was a Feme Covert. Rol. Abr. 761. (*c*) *Viz.* Matters of Fact to be tried by a Jury, thoſe of Law, *i. e.* thoſe appearing on the Face of the Record, by the Judges before whom the Record is removed. Yelv. 58.

* Page 218

* If the Plaintiff in Error aſſigns Error in Fact and Errors in Law, which are not aſſignable together, and the Defendant in Error pleads *In nullo eſt erratum*; this is a Confeſſion of the Error in Fact, and the Judgment muſt be reverſed; for he ſhould have (*d*) demurred for the Duplicity. Style 69. Lev. 6. Salk. 268. pl. 15. 270. pl. 18. 3 Salk. 399. pl. 3. 6 Mod. 113, 206. 2 Ld. Raym. 1005.

(*d*) Where the Errors aſſigned were, 1. That the Declaration was *minus ſufficiens in Lege*. 2. That Judgment was given for the Plaintiff, when it ſhould have been for the Defendant. 3. That the Plaintiff in the Action died before the Verdict given; and though it was agreed, that this Aſſignment of Matter of Fact and Matter of Law was double, and would have been ill on a general Demurrer; yet the Court held, that the Advantage thereof was now loſt by pleading *In nullo eſt erratum*. Carth. 338, 339. *Edmonds* and *Probert*.

Alſo

Sid. 93. Raym. 59.

Alſo if an Error in Fact be well aſſigned, *In nullo eſt erratum* is a Confeſſion of it, for the Defendant ought to have joined Iſſue upon it, ſo as to have it tried by the Country.

Cro. Jac. 12, 29, 521. Raym. 231. (*a*) Cro. Car. 421. Rol. Abr. 758

But if an Error in Fact be ill aſſigned, *In nullo eſt erratum* is no Confeſſion of it; as (*a*) if it be aſſigned, that ſuch an one at the Time of the Return of the *Venire* was not Sheriff, and the Record be removed into *B. R.* by *Certiorari*, there *In nullo eſt erratum* is no Confeſſion of that Error, becauſe the Record is not in Court, that being no Part of the Record, for the Plea is *In nullo eſt erratum in Recordo.*

Yelv. 58. *King* verſus *Goſper* and *Shire.* (*b*) But *vide* Carth. 367.

So if the Plaintiff in Error aſſigns an Error in Fact, *viz.* that the Defendant, who was an Infant, did not appear by Guardian, but by Attorney, and concludes with (*b*) *hoc paratus eſt verificare*, inſtead of concluding to the Country, as he ought to do, though the Defendant in Error pleads *In nullo eſt erratum*, yet it ſhall not amount to a Confeſſion, but ſhall be taken only for a Demurrer.

Cro. Car. 12, 29, 52. Yelv. 58. Raym. 231. Vent. 252. 3 Keb. 259. Lev 76.

Alſo if an Error in Fact that is not aſſignable be aſſigned, and *In nullo eſt erratum* be pleaded, it is no Confeſſion; as if it be aſſigned, that at ſuch a Day there was no Court of Common Pleas ſitting; becauſe that is againſt the Record; and in ſuch Caſe *In nullo eſt erratum* is only a Demurrer; ſo if a Man ſays he did not appear, and the Record ſays he did, *In nullo eſt erratum* is no Confeſſion, but a Demurrer, becauſe it is (*c*) againſt the Record.

(*c*) If a Man appears and pleads as a Priſoner *in Cuſtodia Mareſch.* he cannot after aſſign for Error, that he was not *in Cuſtodia Mareſch.* Cro. Jac. 568. Hob. 264. Rol. Abr. 762.

Cro Eliz. 155, 281, *Yates* and *Windham.* 2 Leon. 2. S. C.

After Errors aſſigned, and the Defendant had pleaded a Releaſe, the Plaintiff diſcontinued; and becauſe there was manifeſt Error in Part of the Record remaining in *B.* he obtained a Writ out of Chancery to the Chief Juſtice to remove the Reſidue of the Record, which being removed in *B. R.* he would aſſign Errors upon the new Part removed; and it was ruled *per Cur'*, that inaſmuch as the firſt Writ was diſcontinued, and this a new Writ, the Plaintiff is not tied to the former Errors, but may ſhew others at his Pleaſure; for it is now as if none were aſſigned before, and he may aſſign other Errors out of the Record; and the removing the Record in this Manner was held allowable; but this being entred upon another Roll, it was held a Miſ-entry, and the Plaintiff was put to a new Writ of Error.

3. Of aſſigning that for Error which appears contrary to the Record.

Rol. Abr. 757.

It ſeems a general Rule, that nothing can be aſſigned for Error that contradicts the Record; for the Records of the Courts of Juſtice, being Things of the greateſt Credit, cannot be queſtioned but by Matters of equal Notoriety with themſelves; wherefore, tho' the Matter aſſigned for
* Page 219 * Error ſhould be proved by Witneſſes of the beſt Credit, yet the Judges would not admit of it.

Dyer 89. Rol. Abr. 757. Cro. Eliz. 469. (*d*) But the Plaintiff in Error may ſay, that after the Conuſance taken, and before the Certificate thereof returned, the Conuſor died, becauſe this is conſiſtent with the Record. Rol. Abr. 757. *Vide* Head of *Fines and Recoveries.*

Hence it is, that in a Writ of Error to reverſe a Fine, the Plaintiff cannot aſſign, that the Conuſor died before the Teſte of the *Dedimus*, becauſe that (*d*) contradicts the Record of the Conuſance taken by the Commiſſioners, which evidently ſhews that the Conuſor was then alive, becauſe they took his Conuſance after they were armed with the Commiſſion, and the *Dedimus* iſſued.

A Conu-

A Conuſance of a Fine was taken before *R. M.* one of the Juſtices of the Common Pleas, and after, in the Proſecution of the Fine, the *Dedimus* was directed to Sir *R. M.* he being after the Conuſance made a Knight, who returned the *Dedimus* with his Name and Title; and this was aſſigned for Error, that the Perſon who took the Conuſance was not the ſame who was impowered to take it; but it was not allowed, becauſe it contradicts the Record, which is, that the *Dedimus* was directed to Sir *R. M.* and that Sir *R. M.* by Virtue thereof took the Conuſance.

Yelv. 33. *Arundel* and *Arundel.* Cro.Eliz.677. S. C. Rol. Abr. 757. Cro. Jac. 11, 12. 3 Mod. 141, S. C. cited.

If a Writ of Error be brought upon a Judgment in an Inferior Court, and the Record certified is of a Court held before the Mayor, Bailiffs and Burgeſſes of *A.* by Cuſtom, it cannot be aſſigned for Error, that there is no ſuch Cuſtom, for this is contrary to the Record, and even what the Writ of Error itſelf ſuppoſes, *viz.* that they have a Court.

2 Bulſt. 243. *Whiſtler* and *Lee*, adjudged. Rol. Rep. 53. S. C. Cro. Jac. 359. S. C. and wherefore the

per totam Curiam, this Aſſignment being directly againſt the Record, it is not receivable; Judgment was affirmed.

If, upon Diminution alledged, the Plaintiff in Error procures an Original to be certified, and the Defendant ſurmiſes there is a good Original; and upon a new *Certiorari* granted that is certified, the Plaintiff in Error cannot aſſign that the Proceedings were upon the firſt Writ, for that is contrary to the Record; for when there is a good Writ to warrant the Proceedings, a Man ſhall never be admitted to ſay the Proceedings were upon the bad Writ.

Cro. Jac. 597. *Johns* and *Bowen.* Palm. 428.

If the Defendant appears by *John Green*, his Attorney, it cannot be aſſigned for Error, that the ſaid *John Green* was dead before the Day of Appearance, becauſe that is againſt the Record.

Cro. Car. 53. *Morris* and *Fletcher*, adjudged upon a Writ of Error in the Exchequer Chamber.

In a Writ of Error upon a Judgment in the Palace Court held *coram Jacobo Duce Ormond*, it cannot be aſſigned for Error, that the Duke was not there, becauſe that is contrary to the Record, though in Fact the Court was held before his Deputy, according to the Patent.

Lev. 76. *Molins* and *Wheatly.* Sid. 94. Keb. 355. S.C.adjudged.

In a Writ of Error upon a Judgment in an Inferior Court, it may be aſſigned for Error, that the Mayor, who was the Judge, had not received the Sacrament, and taken the Oaths, according to the 25 *Car.* 2. *c.* 2. becauſe his Office is made void, and ſo the Proceedings *coram non judice.*

2 Lev. 184. *Hipply* and *Tuck.* 2 Jon. 81. S.C.adjudged.

per Cur', præter Wild. 3 Keb. 606, 665, 721. S. C. adjudged *niſi*; but *vide* 2 Lev. 242. S. P. adjudged *cont'.* 2 Jon. 137.

*4. Of aſſigning that for Error which is for the Party's Advantage.

* Page 220

It ſeems agreed, as a general Rule, that a Man cannot reverſe a Judgment for Error, unleſs he can ſhew that the Error was to his (*a*) Diſadvantage.

5 Co. 39. 8 Co. 59. (*a*) And therefore a Man cannot aſſign Error in Proceſs, or Delay, which is for his own Advantage. F. N. B. 21. 8 Co. 59.———But a Man may aſſign the Want of a Warrant of Attorney of his own Attorney, though it be his own Default. 11 H. 4. 44. Rol. Abr. 760.

5 Co. 39. b. Hence it is, that no Man can have a Writ of Error to reverſe a Fine that took any Eſtate by it; for it would be trifling with the Courts of Juſtice, and unreaſonable to defeat the Eſtate which he accepted by the Fine.

5 Co. 39. b. Moor 74. For the ſame Reaſon, the Conuſor cannot aſſign any Error in the Grant and Render; becauſe by that the Eſtate which paſſed from him by his Conuſance is reſtored to him, and therefore he ſhall not be admitted to defeat the Eſtate which by his own Agreement he accepted.

8 Co. 59. Rol. Abr. 759. Rol. Abr. 759. *Holmes* and *Twiſte*, adjudged, and the Judgment reverſed accordingly. But if the Error be the Default of the Court, though it be for the Advantage of the Party, yet the Party that hath the Benefit by it may aſſign it for Error, for the Courſe of the Court ought to be obſerved.

As if in an Action of Debt it be found, that the Defendant owes the Plaintiff 5 *l.* and the Jury aſſeſs Damages to 2 *d.* and Coſts 2 *d.* and after Judgment is given, that the Plaintiff ſhall recover *debitum & damna prædict'* to 2 *d.* and no Judgment is given for the Coſts, though this is for the Advantage of the Defendant, yet he may aſſign it for Error, becauſe this is the Error of the Court to alter the Manner of Judgments.

8 Co. 59. *Beecher's* Caſe. Cro. Jac. 211. S.C adjudged. 8 Co. 59. Rol. Abr. 759, 760. But where this will be aided by the Statute of Jeofails, *vide* Tit. *Amendment and Jeofail.* So if the Plaintiff in a Suit retracts, by which Judgment is given againſt him, but he is not amerced as he ought; though this is for his own Advantage, yet for that the Amercement ought to be Parcel of the Judgment, and ſo the Judgment is not perfect without it, he may aſſign it for Error.

So in every Caſe where a Judgment is given againſt a Man, in which he ought to be amerced, if he be not amerced, he may aſſign it for Error, though it be for his own Advantage.

Rol. Abr. 760. 5 Co. 59. Cro. Eliz. 84. S. P. adjudged, but for this *vide* Cro. Eliz. 65, 107. Poph. 203. 2 Saund. 47. and Tit. *Amendment and Jeofail.* So if a Man be amerced by Judgments, where he ought to be fined; though this be for his Advantage, yet he may aſſign it for Error; for the Form of the Judgment, which is the Act of the Court, is altered by it.

Rol. Abr. 769. *Bent* and *March per Cur'*. Rol. Rep. 88. S. C. adjudged. 2 Bulſt. 279. 280. S. C. adjudged. 11 Co. 56. a. S. C. adjudged. By which Books it appears, that the Plaintiff before Judgment releaſed his Damages, and had Judgment for the Annuity only, which made it more clear; and ſo it is in Rol Abr. 784. S. C. But if in a Writ of Annuity, the Iſſue be found for the Plaintiff, and no Damages found for him, and Judgment is given according to the Verdict; the Defendant cannot aſſign it for Error, that no Damages were taxed againſt him, becauſe this is for his Advantage; and here the Defect is not in the Judgment, as it is where is a *Capiatur* for a *Miſericordia*, but in the Verdict.

Upon an Iſſue between a Peer of the Realm and another, if the *Venire facias* be *quod ſummoneat* 12 *Liberos & Legales homines*, and does not ſay, * Page 221 * *tam Milites; quam alios*, as the Regiſter is, (*a*) though the Peer of the Realm may aſſign it for Error, yet the other cannot, becauſe it does not concern him.

Rol Abr. 37. between the Earl of *Worceſter* and *Trade*. Saund. 258.

(*a*) Yet this being the Error of the Court may be aſſigned for Error. *Vide* 2

2 Saund. 45. *Williams* and In a Writ of Error brought by the Tenant, it cannot be aſſigned for Error, that the Court awarded a *Grand Cape*, where they ought to have given

given Judgment for the Demandant to recover, becauſe the Award of the *Grand Cape* was only in Delay of the Demandant, and not to the Prejudice of the Tenant, and therefore not by him to be alledged for Error, becauſe not *Ad grave damnum querentis.*

Gwyn, adjudged. 2 Keb. 450, 551, 605. S. C.

5. Where the Matter aſſigned for Error is aided by the Appearance of the Party, and in not being taken Advantage of in proper Time.

A Man ſhall never aſſign that for Error which he might have pleaded in Abatement, for it ſhall be accounted his Folly to neglect the Time of taking that Exception.

Carth. 124. Laid down by *Holt* as a general Rule. Salk. 2. S. P.

As if a Feme Covert bring an Action in her own Name, *per Attornatum*, and the Defendant pleads in Bar to the Action, he ſhall never afterwards aſſign the Coverture for Error.

Carth. 124.

So if a Feme Sole brings Treſpaſs and recovers, and a Writ of Inquiry of Damages is awarded; and before the Return thereof, the Plaintiff takes Huſband; and after the Writ is returned, and Judgment given thereupon, without any Exceptions taken by the Defendant; he ſhall not have Advantage of this in a Writ of Error, becauſe the Writ was only abateable by Plea.

Rol. Abr. 781. *Smith* and *Odyham.*

Alſo if there be an (*b*) Omiſſion of any Writ or Proceſs, or one Writ awarded in Lieu of another; yet if the Judgment be not given thereupon, but after the Party appears and pleads to Iſſue, and Judgment is given upon the Verdict; this is not erroneous, becauſe he had not taken Advantage of this before Pleading to Iſſue.

3 H. 6. 9. Rol. Abr. 779, 780. (*b*) Where an Error in Proceſs is helped by Appearance, *vide* Cro. Eliz. 83, 167. Style 237. Vent. 220, 249. Cro. Jac. 424. Bulſt. 143. Cro. Car. 351. Latch 118.

If a Man in *B.* brings a Bill upon his Privilege, but hath no Writ of Attachment of Privilege; yet if the Defendant after appears and pleads, this ſhall be helped by the Appearance.

Rol. Abr. 780. *Havert* and *Gibbons.* Rol. Abr. 205. S. C. adjudged. 3 Bulſt. 61. S. C.

If a Man be indicted, and no Addition is given to him as there ought, yet if the Defendant appears and pleads to Iſſue, and this is found againſt him, it is helped, for the Addition is ordained by the Statute, that the Party who may happen to be outlawed ought to have Notice of it; and here he hath Notice, and *conſtat de Perſona* by the Appearance.

Rol. Abr. 780. *Johnſon's* Caſe. Cro. Jac. 609. 2 Rol. Rep. 225. S. C. adjudged.

A *Capias* was directed to the Sheriff of *B.* and it was returned by one who was not Sheriff, and this was held a manifeſt Error; but becauſe the Defendant had appeared after and pleaded, it was held not material.

Cro. Eliz. 582. *Thorowgood* and *Sewys*, adjudged.

If upon a Trial between a Peer and common Perſon, the Sheriff does not return a Knight, as he ought, yet if the Array is not challenged for this, the Peer cannot take Advantage of it afterwards; for this is a Privilege only which the Law gives him, and which he may waive if he pleaſe.

Rol. Abr. 781. Lord *Powis* and *Kirtman.*

So

* Page 222 3 H. 4. 6. Rol Abr. 782. Rol. Abr. 783-4. Cro.Eliz.616.

* So if the Sheriff who returns the Panel in an Aſſiſe was Brother to him for whom the Aſſiſe paſſed; yet if the Party does not challenge the Array, it is no Error.

If a Verdict be quaſhable for the Miſbehaviour of the Jury, as for the receiving Evidence of one Part, after Departure from the Bar, which was not given in Evidence at the Bar; if this be not ſhewn in Arreſt of Judgment, no Advantage can be taken thereof in a Writ of Error, for this ſhall not be examined after Judgment.

Cro.Jac..311. *Lovelace* and *Juniper*.

The Writ was in Debt for 40*l.* and the *Capias* and all the Proceſs to the Return of the *Pluries Capias* accordingly, and then the Entry was, that *Querens obtulit ſe in Placito* 40*s.* and upon the Default of the Defendant an Exigent was awarded; and the Defendant after appeared and pleaded, and confeſſed the Action; and this was held no Error, being helped by the Appearance; for as an Appearance ſaves Defaults in meſne Proceſs, ſo it ſaves the Fault of the (*a*) Continuance by an *Obtulit ſe*.

(*a*) Style 209. *Swift* and *Nott*. Keb. 641. Sid. 173. *& vide* Cro. Eliz. 367.

Palm. 270.

If a Writ be brought to the Damage of 40*l.* and the Plaintiff declares *ad damnum* 200*l.* and the Verdict gives 30*l.* this is no Error after Verdict, for the Writ is (*b*) not abated *de facto*, but only abateable by Plea.

(*b*) Here the general Rule to be obſerved is, that where the Writ is *de facto* a Nullity and deſtroyed, ſo that Judgment thereupon would be erroneous, there the Writ is *de facto* abated; as if an Action be brought againſt a Feme Covert as Sole, this makes another Man's Property liable, without giving him an Opportunity of defending himſelf, which would be contrary to common Juſtice; and therefore the Writ is *de facto* abated, for which *vide* Cro. Eliz. 121, 185, 193, 330. Goulſ. 106. 2 Leon. 162. 3 Leon. 93. Rol. Rep. 176. Palm. 311. Hob. 37, 162, 279, 281. Godb. 119. Style 477. Yelv. 56. 3 Co. 85. a. Vaugh 95.——So if the Return of a *Pluries* is laid to be after the Beginning of a Term, and the *Memorandum* of the Bill is entered generally of that Term; this makes the Writ a perfect Nullity, for, by the Plaintiff's own ſhewing, he had no Cauſe of Action at the Time when the Action was brought. Carth. 172.——And in theſe Caſes, which are more than Matters in Form, the Party may move in Arreſt of Judgment, or have Advantage of them by Writ of Error, Jon 304. Cro. Jac. 654. Cro. Eliz. 722.

Sid. 406. *Vaughan* and *Lloyd*. Vent. 7. S. C. adjudged, the *Scire facias* being only in the Nature of meſne Proceſs,

If upon an *Audita Querela* a *Scire facias* be brought bearing Date before the *Audita Querela*, and the Defendant appears, and for this Cauſe demurs; this Fault is cured by the Appearance, for the *Audita Querela* is more of the Nature of a Commiſſion than a Writ; and if the Party be in Court, the Matter ought to be inquired into, without inquiring into the Nature of the Proceſs by which he was brought in.

to bring in the Party to anſwer. 2 Keb. 461.

Sid. 406. Vent. 7. S. P. For this is the Foundation, and *quaſi* an Original; and if an Original ſhould bear Date on a *Sunday*, or other like Defect be therein, it would not be helped by Appearance.

But a *Scire facias* upon a Judgment differs, and a Fault therein will not be cured by Appearance.

Cro. Jac. 651. Sir *George Savil* and *Thornton*. Palm. 306, 311. S. C. adjudged. 2 Rol. Rep. 239. S. C. adjudged. Salk. 4. pl. 10.

If a *Quare Impedit* be brought againſt the Biſhop and Incumbent only, without naming the Patron, though this might have been pleaded in Abatement; yet if the Defendant pleads in Bar, *&c.* it cannot after, upon a Writ of Error, be aſſigned for Error; for though the Want of the Patron's being made a Defendant might make the Writ abateable, yet it was not thereby actually abated; and nothing ſhall be aſſigned for Error concerning the Writ, but what actually abates it.

So, though it be a good Plea for a Defendant to ſay, that a Stranger is Tenant in Common with the Plaintiff; yet if he does not plead it in Abatement, he ſhall not have Advantage of it in Arreſt of Judgment.

* If an Action be brought againſt Sir *Francis Forteſcue Militem et Baronettum*, and he appears and pleads to Iſſue, and a Verdict and Judgment is given for the Plaintiff, the Defendant in a Writ of Error ſhall not aſſign for Error, that he was a Knight of the *Bath*, and ought to be ſo named; for he has loſt this Advantage by appearing to the other Name, and thereby concluded himſelf.

* Page 223 Rol. Abr. 781, 791. *Markham* and Sir *Francis Forteſcue*. Rol. Rep. 450. S. C. adjudged.

If an Alien brings a Real Action as Heir to *J. S.* againſt another, and recovers, the Defendant cannot aſſign for Error, that he was an Alien born, inaſmuch as he did not take this Exception at firſt, as he ſhould have done. Rol. Abr. 782.

Although a Perſon acquitted on an erroneous Indictment or Appeal may be tried again, and cannot plead, that he was acquitted, becauſe his Life was never in Danger on ſuch erroneous Indictment or Appeal; yet if the Error were in the Proceſs only, the Acquittal may be pleaded to a ſecond Indictment or Appeal, becauſe ſuch Error is ſaved by the Appearance. For this *vide* 2 Hawk. P. C. 300, 301, 372.

If a Judgment be given in an inferior Court and no (*a*) Plaint is entred, this is Error, and not aided by the Appearance of the Party; and therefore where by the Record it appeared, that the Defendant (*b*) *ſummonitus fuit*, where the firſt Entry ought to be *A. B. queritur* verſus *C. D. &c.* and Judgment in Debt was reverſed for this Reaſon. Leon. 189, 302. *Knight* and *Savage*. (*a*) Yelv. 158. Rol. Rep. 338. and Salk. 266.

pl. 11. that the Want of a Plaint is the ſame as the Want of an Original in the Common Pleas, which may be certified on alledging Diminution; but in Records out of inferior Courts no Diminution can be alledged, but the Court muſt take them as they find them. (*b*) Cro. Jac. 108.——And that the Court of King's Bench is to take Notice of the particular Laws and Cuſtoms of the Place where Judgment was given. Salk. 269. pl. 17.

6. Where Matters which might have been aſſigned for Error are aided by a Releaſe, and the Conſent of Parties.

If the Plaintiff recovers more Damages than he has declared for, as if he declares for 40 *l.* and the Jury give him 49 *l.* though (*c*) this be Error, yet if before Judgment he releaſes the Overplus, he may take Judgment for the 40 *l.* 10 Co. 115. *Pilfrid*'s Caſe. Where the Plaintiff may releaſe Damages for Part,

and take Judgment for the Reſt, *vide F. N. B.* 107. Moor 281. Leon. 92. 2 Bulſt. 280. Brownl. 235. Style 364. Hard. 58. (*c*) If a Man brings a Plaint in an inferior Court, and in the Declaration ſets forth particular Demands, which over-run the Sum mentioned in ſuch Plaint, though never ſo little, and the Jury give a Verdict according to the Sums mentioned in the Declaration, this is erroneous; for the Plaint in Court is in Nature of a Writ, and is the Original and Foundation of the whole Proceedings; and if the Declaration, Verdict or Judgment are for more than is contained in the Writ or Plaint, and if it be beyond it never ſo little, by the ſame Reaſon they may go to larger Sums *in infinitum*, and then the Plaint or Writ would be no Direction for the future Proceedings of the Court; but in ſuch Caſe the Plaintiff may remit the Overplus. Yelv. 5. Noy 44. 2 Saund. 286.

Alſo where the Jury find greater Damages than the Party declared of, the Court may, to prevent Error, give Judgment for ſo much as the Party declared for, *nullo habito reſpectu* to the Reſt, as well as the Party may releaſe the Overplus, and take Judgment for the Reſt. Yelv. 45.

In an *Ejectione firmæ*, if Part of the Things declared for be well demanded, and others not, and the Plaintiff has a Verdict for the Whole, and intire Damages given, he may releaſe all the Damages in that which is not well demanded, and pray Judgment for the Reſidue; and this helps the Error, if Judgment be given accordingly. Rol. Abr. 786. *Clive* and *Vere*. Cro. Car. 458.

Rol. Abr. 784, 786. *Clifford's* Case. Dyer 369. Cro. Jac. 104. 5 Co. 108. and 10 Co. 130.

As in an *Ejectione Cuſtodiæ terræ & hæredis*, if a Verdict be given for the Plaintiff, the Iſſue being upon the Tenure, and intire Damages given and Coſts, the Plaintiff may relinquiſh the Damages and Coſts, and have Judgment of the Ejectment of the Land only, for that ſuch Writ does not lie for the Body. S. C. cited.

* Page 224 Rol. Abr. 784, 786. *Rhetorick* and *Chappel.* 2 Bulſt. 28. S. C. Cro. Jac. 146. Cro. Eliz. 119. 3 Leon. 128. Style 30. S. P. adjudged.

* So in an *Ejectione firmæ de uno Tenemento*, and ſeveral Acres of Land, upon Not guilty pleaded, if a Verdict be given for the Plaintiff, and intire Damages found where the Action does not lie for the Tenement, for the Uncertainty the Plaintiff may relinquiſh his Damages and have Judgment for the Lands only, without Error.

Rol. Abr. 764. *Aſhford's* Caſe. 2 Saund. 286. Like Point debated.

In a Writ of Debt for 100 *l.* againſt an Executor, if the Plaintiff counts upon an Obligation for 99 *l.* and upon a *Mutuatus* by the Teſtator for 20 *s.* and upon the Iſſue, the Jury find for the Plaintiff in the Whole, and aſſeſs Damages intire, where it appeared no Action lay againſt the Executor upon the *Mutuatus* of the Teſtator; yet if the Plaintiff releaſes the 20 *s.* and all the Damages, and hath Judgment for the Reſidue, this Judgment is not erroneous.

3 Rol. Abr. 784. *Grange* and *Denny.* Rol Abr 363. 3 Bulſt. 174. S.C. adjudged.

In a *Quare Impedit*, If the Jury give Damages and Coſts, where no Coſts ought to be given, for that Statute did not give them, and after Judgment is entred *quod nullo habito reſpectu* of the Coſts, the Court awards that he ſhall recover the Damages, this ſpecial Entry, without any Releaſe of the Coſts, ſhall help the Error.

Hob. 178. Rol. Abr. 785. S. C. Saund. 286. S. C. cited.

If a Bill of Debt be brought againſt an Attorney upon three ſeveral Obligations, and upon Demand of *Over*, it appears by the Condition of one of the Obligations, that the Day of Payment thereof is not yet come; after a Verdict for the Plaintiff, upon Conditions performed pleaded, and Coſts and Damages given, though the Plaintiff cannot have Judgment for this Obligation, of which the Day of Payment is not yet come, yet, upon his Releaſe of Coſts and Damages, he ſhall have Judgment for the other Obligations.

Cro. Jac 104. *Woody's* Caſe.

If in Debt upon the Statute of Uſury it is laid in the Writ, that he *corruptivè* lent 40 *l. &c.* and that he lent 20 *l. &c.* but it is not ſaid *corruptivè*, and the Defendant pleads *Nihil debet*, and it is found againſt him, the Plaintiff ſhall have Judgment as to the 40 *l.* and in this Caſe it was ſaid, that if the Defendant had demurred, the Plaintiff ſhould have had Judgment for this Part.

Raym. 395. *Cutforthy* and *Taylor.*

If in Treſpaſs the Plaintiff declares for taking the Mare of the Plaintiff and ſeveral Goods, but does not ſay of the Plaintiff, and thereupon the Defendant demurs, the Plaintiff may have Judgment for the Mare, and releaſe the Action for the Reſt.

Rol. Abr. 785 *Barber* and *Pomrey*, adjudged; *cont.* Juſtice *Jermin.* Style 175. S.C. 2 Saund. 286. Like Point upon Demurrer debated.

In an Action of Debt for 10 *l.* if the Plaintiff declares upon a Leaſe for Years, rendring Rent at certain Feaſts, and concludes *& quia* 10 *l.* of the ſaid Rent, for ſuch a Time ending at ſuch a Feaſt, *&c.* he brought this Action, where it appears by the Declaration, that there was 4 *s.* wanting of the 10 *l.* ſo that the Rent in Arrear amounted but to 9 *l.* 16 *s.* and thereupon the Defendant pleads *Nihil debet*, and upon this there is a Verdict for the Plaintiff, and Damages and Coſts given; though the Demand be intire, *ſcilicet* of 10 *l.* and it appears by the Plaintiff's own ſhewing, that he had no Cauſe of Action for the Whole; yet the

Plaintiff may releaſe the 4 *s.* and Damages, and take Judgment for the Reſt. but no Judgment given, & *vide All.* 29.

If in Treſpaſs for an Aſſault, Battery, and taking his Corn, the Defendant juſtifies as to the Battery in Defence of his Corn, upon which there is a Demurrer, and pleads Not guilty as to the Corn, upon which Iſſue is joined, and found for the Plaintiff, and Damages taxed thereupon; the Plaintiff may relinquiſh the Demurrer, and pray Judgment on the Verdict, and this will not be Error. Rol. Abr. 785. *Vaſtman* and *Rowe.*

In Treſpaſs for a Battery againſt two, if one pleads Not guilty, and the other pleads a ſpecial Plea; and upon this a Demurrer by the Plaintiff, and it is adjudged for the Plaintiff, (*a*) he may relinquiſh his Action againſt the other, and have his Writ to inquire of the Damages againſt him. Rol. Abr. 785. *Starr* and *Cuckow.* * Page 225 (*a*) For this *vide* 2 Rol. Abr. 100.

In an Action of Treſpaſs, if there be three Iſſues joined, *ſcilicet*, one Not guilty to Part; the ſecond upon a Preſcription for common; the third, whether the Beaſts *raptim momorderunt* in going to take the Common; and the Jury find the firſt Iſſue for the Plaintiff, and the ſecond Iſſue for the Defendant; but did not inquire of the third Iſſue; the Plaintiff relinquiſhing the third Iſſue may pray Judgment for the firſt Iſſue, and this ſhall prevent any Error. Rol. Abr. 785. *Brown* and *Stephens.*

If a *Venire facias* be awarded to the Coroners, where it ought to be to the Sheriff, or the *Viſne* cometh out of a wrong Place, if it be *per* (*b*) *aſſenſum partium*, and ſo entred of Record, it will ſtand good. Co. Lit. 125. a. (*b*) If by Conſent the Defendant on a *Capi Corpus* appears by Attorney, this is no Error. 21 E. 4. 77. b. Rol. Abr. 787.——So if the Defendant appears by Attorney upon the Exigent by Conſent, this is not Error. 7 H. 6. 21. Rol. Abr. 787. for the Rule herein is *Conſenſus tollit errorem*, for which *vide* ſeveral Caſes in 5 Co. 40. 2 Rol. Rep. 21. Godb. 428. Noy 107.

Upon this Rule it hath been (*c*) adjudged, that an Action in its own Nature local may, by the (*d*) Conſent of Parties, be tried in a different County; ſo (*e*) if it be doubtful in which of two Counties the Action did ariſe, it may be tried by a Jury from both Counties; and this being done by Aſſent can be no Error. (*c*) 44 E. 3. 6. 44 Aſſ. 4. Rol. Abr. 787. Rol. Rep. 166. Palm. 100. Raym. 372. 2 Jon. 199. (*d*) But the Conſent muſt be entred on Record, otherwiſe it is Error; for which *vide* Hob. 5. Rol. Abr. 787. Bulſt. 216. Cro. Eliz. 664. Hob. 266. 5 Co. 40. Dyer 284. Sid. 339. (*e*) 7 H. 6. 21. Rol. Abr. 787. S. C.

(L) What Defence the Defendant in Error may make, and herein of pleading a Releaſe.

THE Defendant in Error may plead (*f*) a Releaſe of all Errors, or a Releaſe of all (*g*) Suits, and theſe Pleas, if found for him, will for ever bar the Plaintiff in Error. (*f*) 9 H. 6. 48. Rol. Abr. 788.—The Defendant in pleading a Releaſe muſt lay a *Venue*.——But tho' it be ill pleaded, yet if there are not Errors, the Judgment will be affirmed. Salk. 268. pl. 15. 270 pl. 18. 3 Salk. 399 pl. 3. 6 Mod. 113, 206. 2 Ld. Raym. 1005. (*g*) Latch 110. *Cole's* Caſe reſolved *per Cur'*.

So

Co Lit. 288. b
8 Co. 152.
Rol Abr. 788.
2 Rol. Abr. 405.

So where by a Writ of Error the Plaintiff ſhall recover, or be reſtored to any Perſonal Thing, as Debt, Damage or the like, a Releaſe of all Actions Perſonal is a good Plea; and when Land is to be recovered or reſtored in a Writ of Error, a Releaſe of Actions Real is a good Bar; but where by a Writ of Error the Plaintiff ſhall not be reſtored to any Perſonal or Real Thing, a Releaſe of all Actions Real or Perſonal is no Bar.

9 H. 6. 46.
Rol. Abr. 747, 788.
Dyer 90. a.
3 Lev. 36.
Hutchinſon's Caſe.

Alſo if a Man loſes in a Real Action, and he releaſes all his Right to the Land, this ſhall bar him of his Writ of Error, for no Perſon can bring a Writ of Error to reverſe a Judgment that is not intitled to the Land, &c. for the Courts of Law will not turn out the preſent Tenant, unleſs the Demandant can make out a clear Title, Poſſeſſion always carrying with it the Preſumption of a good Title till the right Owner appears.

Cro. Eliz. 469.
Rol. Abr. 789.
* Page 226

Hence it is, that if a Man releaſes all his Right to the Land of which a Fine was levied, he has thereby barred himſelf of his Writ of Error; * for his Releaſe having for ever excluded him from the Land, he can have no Writ of Error, becauſe no Body is intitled who cannot have the Land of which the Fine was erroneouſly levied.

Rol. Abr 788.
Cro. Eliz. 46.
Moor 413.
Owen 22 S. C.
Wright and the Mayor of *Wickham*.

So it is if a Fine be levied of 120 Acres of Land, and he, that has Right to a Writ of Error, makes a (*a*) Feoffment of the whole, he ſhall never reverſe the Fine; but if the Feoffment had been made, or a Releaſe had been given of twenty Acres only, he might yet have a Writ of Error to reverſe the Fine as to 100 Acres, becauſe he has not transferred his Right as to thoſe, and therefore may be re-inſtated if the Fine be erroneous.

(*a*) A Leaſe for Years of the Land is a Suſpenſion of the Writ of Error for the Time. Lev. 72. *per Cur.* Keb. 350. Bridgm. 57.——But a Feoffment is an Extinguiſhment thereof. Lev. 72. *per Cur.* & *vide* Godb. 26. 4 Leon. 135, 221. Palm. 247. Co. 112. Bridg. 57.

Rol. Abr. 788.
Hart's Caſe.
Noy 59. S. C. and there ſaid the Fine was not pleaded, becauſe not ingroſſed, and the Ingroſſing was ſtaid on Purpoſe by the Conuſee.

If an Infant brings a Writ of Error to reverſe a Fine for his Nonage, and his Nonage after Inſpection is recorded by the Court; but before the Fine reverſed, he levies another Fine to another, this ſecond Fine ſhall hinder him from reverſing the firſt, becauſe the ſecond having intirely barred him of any Right to the Land, muſt alſo deprive him of all Remedies which would reſtore him to the Land.

Rol. Abr. 788.
Carrington's Caſe.
Cro Eliz. 151.
2 Leon. 211.
Moor 366
Rol. Rep. 306.
Bridg. 77.

But if Tenant in Tail levies an erroneous Fine with Proclamations, and then levies a ſecond Fine, which is alſo erroneous, and dies; if the Iſſue in Tail brings a Writ of Error to reverſe the firſt Fine, the Defendant may plead in Bar the ſecond Fine; for tho' there be Error in the ſecond, yet till that appears judicially to the Court, it muſt be looked upon as a Fine duly levied, and conſequently a Bar to the Plaintiff, becauſe while the ſecond ſtands in Force, he cannot have the Land; but if in this Caſe the Plaintiff brings another Writ of Error to reverſe the ſecond Fine, and the Defendant pleads in Bar the firſt Fine, the Plaintiff may reply upon the firſt Writ of Error that the ſecond Fine was erroneous, and upon the ſecond Writ that the firſt Fine was erroneous, and ſo be relieved againſt both, for here the Examination of both Fines comes judicially before Court; and if there appears any Error, the Court will ſet them aſide, and not ſuffer them to ſtand in the Way of the Plaintiff's Right.

2 Jon. 181.
Cockman and *Farrer*.
Raym. 461.
Vent. 353.
2 Sid. 92.

But in a Writ of Error to reverſe a Fine, the Defendant cannot plead the ſame Fine now endeavoured to be reverſed, and five Years in Bar of the Writ of Error, no more than in a Writ of Error to reverſe an Outlawry can that Outlawry be pleaded in Bar of the Writ of Error, *Quia non valet exceptio iſtius rei cujus petitur Diſſolutio.*

So

So if a Fine be levied of Land in Ancient Demeſne, the Lord may reverſe it after five Years expired; but if a ſecond Fine had been levied, the Lord ſhould be barred of his Writ of Diſceit after five Years from the ſecond Fine, for a Fine of Ancient Demeſne is not originally within the Courts of *Weſtminſter*, and the Statute in relation to the Bar does not extend their Juriſdiction; but when a Fine is levied of Ancient Demeſne, it comes within the Conuzance of the King's Courts till the Fine be reſerved, and by Conſequence they have a Juriſdiction of it, and ſo the Fine becomes a Bar.

2 Inſt. 518. 2 Bulſt. 244. Cro. Jac. 333. Rol. Rep. 36. Raym. 462. Jon. 181.

If a Man (*a*) outlawed upon a *Rediſſeiſin* releaſes all Actions to the Recoverer, yet he may have a Writ of Error of the Outlawry, becauſe that this does not belong to the Party, but to the King in Intereſt, and * he may aſſign Error in the Judgment of the Rediſſeiſin to reverſe the Outlawry.

* Page 227 11 H. 4. 6. 94. Rol. Abr. 788.

(*a*) Where a Man is outlawed in a Perſonal Action by Proceſs upon the Original, and brings Error; a Releaſe of Actions Perſonal is no Bar, becauſe he is to be reſtored to nothing againſt the Plaintiff, though when by the Outlawry he forfeited all his Goods to the King, he ſhall be reſtored to them and to the Law, ſo as to be of Ability to ſue. Co. Lit. 288. b. 8 Co. 152. a.

If the Tenant pending a *Præcipe* againſt him aliens in Fee, and (*b*) after Judgment is given againſt him, and he brings a Writ of Error; this Feoffment is not any Bar to the Writ, becauſe he was privy to the Judgment after.

Rol. Abr. 788. Bridg. 77. Rol. Rep. 306.

(*b*) So if the Tenant pending a *Præcipe* againſt him aliens in Fee, and re-purchaſes for Life, and after Judgment is given againſt him, he ſhall have a Writ of Error, and his Feoffment is no Bar. Rol. Abr. 748, 788.——So after his Death his Heir ſhall have a Writ of Error, becauſe of the Privity. Rol. Abr. 788.

In a Writ of Error to reverſe a common Recovery, it is no good Plea, that the Plaintiff pending the Writ of Error hath entered into Part, for before the Poſſeſſion was taken from him, he might have Error to reverſe the Judgment, though not to have Reſtitution.

Lev. 72. *Winn* and *Lloyd*.

In a *Scire facias* againſt a Tertenant, he may plead a Releaſe of Error, though he be not privy to the Judgment.

9 H. 6. 48. Bro. 9. S. C.

But the Tertenants cannot plead (*c*) in Abatement of the Writ of Error, but only in Bar as a Releaſe, *&c.* in Maintenance of their Title.

Lev. 72.

(*c*) Where a *Scire facias* is awarded generally againſt the Tertenants, without naming them, and ſeveral are returned warned, and appear, one may plead Non-tenure to diſcharge himſelf, though not to abate the Writ as to the reſt; as might be done, if all were named in the Writ, for which *vide Holland* and *Jackſon*. Bridg. 72. Rol. Rep. 301, *&c.* Cro. Eliz. 739. Palm. 123, 227.

In a Writ of Error againſt the Heir of the Recoverer within Age, and a *Scire facias* againſt the Tertenants; if the Parol demurs for the Heir, and the Judgment is reverſed againſt the Tertenant; yet at full Age the Heir may plead the Releaſe of the Demandant of the Right, or of the Errors, and bar him.

9 H. 6, 48. Rol. Abr. 766.

(M) Of the Judgment to be given on the Writ of Error: And herein,

1. Where, on the Writ of Error, Part only, or the whole Judgment, ſhall be reverſed.

A Judgment being an intire Thing (*c*) cannot regularly be reverſed for Part, and affirmed for Part; as (*d*) in a *Formedon de uno Croſto*, Meſſuage, &c. if the Demandant recovers, and in a Writ of Error it is adjudged, that a *Formedon* does not lie of a *Croft*, the Judgment for the Reſidue ſhall be reverſed alſo, becauſe the Writ is not good, in as much as there cannot be a good Judgment upon a bad Writ.

(*c*) For this *vide* Moor 366 Noy 117. 2 Leon. 178. Cro. Eliz. 425. 2 Sid. 57, 94. 2 Rol. Rep. 136. Sid. 357. 2 Jon. 374. Carth. 235. Rol. Abr. 774. S. C.

(*d*) *Ellis* and *Wallis*, Rol. Rep. 2. 2 Bulſt. 214. Allen 74.

Rol. Abr. 775. *& vide* Allen 43. Yelv. 209.

So in an Action of Treſpaſs againſt three, if one dies (*e*) pending the Writ, and yet Judgment is given againſt all three, in a Writ of Error upon this Judgment, the whole Judgment ſhall be reverſed, becauſe it is intire, though the Writ by the Death abates but againſt one.

(*e*) But *vide* 17 Car. 2. c. 8. by which it is enacted, that in all Actions Real, Perſonal or Mixed, the Death of either Party between the Verdict and Judgment ſhall not be alledged for Error, ſo as ſuch Judgment be entred within two Terms after the Verdict, & *vide* Sid. 385.———[And the Stat. 8 & 9 W. 3. *c.* 11. *ſ.* 7. the Death of one Plaintiff or Defendant, where there is another ſurviving, ſhall not abate the Suit, and ſuggeſting the Death, it cannot be alledged for Error.]

* Page 228

Rol. Abr. 775-6. *Eltonhead* and *Deerman*. Allen 74. S. C. cited. Vent. 27. 2 Keb. 506, 545. Like Point; but for this *vide* 16 & 17 Car. 2. c. 8. where this is aided, Tit. *Amendment* and *Jeofail*.

* In an Action of Debt upon a Bill, and upon a Contract upon an *Emiſſet*, if the Defendant pleads *Non eſt factum* as to the Bill, and *Nil debet* as to the Contract, and both are found by Verdict againſt the Defendant, and Judgment againſt the Defendant *quod Capiatur* ‡ for denying his Deed; and it is not alſo *quod ſit in Miſericordia* as to the Contract, as it ought to be, and intire Damages given, and a Writ of Error is brought; for this the whole Judgment ſhall be reverſed, *ſcilicet*, as well the Judgment upon the Bill as for the Contract.

‡ *Capiatur pro Fine*, taken away, and other Proviſions in lieu thereof. 5 *W. & M.* c. 12.

Rol. Abr. 776. *Bird* and *Orms*. Cro. Jac. 289. S. C. and S. P. adjudged, Allen 74, 75. S. C. cited and S. P. adjudged, Style 121, 125, 406. S. P. adjudged.

In a Writ of Error upon a Judgment in Treſpaſs againſt ſeveral, if the Judgment be erroneous, becauſe one of the Defendants was within Age, and appeared by Attorney, the Judgment ſhall be reverſed *in toto* againſt all.

Rol. Abr. 776. *Hayward* and *Williams*, adjudged.

If an Action be brought againſt *A.* as a Feme Sole, where ſhe is Covert, and againſt *B.* and *C.* and they all plead to Iſſue, and *A.* as a Feme Sole, and Judgment is given againſt them all accordingly; in this Caſe the Baron of *A.* with *A. B.* and *C.* may join in Error, and aſſign for Error the Coverture of *A.* and thereupon the Judgment ſhall be reverſed for all, becauſe it is intire.

If in Debt for Rent on two ſeveral Demiſes, and on the firſt the Demiſe and Reſervation are laid right; but as to the ſecond, the Demiſe is with a Reſervation of Rent *ſecundum ratam* 18*l. per Ann.* which is a void Reſervation, becauſe no certain Time or Day being appointed for Payment, it would ſubject the Leſſee to an Action of Debt every Hour, (*a*) tho' the Error be only in the ſecond Demiſe; yet the Judgment being intire muſt be reverſed *in toto*. Carth. 234-5. *Parker* and *Harris*, adjudged in *B. R.* and the Judgment given on Demurrer in *C. B.* reverſed accordingly.

4 Mod. 76. Salk. 262. pl. 2. 2 Vent. 249, 270. S. C. (*a*) So where *A.* brought an Action on the Caſe againſt *B.* for Words ſpoken of him, and for cauſing him to be indicted, *&c.* and the Jury found for the Plaintiff as to both, and intire Damages given; yet, it being afterwards held that the Words were not actionable, the Judgment was reverſed *in toto*; but for this *vide* Cro. Jac. 424. Hob. 6. Rol. Rep. 24. Cro. Jac. 343. Allen 75. Rol. Abr. 775. Vent. 27, 40.

But in a Writ of Dower, if the Plaintiff recovers by Default, and upon this a Writ is awarded to the Sheriff or Bailiff, where the Recovery is to deliver to the Plaintiff *tertiam partem per Metas*, and to inquire of the Value by the Year; and how much Time is paſt after the firſt Demand of Dower, and what Damages ſhe hath ſuſtained; and upon this the Sheriff or Bailiff returns, that he had delivered the third Part of the Lands, and the Value found by the Jury to 30*l. per Annum*, and that two Years are paſt after the firſt Demand and Damages 50*l.* and thereupon Judgment is given accordingly to hold in Severalty the ſaid third Part, and to recover the ſaid Damages: In this Caſe, tho' the Judgment is not good as to the Damages, in as much as it is not averred, that the Huſband of the Plaintiff died ſeiſed, (as the Uſe is) nor is it ſo found by the Jury; nor was it ſo commanded by the Writ to be inquired, by which the Judgment as to this is erroneous, yet it ſhall be reverſed only as to this, and ſhall ſtand as to the Recovery of the third Part of the Land. Rol. Abr. 776. *Tie* and *Atkins*.

So in an Action of Account, if Judgment be given *quod computet*, and after Auditors are aſſigned, and upon the Account, Judgment is given againſt the Defendant, and Damages and Coſts, and after a Writ of Error is brought upon both Judgments, and thereupon the laſt Judgment only is found to be erroneous; in this Caſe the laſt Judgment only ſhall be reverſed, and not the firſt Judgment; but this ſhall ſtand in Force, for * theſe are two diſtinct Judgments, and perfect; for the firſt Judgment is *Ideo Conſideratum eſt quod computet & Defendens in Miſericordia.* Cro. Eliz. 776. *Williams* and *White*. Cro. Eliz. 806. S. C. adjudged. * Page 229

If a Judgment be given againſt Executors in an Action of Debt, and after a *Scire facias* Judgment is given againſt them, to have Execution of their proper Goods, and a Writ of Error is brought upon both Judgments; in this Caſe, if the firſt Judgment be good, and the laſt erroneous, the laſt Judgment only ſhall be reverſed, and the firſt Judgment ſhall ſtand. 5 Co. 32. *Pettifer's* Caſe, & *vide* Rol. Abr. 776.

But if a Man recovers in Debt upon a Judgment, if the firſt Judgment be reverſed, the ſecond Judgment ſhall alſo. 43 E. 3. 3 Rol. Abr. Sid. 253. S. P.

and the Court took Time to adviſe, whether, by the Reverſal of the firſt Judgment, the other was not *ipſo facto* void. Palm. 187. *per Doddridge*. The Reverſal of the firſt Judgment does not reverſe the ſecond, but defeats it, ſo that the Plaintiff ſhall have no Fruit thereof. *Palm.* 303. S. P. *per Chamberlain* Juſtice.

After a Recovery in a Rediſſeiſin, if the firſt Judgment be reverſed, the Judgment on the Rediſſeſin ſhall be reverſed alſo. 8 Co. 143. Rol. Abr. 777.

By the Reverſal of the original Judgment, the Outlawry depending thereupon ſhall alſo be reverſed. Rol. Abr. 777. but by the Reverſal of the Outlawry, the original Judgment ſhall not be reverſed. Rol. Abr. 777. 2 Brownl. 39. S. P.

If a Man recovers in an Annuity, and in a *Scire facias* thereupon afterwards, and the Judgment upon the *Scire facias* is after affirmed in a Writ 11 H. 4. 48. Rol. Abr. 777.

of

of Error; yet if the firſt Judgment of the Annuity be reverſed, the other ſhall be alſo.

8 Co. 143. Rol.Abr.777. If a Man recovers upon an Original, and hath another Judgment in a *Scire facias*, if the firſt Judgment be reverſed, the other ſhall be alſo reverſed.

26 E. 3. 75. Rol.Abr.777. If a Man recovers in a *Quare Impedit*, and hath a Writ to the Biſhop, and after recovers againſt the Biſhop in a *Quare non admiſit*, and after the Judgment in the *Quare Impedit* is reverſed, the Judgment in the *Quare non admiſit* ſhall be alſo reverſed by this, though this was for the Contempt to the King.

Rol.Abr.777. If the Demandant recovers againſt the Tenant, and the Tenant againſt the Vouchee, if the Heir of the Vouchee reverſes the Judgment of the Value, becauſe the Vouchee was dead at the Judgment rendered; this ſhall reverſe the Judgment againſt the Tenant alſo.

9 Co. 119. Rol.Abr.777. If the Principal be outlawed of Felony, and the Acceſſary attainted and executed, and after the Principal reverſes the Outlawry, and is indicted, and found not guilty of the Felony; by this Reverſal and Acquittal, the Attainder againſt the Acceſſary is annihilated, for his Heir may have a *Mortdanceſtor*, it ſeems, becauſe he hath no Remedy by Writ of Error, or otherwiſe, to reverſe it, for this depends upon the Principal.

8 Co. 142. 143. 5 Co. 90, b. Rol.Abr.777. If the Conuſee of a Statute recovers in Detinue by erroneous Judgment againſt the Garniſhee, and ſues Execution; if the Garniſhee in a Writ of Error reverſes the Judgment given in the Detinue, yet the Execution is not reverſed by this, becauſe it is a collateral Thing executed.

Leon. 317. Co. 76. b. Hob. 278. Cro.Eliz.115. 124. 2 Leon. 108. Moor 565. 2 Jon. 182. If an Infant and one of full Age join in a Fine, and the Infant after brings Error for the Reverſal thereof, it ſhall be reverſed *quoad* the Infant only.

If Huſband and Wife join in a Fine when they are of full Age, it ſhall bind them both; but if the Feme be within Age, they may
* Page 230
* join in a Writ of Error to reverſe it *(a)* during the Minority of the Wife.

F. N. B. 21. Leon. 115.

(*a*) By the Opinion of ſome Books, the Fine ſhall be reverſed *in toto*, both againſt the Huſband and Wife; as Cro. Eliz. 129. Leon. 115. Owen 21.—But by others, the Writ of Error ſhall reverſe the Fine as to the Wife, but no Execution ſhall be awarded during the Life of the Huſband. Bro. Tit. *Fines* 29. Tit. *Error* 28. Leon. 116.——And accordingly in 3 Lev. 36. *Hutchinſon*'s Caſe, a *Vacat* was entered *quoad* the Wife only.

Rol.Abr.775. F. N. B. 98. Cro.Eliz 469. Jon. 374. 2 Jon. 182. If a Fine be levied of Land of which Part is guildable and Part Ancient Demeſne, and as to that which is Ancient Demeſne, the Fine is reverſed by Writ of Diſceit, yet the Fine ſhall ſtand for the Reſidue; for a Mark ſhall be made on the Fine, in the Nature of a Cancelling of that which is Ancient Demeſne only.

2. What Judgment ſhall be given on the Reverſal of the firſt.

Cro.Car.442. Rol.Abr.774. 2 Saund. 256. Carth. 253, 254. Salk. 262. pl. 2. 263. pl. 4. If Judgment be given againſt the Defendant, and he brings a Writ of Error, upon which the Judgment is reverſed, the Judgment ſhall only (*b*) be *quod Judicium reverſetur*; for the Writ of Error is brought only to be eaſed and diſcharged from that Judgment.

But

See Ld. Raym. 97. 5 Mod. 228. Comb. 393. 12 Mod. 105. (*b*) If the Error be Error in Fact, and not in the Record, as for Infancy, the Judgment ſhall be *quod pro errore prædicto Judicium prædictum*

But if Judgment be given againſt the Plaintiff, and he brings a Writ of Error, the Judgment ſhall not only be reverſed, but the Court ſhall alſo give ſuch Judgment as the Court below ſhould have given; for the Writ of Error is to revive the firſt Cauſe of Action, and to recover what he ought to have recovered by the firſt Suit, wherein erroneous Judgment was given. Rol. Abr. 774, 805. S. P. Cro. Car. 442. Yelv. 47. 2 Saund. 256, 317. Show. Parl. Cases 57. Salk. 262. pl. 2. Carth. 243, 254. S. P. Ld. Raym. 5, 217. 4 Mod. 106. Skin. 447. pl. 5. Salk. 403. pl. 15.

As in an Action upon the Caſe for Words, if Judgment be given againſt the Plaintiff, that the Words are not actionable, upon which the Plaintiff brings a Writ of Error, and thereupon the firſt Judgment is reverſed, becauſe the Words are actionable; the Court, after Reverſal of the firſt Judgment, ought to give Judgment, that the Plaintiff ſhall recover; for this Court ought to give the ſame Judgment that the firſt Court might have done. Rol. Abr. 774. *Hopkins* and *Chele*. Cro. Car. 509. S. P. and Judgment given accordingly.

So in an *Ejectione firmæ*, upon Not guilty pleaded, Iſſue is joined, and a Special Verdict found, and upon this Verdict Judgment given againſt the Plaintiff, and after the Plaintiff brings a Writ of Error, and in this the Judgment is reverſed, the Plaintiff ſhall have Judgment, and recover his Term, his Declaration being good, and the Law being for him upon the Special Verdict; for the Court that reverſes the firſt Judgment ought to give the ſame Judgment which ought to have been given in the firſt Suit. Rol. Abr. 774. *Omulcunrie* and *Ayres*. Cro. Car. 512. adjudged upon a Writ of Error out of *Ireland*.

If in an Action of Waſte in the *Huſtings* in *London*, Judgment is given for the Defendant, and after upon a Writ of Error brought before Commiſſioners in *St. Martins*, according to the Cuſtom of the City, that Judgment is reverſed, the Commiſſioners ſhall give the ſame Judgment as before ought to have been given; for the Cuſtom of Proceeding in *London* ſhall be intended according to the Common Law, if no Precedent appear to the contrary. Lev. 310. *Cole* and *Green*. 2 Saund. 256. S. C. adjudged, and afterwards affirmed in Parliament.

* In Replevin *in Banco*, the Defendant pleaded a Leaſe made 1 *Octob. &c.* and avowed for Rent reſerved thereupon; and the Plaintiff, in Bar thereof, pleaded *Non dimiſit* 1 *Octob. &c. modo & forma*; upon which Iſſue being joined, it was found for the Plaintiff, and Judgment for him, and the Defendant brought Error in *B. R.* and it was agreed to be an immaterial Iſſue, and the Judgment erroneous, and yet that the Court could not award a Repleader, as the Common Pleas might have done (and as the Antient Uſage was, but diſuſed for one hundred Years); and there being groſs Faults in the Avowry, it was ſaid, that if they reverſed the Judgment, perhaps they muſt give Judgment upon the Declaration for the Faults in the Avowry. *Page 231 2 Lev. 11, 12. *Holbeach* and *Bennet*. 2 Saund. 317, 319. S. C. and S. P. as to the Repleader agreed, but *Hale* contra *Twiſden* held the Iſſue was aided by the Statute of Jeofails, and ſaid, the Judgment could not be reverſed for the Faults in the Avowry; and the Judgment was affirmed.

In Treſpaſs brought in *B. R.* Judgment was given for the Defendant upon his Demurrer to the Plaintiff's Replication, and he brought Error in the Exchequer-Chamber; and this Judgment was reverſed, and Judgment given *quod recuperet*; and after the Record being remanded, a Writ of Inquiry Cro. Jac. 206. *Faldoe* and *Rudge*, adjudged. Yelv. 74, 76.

prædictum revocetur, without ſaying, *& aliis in Recordo*. Rol. Abr. 805.—If Judgment be affirmed in *B. R.* upon a Writ of Error, the Judgment ſhall be *quod Judicium Redditum remanebit ſtabile in perpetuum*. 21 E. 4. 44. Rol. 805.

Noy 129. S. C. adjudged.

quiry of Damages was awarded, and upon the Return thereof, Judgment given, that the Plaintiff ſhould recover the Damages found for him, tho' the Statute 27 *Eliz. c.* 8. mentions only the returning of the Record, and that Execution ſhall be intended, therefore that all ſhall be done that is neceſſary in order thereto.

(*a*) Carth. 319. Skin. 514.

But in the Caſe of (*a*) *Phillips* and *Bury*, where the Houſe of Lords reverſed the Judgment that was given in *B. R.* on a Special Verdict, there the Houſe of Lords gave a new Judgment, which was executed accordingly, on Refuſal of the *B. R.* to give a contrary Judgment to what they had given before, although it was objected that they could not, having a Tranſcript only, and not the Record itſelf, before them.

4 Inſt. 270. F. N. B. 19. Skin. 515. S. C. cited.

If in a Writ of Right Cloſe in Antient Demeſne, the Demandant makes his Proteſtation to ſue in Nature of a *Mortdanceſtor*, and the Tenant pleads in Abatement, and Judgment given for him; and after, upon falſe Judgment brought, the Writ is affirmed good, the Court of Common Pleas ſhall proceed as the inferior Court ſhould have done.

3. To what the Parties ſhall be reſtored on the Reverſal of the firſt Judgment.

8 Co. 142. b.

If a Man recovers by erroneous Judgment, and by Virtue thereof preſents to a Church, or enters into the Perquiſite of his Villein; and after the Judgment is reverſed, theſe collateral Things executed ſhall not be deveſted thereby; but collateral Things executory are as (*b*) if no Judgment had ever been when reverſed.

(*b*) In an Aſſiſe, if the Tenant loſes by Verdict, he ſhall be reſtored to the Lands, if it be reverſed in a Writ of Error. 8 H. 6. 2. Rol. Abr. 778.——So he ſhall be reſtored to the meſne Iſſues. 8 H. 6. 2. So if the Tenant loſes in a Writ of Entry *ſur Diſſeiſin*, and after it is reverſed for Error, he ſhall be reſtored to the meſne Iſſues. Rol. Abr. 778.

8 Co. 19,143. Rol. Abr. 778. Cro. Eliz. 278. Moor 573 & *vide* Leon 96. 3 Leon. 89. Goab. 27.

If a Man recovers Damages, and hath Execution by *Fieri facias*, and upon the *Fieri facias* the Sheriff ſells to a Stranger a Term for Years, and after the Judgment is reverſed, the Party ſhall be reſtored only to the Money for which the Term was ſold, and not to the Term itſelf; becauſe the Sheriff had ſold it by the Command of the Writ of *Fieri facias*.

Goulſ. 103. Cro. Jac. 246.

* Page 232 5 Co 90. *Hee's* Caſe. Rol. Abr. 778. S. C. cited. Cro. Eliz. 278.

* But if the Goods of an Outlawed Man are ſold by the Sheriff upon a *Capias Utlagatum*, and after the Outlawry is reverſed by Writ of Error, he ſhall be reſtored (*c*) to the Goods themſelves, becauſe the Sheriff was not compellable to ſell thoſe Goods, but only to keep them to the Uſe of the King.

S. P. adjudged, where a Termor being outlawed upon the Statute of Recuſancy, the Lord Treaſurer and Barons of the Exchequer ſold the Term. (*a*) If the King grants over the Land of a Perſon outlawed for Treaſon or Felony, and afterwards the Outlawry is reverſed, the Party may enter on the Patentee, and needs neither to ſue a Petition to the King, nor a *Scire facias* againſt the Patentee. 2 Hawk. P. C. 462.

Rol. Abr. 778. Cro. Jac. 246. Yelv. 179. Brownl. 107, 108. S. P. adjudged.

If a Man recovers Damages in a Writ of Covenant, as the particular Caſe was, againſt *B.* and hath an *Elegit* of his Chattels, and of the Moiety of his Lands; and the Sheriff upon this Writ delivers a Leaſe for Years of Land which *B.* had, to the Value of 50 *l.* to him that recovered, *per rationabile pretium & extentum* (as the Words were) to have as his own Term, in full Satisfaction of 50 *l.* Part of the Sum recovered; and after *B.* reverſes

verſes the ſaid Judgment, he ſhall be reſtored to the ſame Term, and not to the Value; for though the Sheriff might have ſold the Term upon this Writ, yet (*b*) here is no Sale to a Stranger, but a Delivery of the Term to the Party that recovered, by Way of Extent, without any Sale; and therefore the Owner ſhall be reſtored.

(*b*) That it would be otherwiſe if ſold to a Stranger. Yelv. 108. Brownl. 107, 108.

And for the ſame Reaſon, if Perſonal Goods were delivered to the Party *per rationabile pretium & extentum*, upon the Reverſal of the Judgment, he ſhould be reſtored to the Goods themſelves. Rol. Abr. 778.

If in Debt upon an Eſcape * the Plaintiff recovers, and hath Execution, and after, the firſt Judgment is reverſed; yet the Judgment for the Eſcape remains in Force. 8 Co. 142. b. 3 Mod. 325. S. C. cited.

* This muſt mean of a Priſoner in Execution.

But if an Action of Eſcape be brought againſt the Sheriff, and the Judgment upon which it is founded is reverſed, before ſuch Time as the Defendant is forced to plead, he may plead *Nul tiel Record*. 8 Co. 142. a.

But there is a Diverſity between a Recovery by prior Title, and a Reverſal of a Judgment by Writ of Error; as if a Woman hath Judgment and Execution in Dower in Antient Demeſne, and it is after reverſed in a Writ of falſe Judgment; and becauſe ſhe had held the Lands for two Years between the firſt Judgment and Reverſal, the Value of the Land is inquired, and taxed at twenty Marks in a *Scire facias* againſt her, ſhe cannot plead a Recovery in a Writ of Right Cloſe in Nature of a *Cui in vita*. 8 Co. 143. a.

If an Advowſon comes to the King by Forfeiture upon an Outlawry, and the Church becoming void, the King preſents, and then the Outlawry is reverſed; yet the King ſhall enjoy that Preſentment, becauſe the Preſentment there came to the King as the Profit of the Advowſon. Moor 269. *Beverly* and *Cromwal.*

But if a Church be void at the Time of the Outlawry, and the Preſentation is thereby forfeited, as a Chattel principally and diſtinct of itſelf, there, upon the Reverſal of the Outlawry, the Party ſhall be reſtored to the Preſentation. Moor 269. agreed *per Curiam.*

If a Termor, being outlawed for Felony, grants over his Term, and after the Outlawry is reverſed, the Grantee may have Treſpaſs for the Profits taken between the Reverſal of the Outlawry and the Aſſignment; (*c*) for by the Reverſal it is as if no Outlawry had been, and there is no Record of it. Cro. Eliz. 170. *Ognel's* Caſe, adjudged. (*c*) *Vide* 13. Co. 20, 22.

If after Judgment in a *Scire facias* againſt Bail, the Judgment againſt the Principal is reverſed; (*d*) this is no Reverſal of the Judgment againſt the Bail, becauſe it is a collateral Judgment by itſelf. Cro. Jac. 645. *Appeſley* and Sir *John Key*, agreed *per Curiam.* Palm. 187, 301. S. C. (*d*) But the Bail may be relieved by *Audita Querela*; for which ſee Title *Audita Querela.*

* Page 233

(a) For Escapes in Criminal Cases, *vide* 2 Hawk. P. C. 128. to 138.

* Escape in (a) Civil Cases.

ESCAPE in general is understood, where any Person, who being under lawful Arrest, and restrained of his Liberty, either violently or privily evades such Arrest and Restraint, or is suffered to go at large before delivered by due Course of Law.

For the better Understanding whereof I shall consider,

(A) Where the Party shall be said to be legally committed, so that the suffering him to go at large will be adjudged an Escape. 234.

And herein,

1. Where the Authority by which he is committed shall be said to be sufficient for that Purpose. 234.
2. Where the Form of the Commitment, or being in Custody shall be said to be regular. 236.

(B) What Degree of Liberty, or going at large, shall be deemed an Escape. 237.

And herein,

1. With what Strictness Prisoners are to be kept, 237.
2. What on this Account shall excuse the Sheriff, Gaoler, *&c.* when acting in Obedience to some Authority; as removing a Prisoner on a *Habeas Corpus*, *&c.* 238.
3. What by Construction of Law shall be deemed an Escape, though the Party be still in Confinement. 239.

(C) Of the Difference between voluntary and negligent Escapes. 239.

(D) Of the Difference between an Escape on mesne Process and Execution. 240.

(E) What Persons are answerable for, and to be charged with an Escape. 241.

And herein,

1. Of the preceding or ſucceeding Sheriff, Warden, &c. 241.
2. Where Sheriffs, Wardens, &c. their Superiors or Deputies, are liable at the Election of him who is injured by the Eſcape. 242.
3. Where the Party injured may have his Remedy againſt the Perſon eſcaping: And herein of Eſcape Warrants. 244.

(F) Of the proper Remedy and Nature of the Action to be brought for an Eſcape. 245.

(G) Of the Manner of laying the Action. 246.

(H) Of the Party's Defence who ſuffered the Eſcape; and herein of Pleading freſh Suit. 247.

* (A) Where the Party ſhall be ſaid to be legally committed, ſo that the ſuffering him to go at large ſhall be adjudged an Eſcape: And herein,

* Page 234

1. Where the Authority by which he is committed ſhall be ſaid to be ſufficient for that Purpoſe.

IT ſeems agreed as a general Rule, (*a*) That wherever a Sheriff or other Officer hath a Perſon in Cuſtody, by Virtue of an Authority from a Court which hath Juriſdiction over the Matter, that the ſuffering ſuch Perſon to go at large is an Eſcape; for he cannot judge of the Validity of the Proceſs, or other Proceedings of ſuch Court, and therefore cannot take Advantage of any Errors in them; hence the Law allows him, in an Action of falſe Impriſonment, to plead ſuch Authority, which will excuſe him, though it be erroneous; but if the Court has no Juriſdiction of the Matter, then all is void, and conſequently the Officer not puniſhable for ſuffering a Perſon taken up upon ſuch void Authority to eſcape.

(*a*) This Diſtinction is laid down in Moor 274. Dyer 175. Poph. 203. Leon. 30. 8 Co. 141. b. 5 Co. 64. Cro. Jac. 3, 280, 289. 2 Bulſt. 64, 256

2 Saund. 100, 101. 3 Mod. 325. Carth. 148, 234. 5 Mod. 413. 12 Mod. 396. Ld. Raym. 397. 2 Ld. Raym. 1530. Stra. 509. 2 Stra. 820, 1184.

Upon this Diſtinction it hath been adjudged, that if *A.* obtains Judgment againſt *B.* and a Year afterwards, without any *Scire facias*, takes out a *Capias ad ſatisfaciendum*, upon which *B.* is taken, and the Sheriff lets him go at large; that this is an Eſcape, for though the Award of the *Capias* (*b*) after the Year without a *Scire facias*, was erroneous, yet the Sheriff could not take Advantage thereof, for it was ſufficient Authority for him

Cro. Eliz. 188. *Buſhe*'s Caſe. (*b*) Salk. 273. *Shirly* and *Wright* S. P. adjudged, but there

him to make the Arreſt, and might have been pleaded by him in an Action of Falſe Impriſonment.

ſaid that it would be otherwiſe, had it been on a *Capias ad reſpondend.* bearing *Teſte* in *Trinity* Term, and returnable in *Hilary*, becauſe ſuch Proceſs muſt be returnable from Term to Term, otherwiſe it is out of Court.

Cro. Eliz. 576. Sheriff of *Durham*'s Caſe, adjudged. Cro. Jac. 3. Moor 274. 2 Leon. 84.

So where, upon a Recognizance in Chancery, the Conuſee ſued out Execution by a *Capias ad ſatisfaciend.* by Force whereof the Conuſor was taken and eſcaped; and the Court held, that, though the *Capias ad ſatisfaciend.* in this Caſe was erroneouſly awarded, yet it was a good Execution for the Party as long as it continued unreverſed, and conſequently the Sheriff liable for the Eſcape.

S. P. adjudged; but *vide* Rol. Abr. 709. Yelv. 46. which ſeem contrary.

Salk. 319. *Wolf* and *Daviſon*. 5 Mod. 200. S.C. adjudged.

So where, in Debt for an Eſcape, it was found by ſpecial Verdict, that the Plaintiff had outlawed *J. S.* after Judgment upon a *Capias ad ſatisfaciend.* ſued out within the Year, and that two Years after the Outlawry he was taken up upon a *Capias Utlagatum*, and the Sheriff ſuffered him to eſcape; it was admitted, that if a *Capias Utlagatum* had been ſued out within the Year, no Prayer to charge him in Cuſtody had been neceſſary, becauſe the Plaintiff might have had a *Capias ad ſatisfaciend.* without a *Scire facias*; but this being after the Year, the Queſtion was, whether he could be ſaid to be in Execution for the Plaintiff in the original Action without Prayer; and the Court held that he was, though no Prayer was entered, becauſe he would have been *(c)* ſo, if he had been taken * within the Year; and here is no Difference, for the Plaintiff was at the End of his Proceſs at the Exigent, and no Continuance or *Scire facias* after a *Capias Utlagatum*, and the very *Capias Utlagatum*, which is ſued at his Charge, imports an Election of the Body.

* Page 235

(*c*) 5 Co 88. a. *Garnon*'s Caſe, adjudged. Bridgm. 6. Rol. Abr. 810. S. P. adjudged.

Rol. Rep. 47. *Barnes* and *Cary*, adjudged. Moor 834 pl. 1123. S. C. adjudged; and *note*, according to *Moor*, the Action was Debt.——‖But how could it be Debt, or by what Means could any ſpecific Sum be aſcertained? If ſuch an Action would lie, which it probably might, I ſhould ſuppoſe it muſt be *Caſe*.

If at the Petition of *A.* and the Reſt of the Creditors of *B.* a Commiſſion upon the Statute againſt Bankrupts is iſſued out againſt *B.* and thereupon the Commiſſioners ſit and offer Interrogatories to *C.* and he refuſes to be examined, and by them is thereupon committed to Priſon, and the Gaoler ſuffers him to eſcape; as the Commiſſioners had ſufficient Authority to commit, and *A.* was prejudiced by the Eſcape, he may maintain an Action againſt the Gaoler.

Lutw. 121 to 123. *Slipper* and *Maſon*, adjudged.

So if there be a Suit in the Eccleſiaſtical Court between *A.* and *B.* in which *B.* is excommunicated, and afterwards taken upon an *Excommunicato capiendo*, and ſuffered to eſcape, *A.* may bring an Action on the Caſe for the Eſcape, though it was objected that this was a Spiritual Matter, and that *A.* had other Remedy, as by Writ of Recaption.

Alſo upon this Rule, that the Sheriff cannot take any Advantage of the Irregularity of the Proceedings of a Court which hath Juriſdiction of the Matter, it hath been holden, that (*d*) if a Nobleman be taken in Execution, and the Sheriff lets him go, it will be an Eſcape.†

(*d*) 2 Bulſt. 65.

† *Qu. de hoc*, the Defendant not being liable to be taken in Execution, and no Court having Power to award an Execution againſt the Perſon of a Peer, in a civil Suit?

Upon the ſecond Part of the Diſtinction, that an Officer ſhall not be liable to an Action for the Eſcape of a Perſon taken on a Writ, which iſſued out of a Court that had not Juriſdiction of the Matter; it hath been (*b*) holden, that if *A.* bring an Action againſt an Officer of an Inferior Court for an Eſcape, and declares that he brought an Action againſt *J. S.* in the Court of *Kingſton upon Hull*, upon an Obligation made at *Halifax* in *Com. Ebor.* (but does not alledge it to be within the Juriſdiction of the Court) and that he obtained Judgment, upon which *J. S.* was in Execution, and ſuffered to eſcape by the Defendant; that this Declaration, for Want of alledging *Hallifax* to be within the Juriſdiction of the Inferior Court, is inſufficient to maintain the Action; for though the Action be in its own Nature tranſitory, yet (*c*) Inferior Courts being tied down to Matters ariſing within their own Limits, they muſt ſhew that they had Conuſance of the Matter, otherwiſe their Proceedings will be void, as being *coram non judice*, of which the Officer may well take Advantage.

(*b*) Rol. Abr. 809, 810. *Richardſon* and *Barnard*, adjudged.

(*c*) So though a Writ iſſue out of a Superior Court, yet if ſuch Superior Court had not Juriſdiction of the Matter, it will be void, and the Officer may take Advantage thereof, as if a *Formedon* iſſue out of the King's Bench, or an Appeal out of the Common Pleas. 2 Bulſt. 64. *& vide* 5 Mod. 413. Ld. Raym. 397. 5 Mod. 413. Carth. 234.

So if *A.* declares that he proſecuted one *J. S.* in the Court of *Ely*, upon a Bond made *infra Juriſdictionem*, upon which he was in Execution, and that the Defendant ſuffered him to eſcape; if the Jury find that there was ſuch a Proſecution, but that the Bond was not made *infra Juriſdictionem*, the Action does not lie; for all that was done was *coram non judice*, and therefore no legal Commitment; and though the Defendant in the Court below pleaded *Non eſt factum*, yet that could not give the Court any Juriſdiction which it had not originally in the Cauſe.

2 Mod. 29, 30. *Squibb* verſus *Hole*, adjudged by three Judges againſt Juſtice *Ellis*. Comyns 153. pl. 103. Ld. Raym. 211, 230, 346, 424. Stra. 113, 256, 393, 401, 423, 499, 567, 639. 2 Stra. 873, 901, 951. Barnard. *K. B.* 354. Fitzgib. 263. Salk. 227. pl. 2. 5 Mod. 414.

* 2. Where the Form of the Commitment, or being in Cuſtody, ſhall be ſaid to be regular.

* Page 236

The Sheriff cannot be charged with an Eſcape (*d*) before he had the Party in his actual Cuſtody by (*e*) a legal Authority; and therefore if an Officer, having a Warrant to arreſt a Man, ſee him ſhut up in a Houſe, and challenge him as his Priſoner, but never actually have him in his Cuſtody, and the Party get free, the Officer cannot be charged with an (*f*) Eſcape.

(*d*) Bro. *Eſcape* 22.

(*e*) And therefore it ſeems that an Officer who arreſts a Perſon on a *Sunday* contrary to the 29 Car. 2. c. 7. cannot be charged with an Eſcape for letting him go again, *vide* 6 Mod. 95. Salk. 78.

(*f*) But if an Officer refuſes to arreſt a Perſon that he may, an Action on the Caſe lies againſt him; and hence it hath been adjudged, that if a *Capias ad ſatisfaciend.* is directed to the Coroners of a County, and one of them, when he may arreſt the Party, refuſes ſo to do, the Plaintiff muſt bring his Action ſingly againſt the Coroner ſo refuſing, for this is a Perſonal Tort. 2 Mod. 23, 24. See Ld. Raym. 331. 10 Mod. 251, 255.

But if *A.* is arreſted, and in the actual Cuſtody of the Sheriff, and afterwards another Writ is delivered to him at the Suit of *J. S.* upon the Delivery of the Writ, *A.* by Conſtruction of Law is (*g*) immediately in the Sheriff's Cuſtody, without an actual Arreſt; and if he eſcapes, the Plaintiff may

5 Co. 89. *Froſt*'s Caſe.

(*g*) So if the Sheriff of *Northumberland* have a Man in Cuſtody in *Northumberland*, and the Sheriff himſelf is in *London*, and a Writ is delivered to him againſt that Perſon, he is in his Cuſtody immediately upon that Writ; otherwiſe if the Man was out of the Connty at the Delivery of the Writ; as in caſe the Sheriff was bringing him to *Weſtminſter* on a *Habeas Corpus*. Salk. 273. pl. 6. *per Holt* Ch. Juſt.

may declare, that he was arreſted by virtue of the ſecond Writ, which is the Operation it hath by Law, and not according to the Fact.

Salk. 273. pl. 6. *Jackſon* and *Humphreys.*

So in Eſcape againſt the Sheriffs of *London*, the Plaintiff may declare, that he levied a Plaint in the Sheriff's Court againſt *J. S.* being then in the Counter, in Cuſtody on a former Plaint levied againſt him by *J. S.* and being ſo in Cuſtody was ſuffered to eſcape; for the Entering the Plaint is of the Nature of a Writ or Precept in another Court, upon which the *Serjeant at Mace* arreſts the Party by his general Authority; and therefore by entering the Plaint, and charging the Defendant in the Counter, he is in actual Cuſtody of the Sheriff.

2 Show 17. pl. 10. *Bourne* and *Cooling*, adjudged, and Judgment arreſted accordingly.

If *A.* declares againſt the Marſhal of the King's Bench for the Eſcape of a Priſoner, (*e*) formerly in the *Fleet*, that he, *virtute brevis de Habeas Corpus*, directed to the Warden of the *Fleet*, was, *debito modo Commiſſus* to the King's Bench; this will not be ſufficient, without alledging an actual Commitment, for he cannot be commited on a *Habeas Corpus*, and the *debito modo* will not help it.

(*e*) If *A.* obtains Judgment againſt *B.* in *B. R* and alſo another Judgment in *C. B.* upon which he is taken in Execution and committed to the *Fleet*, and afterwards he removes himſelf to the *Marſhalſea* by *Habeas Corpus cum cauſa*, if the Marſhal ſuffer him to eſcape, he is liable to both Debts, Dyer 152.

Cro. Jac. 203. *Farneby* and *Baſſet.*

If by *Habeas Corpus* the Body of *J. S.* together with a Plaint entered againſt him in the Court of *Norwich*, be removed before the Chief Juſtice of *B. R.* who upon the Return of the Writ accepts Bail, the Acceptance of Bail, tho' before the Filing thereof, is a Diſcharge of the Priſoner; and though afterwards a *Procedendo* ſhould be awarded, yet the Sheriff cannot be charged with the Eſcape.

Salk. 272. pl. 3. *Watſon* ver. *Sutton.*

If a Perſon out upon Bail renders himſelf in Diſcharge of his Bail, and a *Redditit ſe* is entered in the Judge's Book, and a *Committitur* filed in the Office, and the Priſoner afterwards eſcapes; yet if no Notice was given the Marſhal of ſuch Render, nor any Entry made of the Commitment in his Book, the Priſoner ſhall not be deemed in Cuſtody ſo as to charge * the Marſhal with an Eſcape; but it ſeems this Matter cannot be inſiſted upon after Trial.

*Page 237

Sid. 220. Keb. 775. *Conny* and *Jacob.*

It hath been held that entring a *Committitur* upon the Roll was not ſufficient Evidence to charge the Marſhal with an Eſcape, without proving an actual Impriſonment; but that proving the Party to be actually in Priſon, though there be no Entry made in the Marſhal's Book (without which he pretends he knows not how to take Charge of them) is ſufficient.

And now for the greater Security of Creditors, and the better to enable them to prove the actual Cuſtody of the Priſoner, by the 8 & 9 *W.* 3. *cap.* 27. it is enacted, " That if any Perſon, deſiring to charge any Perſon " with any Action or Execution, ſhall deſire to be informed by the Marſhal " or Warden, or their reſpective Deputy or Deputies, or by any other " Keeper or Keepers of any other Priſon or Priſons, whether ſuch Per- " ſon be a Priſoner in his Cuſtody, or not, the ſaid Marſhal or Warden, " or ſuch other Keeper or Keepers of any other Priſon or Priſons, ſhall " give a true Note thereof in Writing, to the Perſon ſo requeſting the " ſame, or to his lawful Attorney, upon Demand, at his Office for that " Purpoſe, or, in Default thereof, ſhall forfeit the Sum of 50 *l.* and if ſuch " Marſhal or Warden, or their reſpective Deputy or Deputies, exerciſing " the ſaid Office, or other Keeper or Keepers of any other Priſon or Pri- " ſons, ſhall give a Note in Writing, that ſuch Perſon is an actual Priſoner " in his or their Cuſtody, every ſuch Note ſhall be accepted and taken as " a ſufficient Evidence, that ſuch Perſon was at that Time a Priſoner in " actual Cuſtody.

(B) What Degree of Liberty, or going at large, ſhall be deemed an Eſcape: And herein,

1. With what Strictneſs Priſoners are to be kept.

EVery Perſon in Priſon by Proceſs of Law is to be kept *in ſalva & arcta Cuſtodia*, in order to compel them the more ſpeedily to pay their Debts, and make Satisfaction to their Creditors. (a) Plow. 36. 3 Co. 44. 2 Inſt. 381. Rol. Abr. 806.

(a) And by *Weſtm. 2. cap. 11. Carceri mancipentur in ferris*, which my Lord *Coke* ſays, was enacted in order to oblige them to a more ſpeedy Compliance with their Duty. 3 Co. 44. a. and 2 Inſt. 381. in his Comment on this Statute, he ſays, that though Priſoners, if need require, may now be kept in Irons, yet that it could not be done by the Common Law.—And Co. Lit. 260. a. he ſays Impriſonment muſt be *Cuſtodia & non pœna*, for *Carcer ad homines cuſtodiendos non ad puniendos dari debet.*

Therefore if the Sheriff or other Officer who hath the Cuſtody of a Priſoner, either bail him when he is not bailable by Law, or ſuffer him to go out of the (b) Limits of the Priſon, though with a Keeper, and for ever ſo ſhort a Time, it is an Eſcape. Rol. Abr. 806. 3 Co. 44. Plow. 36. Dyer 166. Hetly 34.

(b) For the Limits of the *Fleet* Priſon, *vide* 2 Mod. 221, 222.

But the Law and Proviſion made by *Weſtm. 2 cap. 11.* being eluded by the Acts and Contrivances of Sheriffs, and other Keepers of Priſons, by the 8 & 9 *W. 3. cap. 26.* it is enacted, "That all Priſoners, either upon Contempt or meſne Proceſs, or in Execution, who are or ſhall be committed "to the Cuſtody of the Marſhal of the *King's Bench* Priſon or Warden of "the *Fleet*, ſhall be actually detained within the ſaid Priſons of the *King's* "*Bench* and *Fleet*, or the reſpective Rules of the ſame, until they ſhall be * Page 238 "* from thence diſcharged by due Courſe of Law; and if at any Time the "ſaid Marſhal or Warden, or any other Keeper or Keepers of any Priſon, "ſhall permit and ſuffer any Priſoner committed to their Cuſtody, either "on meſne Proceſs, or in Execution, to go or be at large out of the Rules "of their reſpective Priſons (except by Virtue of ſome Writ of *Habeas* "*Corpus*, or (c) Rule of Court, which Rule of Court ſhall not be granted, "but by Motion made, or Petition read in open Court) every ſuch going "or being out of the ſaid Rules ſhall be adjudged and deemed, and is "hereby declared to be, an Eſcape."

(c) The Intent of a Day-rule is, that the Priſoner may be brought to *Weſtminſter-Hall* and by Indulgence they have been allowed to go to any of the Inns of Court, to conſult with their Counſel or Attornies; but ſuffering them to go on their Pleaſure, as to a Playhouſe, &c. is an Eſcape. 2 Show. 298. pl. 300. *

* But at this Time Priſoners, who have Day-rules, go wherever they pleaſe, and their Creditors in general voluntarily ſubmit to it, ſuppoſing they have a Right; and few Juries, if Actions of Eſcape were brought, where Priſoners were out by Day-rule, tho' on Pleaſure, not Buſineſs, would give a Verdict againſt the Marſhal, or the Warden of the Fleet, as it would be morally impoſſible for them to attend every Priſoner, during the whole Courſe of the Day.

2. What on this Account ſhall excuſe the Sheriff, Gaoler, &c. when acting in Obedience to ſome Authority, as removing a Priſoner on a *Habeas Corpus*, &c.

(a) Cro. Car. 14. Rol. Abr. 808. (b) Hob. 202. 3 Co. 44. Cro. Car. 14.

The Writ of *Habeas Corpus* is an (a) antient Writ, and what the Subject is by Law intitled to; yet (b) if a Sheriff or other Officer, who hath the Cuſtody of a Priſoner, does by Colour thereof ſuffer the Priſoner to go at large, it is an Eſcape.

Hard. 476. agreed by *Hale* Chief Baron, and the whole Court.

As if a *Habeas Corpus* be returnable the next Term, and the Sheriff or Gaoler in the mean Time ſuffers the Priſoner to go at large, it is an Eſcape, though he appear at the Return of the Writ; for the Writ only impowers the Gaoler to bring him directly to the Court, and if he gives him any Liberty in the mean Time, it is at his Peril.

Mod. 116. *Moſedel*'s Caſe. So ruled upon Evidence, and the Plaintiff had a Verdict for 6200*l*.

So where a *Habeas Corpus ad* (c) *Teſtificand.* was directed to the *Marſhal* to carry one *Reynolds* to the Aſſiſes at *Wells* in *Somerſetſhire*, who after the Aſſizes was ſuffered to go ſixty Miles beyond *Wells*, and though he returned again to the *Marſhal*, yet it was held an Eſcape.

3 Keb. 305. S. C. Ld. Raym. 241, 399. 2 Ld. Raym. 788. 6 Mod 78. Comyns 422. pl. 199. 554. pl. 231. 2 Ld. Raym. 1574. 2 Stra. 882. 8 Mod. 120. 10 Mod. 394, 395, 396 11 Mod. 3. pl. 17. 4, 50. pl. 20. 51 pl. 4. 69. pl. 15. 79, 93. pl 1. 2 Ld. Raym. 1207. Ld. Raym. 424. Salk. 272. pl. 2. 5 Mod 414. 12 Mod. 31, 227, 230, 583, 634 (c) If *J. S.* is in Execution, and a *Habeas Corpus ad Teſtificandum* is directed to the Gaoler, who, according to the Command of the Writ, carries the Priſoner to give his Teſtimony; this is an Eſcape. Sid. 13. ſaid by *Twiſden* to have been adjudged by all the Judges.

Mod. 116. *per Hale.* (d) That he is to bring him in convenient Time, and the moſt convenient Way; and this is to be judged of by the Judges. Cro. Car. 14. Dalt. Sheriff 561.

So if the Gaoler carry him round about (d) a great Way for the Accommodation of the Priſoner, it is an Eſcape; but he is not bound to bring him the direct Way for fear of being reſcued.

3 Co. 44. *Mitton*'s Caſe.

Alſo it hath been adjudged, that if the Sheriff hath one in Execution, and a *Habeas Corpus* iſſues to have his Body in Court ſuch a Day, and before the Return of the Writ the Sheriff brings the Priſoner to an Inn in *Smithfield* in his Way to *Weſtminſter*, and the Priſoner of his own Head goes without any Keeper to *Southwark*, and next Morning returns again to the Sheriff, ſo that at the Return of the *Habeas Corpus* the Sheriff delivers the Priſoner into Court, this is no Eſcape.

Dalton Sheriff 486.

As the Sheriff muſt be careful that he does not give the Priſoner more Liberty than by Law he ought to do, when he acts in Obedience to a lawful Authority; ſo he muſt take Care that he does not let him go at large by Colour of a void Authority.

Dyer 297. a. Rol. Abr. 808. S. C. * Page 239

Therefore if one in Execution at the Suit of the King and a private Perſon be, by Warrant from the Lord Chancellor or Treaſurer, ſuffered to go at large with a Keeper, in order to collect the Money due to the King; * this is an Eſcape, as to the private Perſon, although he return again to Priſon; for the King himſelf cannot licenſe one in Priſon to go at large with a Keeper.

Cro. Eliz. 893. *Colſton* verſus *Roſ* and *Levet.*

So where the Sheriffs of *York* pleaded, that they let the Priſoner go at large by Virtue of a Writ of Privilege directed to them from the Council of *York*; and it not appearing to the Court, that the Writ was a ſufficient

Warrant for that Purpoſe, or that the Council of *York* could in ſuch Caſe diſcharge a Priſoner, the Plea was held ill. *Vide* Tit. *Privilege.*

If an Act of Parliament is made for the Relief of confined Debtors, and purſuant thereto the Juſtices of the Peace are enabled to diſcharge ſuch and ſuch Priſoners, if they authoriſe the Sheriff to diſcharge a Perſon that does not come within the Deſcription of the Act, and he lets the Party go at large, it will be an Eſcape.* Salk. 273. pl. 5.

* *Qu.* The Juſtices being the proper Judges, appointed by the Act, of who is, and who is not within the Meaning, and the Sheriff being, as I conceive, obliged to obey the Order of the Juſtices?

3. What by Conſtruction of Law ſhall be deemed an Eſcape, though the Party be ſtill in Confinement.

The Marſhal of the King's Bench being ſued to Judgment, if he be afterwards taken in Execution, he can be committed to no other Priſon but the *Marſhalſea*; and if he is committed to that Priſon whereof he is Keeper, without ſecuring the Priſoners there firſt, it will be an Eſcape in Law of all the Priſoners. Style 465. *per Glyn* C. J. *& vide Dalton Sheriff* 487.

If a Woman Warden of the *Fleet* Priſon marries her Priſoner, or if a Sheriff, *&c.* marries a Woman in Execution with him, in either Caſe it will be deemed an Eſcape in Law. Plow. 17.

If a Man hath Judgment againſt two (*b*) Perſons, and both are taken in Execution, if the Sheriff ſuffer one of them to eſcape, he ſhall be anſwerable for the whole Debt, though he hath one of them ſtill in Cuſtody. Rol. Abr. 810. (*b*) So if Baron and Feme are taken in Execution, if the Feme eſcapes, the Sheriff ſhall anſwer the whole Debt, though the Baron continues ſtill in Execution. Rol. Abr. 810. Cro. Jac. 657. S. P.

By the 8 & 9 *W.* 3. *cap.* 27. it is enacted, "That if the Marſhal or "Warden for the Time being, or their reſpective Deputy or Deputies, or "other Keeper or Keepers of any other Priſon or Priſons, ſhall, after one "Day's Notice in Writing given for that Purpoſe, refuſe to ſhew any Pri"ſoner committed in Execution to the Creditor, at whoſe Suit ſuch Priſoner "was committed or charged, or to his Attorney, every ſuch Refuſal ſhall "be adjudged to be an Eſcape in Law."

(C) Of the Difference between voluntary and negligent Eſcapes.

IT was formerly held, that where the Sheriff ſuffered a Priſoner in Execution to make a voluntary Eſcape, the Priſoner was in ſuch Caſe abſolutely diſcharged from the Creditor, and that the Right of Action was intirely transferred againſt the Sheriff, who by means of ſuch Eſcape became *Debitor ex delicto.* Leon. 73. *Arundell* and *Wytham.* Hob 202. S. P. *per Hobart*, in the Sheriff of *Eſſex*'s Caſe.

——[This not Law, either now or formerly. See *infra* 248, & *poſt* 242. n.]

* But the latter Reſolutions have been contrary; and it has been (*c*) adjudged, that where a Sheriff ſuffered a voluntary Eſcape, the Plaintiff might have * Page 240 (*c*) Sid. 330.

Allanſon and *Butler.* Show. 174. have a new Action of Debt or *Scire facias quare executionem non* againſt the Priſoner.

Buxton and *Home*, 2 Mod. 136. *Baſſet* and *Salter*, Vent. 269. 2 Jon. 21, 22. 2 Ld. Raym. 788, 927, 1028. 6 Mod. 78. 2 Salk. 626. pl. 7. 6 Mod. 95. Caſ *temp.* Talb. 22. 2 Stra. 901. Fitzgib. 265. Mod. 194. *Compton* and *Ireland.* 2 Lutw. 1264. *Sudal* and *Wytham.*

Alſo the Statute 8 & 9 *W.* 3. *cap.* 26. hath taken away all Diſtinction between voluntary and permiſſive Eſcapes with regard to the Plaintiff's Remedy; for thereby it is enacted, "That if any Priſoner, who is or ſhall be "committed in Execution to either or any of the ſaid reſpective Priſons, "ſhall eſcape from thence by any Ways or Means howſoever, the Creditor "or Creditors, at whoſe Suit ſuch Priſoner was charged in Execution at "the Time of his Eſcape, ſhall or may retake ſuch Priſoner by any new "*Capias* or *Capias Satisfaciend.* or ſue forth any other Kind of Execution "on the Judgment, as if the Body of the Priſoner had never been taken "in Execution."

Carter 212. & *vide* the Authorities *ſupra.* But yet there remains a Difference as to other Purpoſes between Permiſſion and negligent Eſcapes; for if a Sheriff ſuffer a Priſoner voluntarily to go at large, the Sheriff cannot retake him even upon freſh Suit; and if he does, the Priſoner may have an Action of Treſpaſs againſt him.

3 Mod. 146. Carter 212. 10 Mod. 74, 108, 209 Fitzgib. 186, 293. If the Marſhal of the *King's Bench* or Warden of the *Fleet*, or any other who hath the Keeping of Priſons in Fee, ſuffer a voluntary Eſcape, it is a Forfeiture of the Office.

Ld. Raym. 424. Salk. 272. pl. 2. 5 Mod. 414.

And now, by the 8 & 9 *W.* 3. *cap.* 26. a further Penalty is added, which enacts, "That if any Marſhal or Warden, or their reſpective Deputy "or Deputies, or any Keeper of any other Priſon within this Kingdom, "ſhall take any Sum of Money, Reward or Gratuity whatſoever, or Secu"rity for the ſame, to procure, aſſiſt, connive at, or permit any ſuch "Eſcape, and ſhall be thereof lawfully convicted, the ſaid Marſhal or War"den, or their reſpective Deputy or Deputies, or ſuch other Keeper of "any Priſons, as aforeſaid, ſhall for every ſuch Offence forfeit the Sum of "500 *l.* and his ſaid Office, and be for ever after incapable of executing "any ſuch Office."

(D) Of the Difference between an Eſcape on meſne Proceſs and Execution.

2 Rol. Abr. 99, 807. *Brohy* and *Lumley.* IF the Sheriff ſuffer a Perſon arreſted on meſne Proceſs to eſcape, an Action lies againſt him at (*a*) Common Law, from the Delay and Prejudice which the Party ſuffers thereby.

Moor 852. Cro. Eliz. 623, 652, 868. Cro. Jac. 280. (*a*) And by the expreſs Words of 8 9 W. 3. c. 26.

2 Rol. Abr. 807. Jon. 207. Rol Rep. 388. 3 Lev. 46. But there is this Difference between an Eſcape on meſne Proceſs, and Execution, that if the Sheriff arreſts a Perſon on meſne Proceſs, and he is reſcued by *J. S.* he may return the Reſcue, and ſuch Return is good, and no Action of Eſcape lies againſt him after ſuch Return; but the Court will iſſue Proceſs againſt ſuch Reſcuer, or fine him; for in this

* this Caſe, though the Sheriff may, yet he is not obliged to raiſe the *Poſſe Comitatus*. * Page 241

But after an Arreſt on a *Capias ad Satisfaciend.* the Sheriff cannot return a Reſcue, for in ſuch Caſe the Sheriff is obliged to raiſe the *Poſſe Comitatus*, if needful, and therefore, if he return a Reſcue, an Action of Eſcape lies, or a new *Capias*, (*a*) for the Return of an ineffectual Execution is as none.

Rol. Abr. 807. *vide* the Authorities *ſupra*.

(*a*) Cro. Car. 240, 255. Rol. Abr. 904. 8 Co. 142.

Alſo upon an Arreſt on meſne Proceſs, the Sheriff is obliged to take Bail by the Statute 23 *H.* 6. *cap.* 10. therefore if the Plaintiff declares, that the Defendant being Sheriff of *Y.* did arreſt *J. S.* at the Suit of the Plaintiff, and afterwards did ſuffer him to go at large; and the Defendant pleads the Statute, and that he took good and ſufficient Bail, and the Plaintiff replies and traverſes, that the Defendant took good and ſufficient Bail; this Action does not lie; for *quoad* the Plaintiff the Sufficiency of the Bail is altogether immaterial, 'tis for the Security of the Sheriff; and if the Party does not appear, the Plaintiff need not take an Aſſignment of the Bail-Bond, but proceed againſt the Sheriff by Way of Amercement, and leave the Sheriff to take his Advantage againſt the Bail. *

2 Mod. 177. *Ellis* and *Yarborough*. adjudged. 425, 722. Ld. Raym. 904, 1564. 2 Ld. Raym. Comyns 132. pl. 89. 264. pl. 145. Gilb. Rep. 84. Anon Stra. 479. 2 Ld. Raym. 1574. 2 Stra. 882. Will. Rep. 687. 10 Mod. 288, 289. S. C. adjudged. Cro. Eliz. 624. S. P. adjudged.

Anon. Barnes 80. 2 Barnes 78. Mod. 227. See Comyns 422, pl. 199. 554. pl. 231.

* The Practice is, if Plaintiff does not like the Bail to the Sheriff, to rule the Sheriff, to return the Writ, who having returned a *Cepi Corpus*, then to rule him to bring in the Body, which either produces good Bail, or Payment by the Sheriff to avoid an Attachment.

(E) What Perſons are anſwerable for, and to be charged with an Eſcape: And herein,

1. Of the preceding or ſucceeding Sheriff, Warden, &c.

WHERE a new Sheriff is appointed, his Predeceſſor ought to deliver over by (*b*) Indenture all the Priſoners in his Cuſtody, charged with their reſpective Executions; for the Priſoners, until they are turned over to the new Sheriff, remain in the Cuſtody of the old Sheriff, and if he omits to deliver them over, every Omiſſion will be deemed an Eſcape, wherewith he will be chargeable.

Hob. 266. 2 Rol. Abr. 457. Cro. Eliz. 365. Bulſt. 70. 2 Leon. 54. 4 Co. 72.

(*b*) See the Form thereof, Dalt. Sheriff 180.

As where one *Buſtard* was ſeverally in Execution in the Cuſtody of the Defendants, then Sheriffs of *London*, as well at the Suit of *A.* as at the Plaintiff's Suit, and the Defendants at the End of the Year delivered over the Body of *Buſtard* to the new Sheriffs by Indenture, wherein the Execution at the Suit of *A.* was mentioned, but the Execution at the Plaintiff's Suit was omitted, and afterwards *Buſtard*, in the Time of the new Sheriffs, eſcaped; and it was reſolved by the whole Court, that the Defendants being the old Sheriffs ſhould be charged with this Eſcape, for that the old

3 Co. 71. *Weſtley's* Caſe.

Sheriffs ought to have given (*a*) Notice to the new Sheriffs of all the Executions wherewith any Perſon was charged in their Cuſtody.

(*a*) That ſuch Notice may be by Word only, or by ſome Note in Writing under the old Sheriff's Hand, or under the Hand of his Under-Sheriff, and need not be by Indenture, unleſs the new Sheriff require it. Moor 689. Dalt. Sheriff 16. Cro. Jac. 588.

* Page 242 3 Co. 72. * But if the Sheriff dies during his Shrievalty, the new Sheriff, as ſoon as he is appointed, muſt take Notice of all Perſons in Cuſtody, and of the ſeveral Executions with which they are charged; and this he muſt do out of Neceſſity, for there being nobody to inform him, he muſt himſelf take Notice hereof at his Peril.

2 Lev. 109. *Lenthal* and *Lenthal*, adjudged. 3 Keb. 487. S. C. Vent. 269. *James* and *Pierce*. S. P. adjudged, and the Caſe of the Sheriff of *Eſſex* in Hob. 202. (*ante* 239. C.) *cont.* denied to be Law. *J. S.* being in Execution in the *Fleet*, was ſuffered to make a voluntary Eſcape, after which he returned again to the *Fleet*; and the Defendant being made Warden in the Place of the former Warden, *J. S.* was turned over with the other Priſoners, and afterwards ſuffered to eſcape; and the Queſtion was, whether the voluntary Eſcape ſuffered by the former Warden did not ſo intirely diſcharge the Execution, that the Priſoner could not be retaken, nor judged in Execution, by Law, even tho' he ſhould yield himſelf to it; and it was held, that it did not, and that the ſucceeding Warden ſhould be chargeable with the Eſcape ſuffered in his Time.

6 Mod. 183. *Grant* verſus *Southers*. Stra. 423. So in the Caſe of one *Grant*, who being in the Cuſtody of the former Marſhal was ſuffered by him voluntarily to eſcape, after which he returned voluntarily to Priſon, and being found in Priſon, the ſucceeding Marſhal detained him; and in an Action of falſe Impriſonment brought by him, the Court held that he might, and that if he had ſuffered him to go at large, it would have been an Eſcape.

2 Where Sheriffs, Wardens, *&c.* their Superiors or Deputies, are liable, at the Election of him who is injured by the Eſcape.

Where one hath the Cuſtody of a Gaol of Freehold or Inheritance, and commits it to another Perſon, who is inſufficient, the (*b*) Superior is anſwerable for all Eſcapes ſuffered by his Inferior; but if the Inferior be ſufficient, the Action muſt be brought againſt him, and not againſt the Superior.

(*b*) But in what Caſes at Common Law, and upon the Statute of *Weſt.* 2. *cap.* 11. the Rule of *Reſpondeat Superior* will hold, *vide* 2 Inſt. 382, 466. 9 Co. 98. 2 Jon. 60. 2 Lev. 158. Vent. 314. 2 Mod. 119. 2 Ld. Raym. 1580. 10 Mod. 95. 11 Mod. 3. pl. 17. 4. pl. 19. 93. pl. 1. 2 Ld. Raym. 1207. Holt. pl. 11. 3 Keb. 591, 656, 701, 754, 758, 773. Noy 69. 3 Mod. 146. Comb. 95.

Alſo by the 8 & 9 *W.* 3. *cap.* 26. it is enacted, "That the Offices of "Marſhal of the *King's Bench* Priſon and Warden of the *Fleet*, ſhall be "executed by the ſeveral Perſons to whom the Inheritance of the Priſons, "Priſon-houſes, Lands, Tenements, and other Hereditaments of the ſaid "Priſons of *King's Bench* and *Fleet*, or either of them, ſhall then belong "or appertain reſpectively, in his or their reſpective proper Perſon or Per"ſons, or by his or their ſufficient Deputy or Deputies, for which Deputy "or Deputies, and for all Forfeitures, Eſcapes, and other Miſdemeanors "in their reſpective Offices by ſuch Deputy or Deputies permitted, ſuffer"ed or committed, the ſaid Perſon or Perſons in whom the aforeſaid In"heritances reſpectively are, or ſhall then be, ſhall be anſwerable, and the "Profits and aforeſaid Inheritances of the ſaid ſeveral Offices ſhall be ſe-

" queſtred, ſeiſed or extended to make Satisfaction for ſuch Forfeitures,
" Eſcapes or Miſdemeanors reſpectively, as if permitted, ſuffered or com-
" mitted by the Perſon or Perſons themſelves, or either of them, in whom
" the reſpective Inheritances of the ſaid Priſons ſhall then be. ‡

‡ *Note*, By 27 Geo. 2. c. 17. the Power of appointing the Marſhal of the King's Bench is reveſted in th Crown.

If the (*a*) Bailiff of a Franchiſe ſuffer an Eſcape and be inſufficient, the Lord of the Franchiſe ſhall anſwer for him. 2 Brownl. 50. *per totam Cur.* 2 Lev. 160.

S. P. (*b*) If his Deputy ſuffers an Eſcape, he ſhall anſwer for it himſelf. Lit. Rep. 33. *per Curiam.* ‖

‖ That is, if he is ſufficient; otherwiſe the Perſon appointing him.

* If a Gaoler, who is the Sheriff's Servant, ſuffers a Priſoner to eſcape, the Action muſt be brought againſt the Sheriff, not (*a*) againſt the Gaoler; for an Eſcape out of the Gaoler's Cuſtody is by Intendment of Law an Eſcape out of the Sheriff's Cuſtody, for by the 13 *E.* 3. *cap.* 10. Sheriffs are to put in ſuch Keepers of Gaols as they ſhall anſwer for. * Page 243 2 Lev. 159. 2 Jon. 62. 2 Mod. 124. (*a*) *Vide* 5 Mod. 414. 416. Ld. Raym. 424. Salk. 272. pl. 2. where it is ſaid in general, that Gaolers are liable for Eſcapes; but the Queſtion being there touching the Eſcape of a Perſon committed for a criminal Offence, muſt be underſtood of Eſcapes in thoſe Caſes, for which whoever *de facto* occupies the Office of Gaoler is liable to anſwer; nor is it material, whether his Title to the Office be legal, or not. Hale P. C. 114. 2 Rol. Rep. 146. 2 Hawk. P. C. 135. & *vide* Hard. 29 to 35, that where Actions for Eſcapes are ſaid to lie againſt Gaolers, ſuch abſolute Gaolers are intended, as Writs are directed to.

So an Arreſt by the Sheriff's Officer is in Judgment of Law the (*b*) ſame as if the Arreſt were by the Sheriff in Perſon; and if ſuch Officer ſuffer the Party arreſted to eſcape, the Action muſt be brought againſt the Sheriff. 5 Co. 89. Rol. Abr. 94.

(*b*) Although in Law the Cuſtody of the Bailiff be the Cuſtody of the Sheriff; yet the Sheriff cannot return, that ſuch a one was in his Cuſtody, and reſcued out of the Cuſtody of his Bailiffs, becauſe of the Repugnancy; but he may return, that he was reſcued out of his own Cuſtody, altho' he was never in his actual Cuſtody, or out of his Bailiff's Cuſtody. 2 Salk. 586. pl. 2. & *vide* Sid. 332. 2 Jon. 197

But if the Sheriff directs his Warrant to his Bailiff, and afterwards *J. S.* puts in his own Name as ſpecial Bailiff, and thereupon arreſts the Defendant, who eſcapes; here *J. S.* ſhall be only chargeable, and not the Sheriff, becauſe the Defendant was never in the Sheriff's Cuſtody, but only in the Cuſtody of *J. S.* Cro. Eliz. 745. Dalt. Sheriff 560.

So if a Writ comes to the Sheriff, and he makes out his Mandate to the Bailiff of a Liberty, who takes the Party, and after ſuffers him to eſcape, an Action lies againſt the Bailiff of the Franchiſe, and not againſt the Sheriff. Rol. Abr. 98, 99. Bro. *Eſcape* 40. Noy 27.

So where a *Capias ad Satisfaciend.* was awarded to the Sheriff of *Berks* to arreſt *J. S.* who then was in Cuſtody of the Mayor and Burgeſſes of *W.* and thereupon the Sheriff made a Warrant to the Mayor, &c. to take him, and afterwards they let him eſcape; and it was clearly held, that the Mayor, &c. and not the Sheriff, were chargeable with the Eſcape. Cro. Eliz. 26.

If a *Capias* iſſues againſt *A.* out of the Sheriff of *London*'s Court, directed to one of the Serjeants, who arreſts *A.* and lets him eſcape before he is carried to the Counter, the Serjeant, in this Caſe, and not the Sheriff, is chargeable with the Eſcape, for the Sheriff is Judge of the Court, and not Rol. Abr 806. *Dunn* and *Patie.* Sid. 318. S. P.

not a miniſterial Officer; but if *A.* had been carried to the Counter, and eſcaped thereout, the Sheriff would then be anſwerable, as Gaoler or Keeper of the Counter.

Rol.Abr.806. So if a Serjeant at Mace arreſt a Man by Virtue of a Warrant iſſuing out upon a *Latitat*, and afterwards ſuffers him to eſcape before he brings him to the Counter; in this Caſe an Action lies againſt the Sheriff only for this Eſcape, becauſe he was in the Cuſtody of the Sheriff preſently upon this Arreſt; and the Sheriff is the Officer of the Court of King's Bench, and not the Serjeant.

Cro.Eliz.743. *Baldry* verſus *Johnſon*, adjudged. If upon a Plaint levied in the Court of *B.* before the Bailiffs of *B.* according to the Cuſtom there, a Warrant is directed to the Under-Bailiffs to take *J. S. ita quod habeant Corpus ejus coram Ballivis ad prox' Curiam*, and the Under Bailiffs take him and commit him to the Priſon *ſub Cuſtodia* of the Gaoler of the Priſon of *B.* if they have him not at the Day, *&c.* an Action lies againſt them, and not againſt the Gaoler; for there was no Commitment to him by any lawful Authority, and that Cuſtody the Gaoler had was only as a Servant to the Under-Bailiffs.

* Page 244

Carth. 145. *Ryding* and *Edwin.* * A Priſoner in *Wood-ſtreet Counter* upon meſne Proceſs on a Plaint levied againſt him, *&c.* eſcaped, whereupon the Plaintiff brought his Action againſt both Sheriffs of *London*; and, upon a Demurrer to the Declaration, the Plaintiff had Judgment; and it was reſolved, that though the Plaint was levied before the Defendant was in his Court, and the Priſoner eſcaped out of his Counter, yet that both Sheriffs had the Cuſtody of the Priſoners in both Counters, and by Conſequence the Action was well maintainable againſt both.

Cro.Eliz.625. *Benion* verſus The Sheriffs of the City of *York.* If there are two Sheriffs of the ſame Place, and an Action of Eſcape is brought againſt them both, if one of them dies, yet the Writ ſhall not abate; for it being in Nature of a Treſpaſs, and (*a*) merely Perſonal, the Party can only have Remedy againſt the Survivor.†

(*a*) That no Action lies againſt the Executor or Adminiſtrator of a Perſon who ſuffers an Eſcape, becauſe it is a Perſonal Tort, and comes within the Rule *Actio Perſonalis moritur cum Perſona, vide* Dyer 271, 322. Jon. 173. Noy 87. Latch 167. Poph. 187. Vent. 31. 6 Mod. 125-6. Ld. Raym. 36, 40. Fitzgib. 265, 266. Will. Rep. 687. 10 Mod. 95. 12 Mod. 71. Salk. 12. pl. 2. 4 Mod. 403.

† By 8 & 9 W. 3. c. 11. ſ. 7. the Death of one Plaintiff or Defendant, where there is another ſurviving, not to abate the Suit.

3. Where the Party injured may have his Remedy againſt the Perſon eſcaping, and therein of Eſcape Warrants.

It has been already obſerved, that if the Sheriff ſuffers the Priſoner voluntarily to eſcape, that the Party at whoſe Suit he was in Cuſtody may, notwithſtanding, ſue out any new Execution againſt the Perſon eſcaping; for it would be unreaſonable that he ſhould be allowed to take Advantage of his own Act, or that the Creditor ſhould be compelled, whether he will or no, to take his Remedy againſt the Sheriff, who may die or become inſolvent. §

§ It is put out of Doubt by the Stat. 8 & 9 W. 3. c. 26. which *vide ante* 240.

Salk. 271. pl. 1. *Scott* and *Peacock.* Therefore where to a *Scire facias quare executionem non* upon a Judgment the Defendant pleaded, that he was formerly taken in Execution by a *Capias ad Satisfac.* upon the ſame Judgment, and the Sheriff ſuffered him to eſcape, to which Eſcape the Plaintiff then and there conſented; and this was held an ill Plea; for the Aſſent (*b*) ſubſequent will not make it an Eſcape with the

(*b*) Show. 174. S. P. ad-

the Conſent of the Plaintiff, and therefore he has either his Remedy againſt the Sheriff, or may retake the Party.

judged on the like Plea.

But if (*a*) a Man in Execution upon a Judgment for Debt or Damages be delivered out of Execution by the Sheriff or Gaoler who hath him in Execution, with the (*b*) Aſſent of him at whoſe Suit he is in Execution; and after by Colour of this Judgment he takes him again and puts him in Priſon, an *Audita Querela* lies upon this Matter, and thereupon he ſhall be delivered.

Rol. Abr. 307. *Welby* and *Andrews*, adjudged.

(*a*) So if the Plaintiff conſents that one Defendant only ſhall be delivered out of Execution. Style 387.—So if he conſents that one of the Bail ſhall be delivered out of Execution, he ſhall not take the other. 2 Leon. 260. (*b*) Where the Conſent was only, that he ſhould come to a Tavern out of the Rules. Style 117.——Where one was in Execution in the *King's Bench*, and ſome Propoſals were made to the Plaintiff in Behalf of the Priſoner, who ſeeing there was ſome Likelihood of an Accommodation conſented to a Meeting in *London*, and deſired the Priſoner might be there, who came accordingly; and this was held to be an Eſcape with the Conſent of the Plaintiff, and he could never after be in Execution at his Suit for the ſame Matter.

By the 1 *Ann. cap.* 6. it is enacted, "That if any Perſon committed, "*&c.* ſhall eſcape from the Cuſtody of the Marſhal of the *Queen's* "*Bench* for the Time being, or from the Priſon of the ſaid *Queen's* "*Bench*, or from the Priſon of the *Fleet*, or either of them, it ſhall "and may be lawful, upon Oath thereof in Writing, to be made "by one or more credible Perſon or Perſons, before any one of the "* Judges of (*c*) that Court where ſuch Action was entred or Judgment and "Execution were obtained, or where the Party was ſo committed or charged "as aforeſaid, to and for ſuch Judge before whom ſuch Oath ſhall be made, "as aboveſaid, and ſuch Judge is hereby authoriſed and required from "Time to Time to grant unto any Perſon whatſoever, who ſhall demand "the ſame, one or more Warrant or Warrants under his Hand and Seal, "therein reciting the Action or Actions, Execution or Executions, Contempt "or Contempts, with which ſuch Perſon or Perſons, ſo eſcaping or going at "large, ſtood charged, or were committed, at the Suit of any Perſon or "Perſons on whoſe Behalf ſuch Warrant or Warrants ſhall be demanded, "at the Time of ſuch Eſcape or going at large, (which ſaid Warrant or "Warrants ſhall be in Force in all Places whatſoever within that Part of "*Great Britain* called *England*) directed to (*d*) all Sheriffs, Mayors, Bai- "liffs, Conſtables, Headboroughs and Tithingmen, therein, and thereby "commanding them and every of them in their reſpective Counties, Cities, "Towns and Precincts, to ſeize and (*e*) retake ſuch Perſon or Perſons (*f*) "ſo eſcaped or going at large; and ſuch Perſon or Perſons, ſo retaken upon "ſuch Warrant, forthwith to convey and commit to the Common Gaol of "ſuch County where ſuch Perſon or Perſons ſo eſcaped or going at large "ſhall be re-taken, there to remain without Bail or Mainprize, or being "thence (*e*) upon any Account whatſoever, delivered or removed, until he

* Page 245.

(*c*) If a Perſon charged in Execution in the King's Bench be turned over to the *Fleet*, and he eſcape, either a Judge of the King's Bench or Common Pleas may grant an Eſcape-Warrant. *Paſch.* 10 Geo. 1. *The King* and *Dunbar*. 8 Mod. 240. ruled on Motion.

(*d*) If one who is no Officer, by Virtue of the Warrant, ſeiſes a Perſon eſcaping, and brings him before the Sheriff, he cannot detain him; for, being illegally executed, it is the ſame Thing as if there had been no Warrant at all. 6 Mod. 154. See Comyns 554. pl. 231. Ld. Raym. 353. 12 Mod. 31, 227, 230. Ld. Raym. 424. Salk. 272. pl. 2. 5 Mod. 414.† (*e*) One may be taken on a *Sunday* by Virtue of an Eſcape-Warrant; for one may take another on a *Sunday* upon freſh Purſuit, and this in the Nature of it, though it be by a new Method; for this is no original Proceſs, but the Party is in ſtill upon the old Commitment continued down. 2 Salk. 626. pl. 7. 2 Ld. Raym. 1028. 6 Mod. 95, 253, 254. See 8 Mod. 21. 12 Mod. 275, 348, 606, 667. Stra. 387. Forteſc. 373. (*f*) If a Perſon is taken upon an Eſcape-Warrant at eight in the Morning, and the ſame Day obtains a Day-Rule, purſuant to a Petition, which was not read in Court till after eight, yet he ſhall be diſcharged; for as to this Purpoſe there ſhall be no Fraction of a Day. Trin. 8 Geo. 1. *Wilkinſon* and *Matthews*, 8 Mod. 80. (*g*) Cannot be diſcharged upon bringing the Money into Court. 6 Mod. 21.——Cannot come out on a Day-Rule. 6 Mod. 63.

† *Sed. qu.* If the Warrant is delivered to the Sheriff, whilſt the Priſoner is before him, cannot he detain him? as the Warrant is directed to all Sheriffs. *Vide* 6 Mod. 154.

" ſhe or they ſhall have made full Payment or Satisfaction to the reſpective
" Plaintiff or Plaintiffs, Creditor or Creditors in ſuch Action or Actions,
" Execution or Executions, named, or until the Judgment or Judgments,
" on which ſuch Execution or Executions was or were ſued out againſt ſuch
" Perſon or Perſons, ſhall be reverſed or diſcharged by due Courſe of Law,
" or until Judgment in ſuch Action or Actions be given for ſuch Perſon or
" Perſons ſo committed as aforeſaid, or until the Contempt or Contempts,
" for which ſuch Perſon or Perſons were or ſhall be committed, be cleared
" and diſcharged, &."

(F) Of the proper Remedy and Nature of the Action to be brought for an Eſcape.

2 Inſt 382. Show. 176. 2 Saund. 34. Hard. 30.

AT Common Law the Plaintiff had no Remedy againſt the Sheriff for an Eſcape, whether upon meſne Proceſs, or in Execution, but by ſpecial Action upon the Caſe.

But now by an equitable Conſtruction of *Weſtm.* 2. *cap.* 11. (*a*) Action of Debt is given againſt Sheriffs, and by the 1 *Rich.* 2 *cap.* 12. againſt the (*b*) Warden of the *Fleet* for Eſcapes of Priſoners in *Execution.*

(*a*) This Action being founded *in Maleficio*, and alſo given by Statute, is not within the Statute of Limitations of 21 *Jac.* 1. *c.* 16. which ſpeaks of Debts ariſing by Lending or Contract. Saund. 34. *Jones* and *Pope* adjudged. Sid. 305. and Lev. 191. S. C. adjudged. (*b*) Extends to all Gaolers and Keepers of Priſons, though Infants, or Feme Coverts. 2 Inſt. 382.

*Page 246 Cro. Jac. 288. 2 Bulſt. 321. Cro. Eliz. 767.

* Alſo the Plaintiff, at his Election, may maintain either an Action upon the Caſe, or Debt, for an Eſcape in Execution.

Cro. Jac. 657. *Whiting* ver. *Sir George Reynel.* *Throgmorton* v. *Church*, 1 P. Wms. 685.

If there be Judgment againſt Baron and Feme, and the Feme only taken in Execution, and ſuffered to eſcape, an Action of Debt lies againſt the Marſhal; for as the Plaintiff may elect to take either the Huſband or Wife in Execution, ſo by his Election he has made her a ſole Debtor within the Statute of *R.* 2. although it was objected that it ſhould be Caſe, becauſe the Party is not totally deprived of his Remedy, the Huſband being ſtill liable.

Cro. Jac. 361, 533, 619. Cro. Eliz. 877. S. P. adjudged.

If a Priſoner in Cuſtody upon a (*c*) *Capias Utlagatum* is ſuffered to eſcape, the Plaintiff may either maintain an Action *Qui tam* againſt the Sheriff, or bring an Action of Debt againſt him in his own Right.

(*c*) So an Action on the Caſe will lie for the Eſcape of one taken upon a Writ *de Excommunicato Capiendo.* Lut. 123.

(*d*) Dyer 278. b. adjudged. & *vide* 1 Jon. 144. Sid. 364. S. C.

An Action of Eſcape is not a local Action, and therefore (*d*) if one eſcapes out of the *Marſhalſea*, which is in *Surry*, the Action againſt the Marſhal may be laid in *Middleſex.* †

† An Action is given for the Eſcape of a Priſoner in Execution upon a Decree in Equity by 5 *Ann. c.* 9. *ſ.* 4.—And a Penalty of 500*l.* is inflicted on Gaolers ſuffering Bankrupts to eſcape by 5 *Geo.* 2. *c.* 30 *ſ.* 18, 36.—Alſo by 16 *Geo.* 2. *c.* 31. aſſiſting Priſoners to eſcape is made Felony.

(G) Of the Manner of laying the Action.

IN this Action it is not neceſſary to ſet forth all the (*a*) Formalities required by Law in other Caſes. Cro. Eliz. 877. (*a*) *Vide* 2 Show. 424. pl. 391.

Therefore if, upon a Judgment obtained by the Teſtator, the Executor brings a *Scire facias*, and has Judgment, whereupon a *Capias ad Satifac.* iſſues, and *B.* is arreſted, and ſuffered to eſcape, the Plaintiff in an Action againſt the Sheriff for this Eſcape may declare briefly upon the Judgment in the *Scire facias*, without ſhewing the gradual Proceedings at Lengh, as is uſually done in an Action of Debt upon a Judgment. Carth. 148. *Gold* and *Strode*. 3 Mod. 324. S. C. Cro. Eliz. 877. S. P. adjudged.

But if the Plaintiff declares, that he ſued out a Writ of Execution againſt *J. S.* without ſetting forth any Judgment, and that the Defendant ſuffered him to eſcape; this is an incurable Fault; for by this Means he loſt the Benefit of pleading *Nul tiel Record*, (*b*) which he might do, if the Plaintiff had ſet forth the Judgment. Saund. 37, 38. *Jones* and *Pope*. Lev. 191. and 1 Sid. 306. S. C but the *Drury*'s Caſe.

(*b*) 8 Co. 142. Plaintiff had Leave to diſcontinue.

If *A.* recovers as Executor againſt *B.* and has him in Execution, and the Sheriff ſuffers him to eſcape, the Action muſt be brought as Executor in the (*c*) *Detinet* only, and not in the *Debet* and *Detinet*. Lutw. 893. *Glover* and *Kendal*, adjudged.

(*c*) For this *vide* 5 Co. 31. *Hargrave*'s Caſe. Cro. Jac. 545. Hob. 264. 3 Bulſt. 112. Lan. 79. Savil 130. Comb. 114. S. C. adjudged.

If the Plaintiff declares, that the Priſoner was committed, and eſcaped, but does not ſay *prout patet per recordum*; yet upon a general Demurrer this ſhall be good; for the Giſt of the Action was the Eſcape, and the Commitment only Inducement. 2 Salk. 565. pl. 1. *Waits* and *Briggs*. 5 Mod. 8. S. C. & *vide* 3 Lev. 393.

If in Eſcape the Plaintiff declares, that he had *J. S.* and his Wife in Execution, and that the Defendant ſuffered them to eſcape, and the Jury find ſpecially, that the Huſband only was taken in Execution (it being for a Debt due from the Wife before Coverture) and that he eſcaped; this is ſufficient, * and the Plaintiff ſhall have Judgment; (*d*) for the Subſtance of the Iſſue is found, though not purſuant to the Declaration. Sid. 5. *Roberts* and *Herbert*, adjudged.

* Page 247

(*d*) As where a Man aſſigns, for Breach of a Condition, that he was turned out of his Houſe by Two, and the Jury find that it was done by one only. Cro. Jac. 475. *Hinger* and *Pain*, adjudged.

So in an Action on the Caſe for the Eſcape of *A.* where the Jury found that *A.* was taken by *J. S.* the former Sheriff, and not by the Defendant, the preſent Sheriff; but finding that he was legally in his Cuſtody, and that he ſuffered him to eſcape, the Plaintiff had Judgment. Cro. Jac. 380. *King* verſus *Andrews*, adjudged. Sid. 5. S. C. cited.

The Plaintiff declared, that whereas he had good Cauſe of Action againſt *A.* and ſued out a *Latitat* againſt him; the Defendant being Sheriff arreſted him, and ſuffered him to eſcape; upon Trial at *Niſi prius* the Plaintiff was nonſuit, 2 Lev. 85. *Gunter* and *Cleyton*.

nonſuit, becauſe he could prove no Cauſe of Action againſt *A.* but *Hale* Ch. Juſt. ſaid, that if the Plaintiff had declared of a Debt of 40 *s.* and upon Evidence could prove but 30 *s.* it had been ſufficient; but the Book adds a *Quære*, it being a ſpecial Action upon the Caſe.

By the 8 & 9 *W.* 3. *cap.* 27. reciting, that the Way of Proceeding againſt the Warden of the *Fleet* Priſon, by Bill in the Courts of Common Pleas and Exchequer at *Weſtminſter*, is found to be very dilatory; it is enacted, "That "it ſhall and may be lawful to and for any Perſon or Perſons, having Cauſe "of Action againſt the Warden of the *Fleet* Priſon, upon Bill filed in the "ſaid Courts of Common Pleas or Exchequer againſt the ſaid Warden, "and a Rule being given to plead thereto, to be out eight Days at moſt "after filing ſuch Bill, to ſign Judgment againſt the ſaid Warden of the "*Fleet*, unleſs he plead to the ſaid Bill within three Days after ſuch Rule "is out."

(H) Of the Party's Defence who ſuffered the Eſcape; and herein of pleading freſh Suit.

5 E. 6. 66. 15. Rol. Abr. 808. IF the Priſon takes Fire, by means whereof the Priſoners eſcape, this ſhall excuſe the Sheriff, and he may plead it.

4 Co. 84. Rol. Abr. 808. So if the Priſon is broken by the King's Enemies, this ſhall excuſe the Sheriff, for he can have no Remedy over againſt them.

4 Co. 84. Rol. Abr. 808. But if the Priſon was broken by Rebels and Traitors, the King's Subjects, this ſhall not excuſe him, for he may have his Remedy over againſt them.

Cro. Jac. 657. Jon. 144. Rol. Abr. 808. If a Priſoner in Execution eſcapes without the Aſſent of the Sheriff, *&c.* and he make freſh Purſuit and retake him (*b*) before any Action brought againſt him, this ſhall excuſe the Sheriff.

(*b*) But if he retake him after the Action commenced againſt him, this ſhall not excuſe him; nor can it be pleaded to an Action that was well attached before. Rol. Abr. 808, 809. Jon. 145. Cro. Car. 657. *Harvey* and *Reynell*, adjudged.

Rol. Abr. 809. Dalt. Sheriff 562. So the Sheriff may plead, that the Priſoner eſcaped the ſixteenth Day of *December*, and that he made freſh Suit, and retook him the ſeventeenth Day of *December*, and retained him in Execution; for it is ſufficient, if he did all he could, though he loſt Sight of him in the Night, or otherwiſe.

* Page 248 Rol. Abr. 809. *So if a Priſoner eſcapes, and ſeveral Days after, but as ſoon as the Sheriff has Notice of it, he makes freſh Suit, and retakes him before any Action brought, this ſhall excuſe him. ‡

† See 3 Co. 52. *Vid. Ent.* 195, 198.

Vent. 211, 217. Sir *Ralph Bovy*'s Caſe. If in Debt upon an Eſcape the Plaintiff ſets forth in his Declaration a voluntary Eſcape, the Defendant may plead that he took him upon freſh Purſuit, without traverſing the voluntary Eſcape; for it was impertinent for the Plaintiff to alledge it, and no Ways neceſſary to his Action.

Vide Mod. 116. Sid. 13. It was formerly held that the Sheriff, *&c.* might give freſh Purſuit in Evidence, and need not have pleaded it.

Ld. Raym. 241, 399. 2 Ld. Raym. 788, 1574. 2 Stra. 882. Comyns 422. pl. 199, 554. pl. 231. 8 Mod. 120. 10 Mod. 394, 395, 396. 11 Mod. 3. pl. 17. 4. pl. 19, 50. pl. 20. 51. 69. pl. 4. 79. pl. 15. 93. pl. 1. 2 Ld. Raym. 1207. 12 Mod. 31, 227, 230, 583, 634. Ld. Raym. 424. Salk. 272. pl. 2 5 Mod. 414.

But

But now by the 8 & 9 *W.* 3. *cap.* 27. *ſ.* 6. it is enacted, "That no Re-
" taking on freſh Purſuit ſhall be given in Evidence on the Trial of any
" Iſſue in any Action of Eſcape againſt the Marſhal or Warden, or their
" reſpective Deputy or Deputies, or againſt any other Keeper or Keepers
" of any other Priſon or Priſons, unleſs the ſame be ſpecially pleaded;
" nor ſhall any ſpecial Plea be taken, received or allowed, unleſs Oath be
" firſt made in Writing by the Marſhal or Warden, or their reſpective De-
" puty or Deputies, or by ſuch other Keeper or Keepers of any other Pri-
" ſon or Priſons againſt whom ſuch Action ſhall be brought, and filed in
" the proper Office of the reſpective Courts, that the Priſoner for whoſe
" Eſcape ſuch Action is brought, did, without his Conſent, Privity or
" Knowledge, make ſuch Eſcape; and if ſuch Affidavit ſhall at any Time
" afterwards appear to be falſe, and the Marſhal or Warden, or other
" Keeper or Keepers of any other Priſon or Priſons, ſhall be convicted
" thereof by due Courſe of Law, ſuch Marſhal or Warden, or other
" Keeper or Keepers of any other Priſon or Priſons, ſhall forfeit the Sum
" of 500 *l.*"

If an Action of Eſcape be brought againſt the Sheriff, and the Judgment upon which it is found is reverſed, before ſuch Time as the Defendant is forced to plead, he may plead *(a) Nul tiel Record*, for (*b*) collateral Things executory are as if no Judgment had ever been, when reverſed.

8 Co. 142. Dalt. Sheriff 563.

(*a*) In Debt for an Eſcape of one committed on a *Capias Utlagatum*, the Sheriff may plead *Nul tiel Record*. Hob. 209. Brownl. 51. (*b*) But if, in Debt, upon Eſcape, the Plaintiff recovers, and hath Execution, and after the firſt Judgment is reverſed, yet the Judgment for the Eſcape remains in Force. 8 Co. 142. b. 3 Mod. 325. S. C. cited. ‖

‖ But if the firſt Judgment is reverſed before Defendant is forced to plead, he may plead *Nul tiel Record*. 8 Co. 142. a.

If a Priſoner taken on a *Capias ad Satisfaciendum* pays the Debt to the Marſhal for the Uſe of the Plaintiff in the original Action, and is thereupon diſcharged, yet he cannot plead it to an Action brought againſt him for the Eſcape; for the Marſhal had no Authority to receive the Money, the Words of the Writ being *Quod Capias, &c. & eum ſalvo Cuſtodias ita quod Habeas Corpus ejus coram Juſticiar.* tiel Jour *ad Satisfaciendum* the Plaintiff.†

For this *vide* Cro. Eliz. 404. Mod. 194. 2 Jon. 97. Lut. 587. 8 Mod. 225, 366. 10 Mod. 206, 307, 351. 12 Mod. 230, 385, 541. Ld. Raym. 399.

† Yet, *qu.* If the Court, on Motion, would not ſtay Proceedings on Payment of Debt and Coſts, for what can the Plaintiff require farther?

* Page 249

* Eſtate in Fee-ſimple.

(a) It was a common Practice among the Northern Nations that invaded the *Roman* Empire, for the Lords, who held great Diſtricts, to give Lands to ſuch Perſons as had behaved themſelves well in the Wars, ſometimes for Life only; and when they married their Daughters to any of thoſe Soldiers who were uſually their Vaſſals or Tenants, they gave the Lands to them and the Iſſue of that Marriage, which brought in the Notion of Succeſſion amongſt us. Dig. Lib. 1 Tit. 1. How from this Notion of Succeſſion a Fee-ſimple aroſe, by letting in all Heirs, whether lineal or collateral, of the Excluſion of the aſcending Line, Baſtards and the Half-blood, and why the Male Line was preferred, *vide* Title *Deſcents*. (*Ante* 27.)

(b) My Lord *Coke* divides *Fee*, which he ſays ſignifies the ſame with Inheritance, into Fee-ſimple or abſolute, conditional and qualified, or baſe. Co. Lit. 21. b. and this, which is the moſt ample Eſtate of Inheritance, may be in Things (c) *Real*, *Perſonal*, or *Mixed*; Real, as in Lands or Tenements; Perſonal, as when an Annuity is granted to one and his Heirs; Mixed, as when an Earl is created of ſuch a County. Co. Lit. 1. b. 2. a.

(a) (b) FEE-SIMPLE is an Eſtate in (c) Lands, Tenements, &c. to one and his Heirs for ever; alſo where a Corporation ſole or aggregate are capable of holding in Succeſſion, and Lands are given to them and their Succeſſors, they are ſaid to have a Fee-ſimple.

In Fee-ſimple we ſhall conſider,

(A) Who may purchaſe or inherit ſuch Eſtate. 249.

(B) The Import of the Word Heir that creates the Eſtate. 252.

1. When it is a Word of Limitation. 252.
2. When it is a Word of Purchaſe. 254.

(A) Who may purchaſe or inherit ſuch Eſtate.

Vau. 227, 291.
7 Co. 16, 17, 18.
Dyer 2. pl. 8.
but for this
vide Head of *Aliens*.

AN Alien ‡ cannot purchaſe any Lands in *England*; the Reaſon is, becauſe every Perſon is preſumed to have a natural and neceſſary Allegiance to that Society that firſt protected and preſerved him; and therefore he cannot pay any Allegiance to any other Society, unleſs he be afterwards received into it.

‡ Natural Subjects may inherit and make their Title by Anceſtors born beyond Sea. 11 & 12 *W.* 3. *c.* 6. 25 *Geo.* 2. *c.* 39.

All

All Perſons attainted of Treaſon or Felony are incapable of purchaſing; Felony, by the antient Feudal Law, being a (*a*) Crime for which a Vaſſal forfeited his Feud to the Lord, becauſe he breaks his Oath of Fealty in the higheſt Manner; his Body with which he had engaged to ſerve the Lord being forfeited to the King; and his Blood is ſaid to be corrupted, becauſe no Man can repreſent his Perſon, that Perſon itſelf being forfeited by the Law, and the Note of Infamy reſting upon his Family; ſo that no Repreſentative of his can be received to do any feudal Service; for the greater Terror of all Offenders therefore, ſuch Tenant dying without Heirs, the Land is in the Lord by Forfeiture; but if the Tenant commits Treaſon, the Lands are forfeited to the King, becauſe there is an Exception in the Oath of Fealty that ſaves his Allegiance to the King; ſo that if he forfeits his Allegiance, even thoſe Lands held of another Lord are forfeited to the King, for the Lord himſelf cannot give out Lands, but upon that Condition, as appears by the Reſervation in the Oath.

(*a*) Co. Lit. 8. a of ſuch Crimes there were many by the antient Feudal Law, for which *vide Digeſt. Feudorum, Lib.* 2 Tit. 23, 24. Vigellius 242. 350. Spelm. Gloſſ. 214, 215. Co. Lit. 64.

* If a Man be attainted of Felony, and after purchaſe Land, and dies, the King ſhall have it by his Prerogative, and not the Lord of the Fee; becauſe his Perſon being forfeited to the King, he cannot purchaſe but for the King.

* Page 250 Co Lit. 2. b.

If there be Grandfather, Father and Son, and the Father be attainted, the Son cannot inherit the Grandfather, becauſe the Father cannot be repreſented; but if the Father be attainted, two Brothers may inherit each other, becauſe there is no Diſability in the one to be repreſented, or in the other to repreſent; if the Father be attainted, the Son may inherit the Mother; if the eldeſt Son be attainted, and the Father die in the Life-time of ſuch eldeſt Son, the younger cannot inherit, becauſe there is the Line of the elder Brother in Being before him; but if the eldeſt Son dies in the Life-time of his Father, without Iſſue, the younger Brother ſhall inherit; but if he leave Iſſue, neither the Iſſue nor younger Brother can inherit.

Noy 158 to 170. Co. Lit. 8. 4 Leon. pl. 21. Mo. pl. 775. Dyer 48.

If the Father be attainted and dies during the Life of the Grandfather, yet the Son ſhall not inherit the Grandfather, becauſe he muſt repreſent his Father, who cannot be repreſented; but if the Grandfather be ſeiſed in Tail, and the Father be attainted of Treaſon ſince the 26 *H.* 8. *c.* 13. and dies in the Life-time of the Grandfather, the Son ſhall inherit the Grandfather; for the Son is Heir *per formam Doni* to the Tail, which is originally not forfeitable, and by that Statute the Father only forfeits the Lands and Right that he hath in him.

Co. Lit. 8. 2 Co. 10. *Dowtie's* Caſe.

If a Man attainted be pardoned by Act of Parliament, he is totally reſtored and inheritable to all Perſons; but if he be pardoned by Charter, he may thenceforth purchaſe Lands, but cannot inherit his former Relations; for the King's Charter cannot alter the Law, or take away the Right of others, or reſtore the Relation that was loſt.

Co. Lit. 8. But if a Man be attainted, and after pardoned by Charter, the Children born before ſuch Pardon ſhall not inherit; but if they fail, the Children born after ſuch Pardon may inherit him, for the Pardon makes him capable of new Relations as well as of new Purchaſes, though all the old legal Benefits and Relations are loſt, Noy 170.

All cuſtomary Eſtates are within this Rule, unleſs there be ſome particular Cuſtom to the contrary, as in Gavelkind, becauſe the Perſon is *civiliter mortuus* by the Attainder, and therefore is diſabled to have or hold any Eſtate, or to have any Property in any Thing; and therefore if a Perſon be ſeiſed in Fee of a Copyhold, and be attainted of Treaſon or Felony, the Copyhold is in the Lord without any Preſentment of the Homage, becauſe it is againſt the Nature of a Court-Baron to inquire of criminal Matters or Offences againſt the King, and ſuch Homage is at the Will of the Lord, and often influenced by him; but if a Copyholder be convicted of Felony,

Pollex. 617. 2 Keb. 451, 456. 2 Vent. 38-9. 2 Brown. 118. *vide* Co. Cop. Sect. 58. *cont.*

Leon. 1. Pollex. 615 to 621.

and preſented by the Homage by ſpecial Cuſtom, the Eſtate may be forfeited to the Lord; but this is only by the ſpecial Cuſtom, ſince the Copyholder is not diſabled by the Conviction to hold the Eſtate, as he is if he were attainted; and therefore, ſince it is by the Cuſtom only that ſuch Forfeiture accrues, it muſt be in the Manner in which the Cuſtom ſettled it, which is by Preſentment of the Homage; but if a Copyhold is granted for Life, and by another Copy the Reverſion is granted to another, *Habendum* after the Death of the firſt Copyholder, or Surrender, Forfeiture, or other Determination of the firſt Eſtate, the firſt Copyholder commits Murder, and is thereof attainted, and the King pardons the Murder and the Attainder, and all Forfeitures thereby; in this Caſe he in the Reverſion is intitled to the Eſtate; for the King cannot have it for the Baſeneſs of the Tenure, ſince he cannot be Tenant at Will to any Perſon, and the Lord cannot have it, becauſe he cannot be Tenant to himſelf; therefore the particular Eſtate of Tenant for Life being extinguiſhed, the Reverſion immediately commences.

*Page 251 Co. Lit. 3. b. but for this *vide* Head of *Baſtardy*.

*A Baſtard cannot inherit, but if he hath got a Name by Reputation, he may purchaſe by it, for all Surnames were originally acquired by Reputation.

Notwithſtanding the Charters and Immunities granted to the *Jews*, yet their whole Eſtates were taxable at the Pleaſure of the King, and might at any Time be ſeiſed by him. About the 18 E. 1. when their Uſuries

As to *Jews*, they were tranſlated from *Roan*, by *William* the Conqueror, *ob numeratum Pretium*, and were allowed by ſeveral Kings following the Conqueror, becauſe they dealt with one another chiefly in Money, and ſo drew a great Deal of Money into the Kingdom, which they let out to Chriſtians on Uſury, and were taxable to the King at his Pleaſure. *Richard* the Firſt erected a Court where all their Real and Perſonal Eſtates were regiſtered; which all, upon the Death of any *Jew*, came to the King, but was redeemable by his Children, paying their Fine, and all the Children equally inherited; the Wives ſued for Dower in this Court, and could not ſue at Common Law for it; and therefore if a *Jew* born in *England* took to Wife a *Jew* alſo born in *England*, if the Huſband was converted to the Chriſtian Faith, and purchaſed Lands and enfeoffed another and died, the Wife could not demand Dower at Common Law againſt a Chriſtian.

and Extortions were very grievous to the People, they were baniſhed by Proclamation, and their Eſtates ſeiſed to the King, and a Statute made againſt their taking Uſury in this Land, for ever afterwards; but now all the Records touching their Courts, their Immunities, and the Power of the Crown over them, are loſt and obſolete, ſo that thoſe that are born here ſeem inheritable at this Day; but *quære* how far thoſe old Laws, of which there are Foot-Steps in Hiſtory, may be revived upon them. Hollingſhead, Vol. 3. p. 15. Co Lit. 31, 32. 2 Inſt. 506, 507. *Vide* Molloy 397 to 410. a good Account of the *Jews*.

11 & 12 W. 3. c. 4. for this *vide* Tit. *Papiſts and Popiſh Recuſants*.

As to Papiſts, there hath been an Act made to prevent the dangerous Growth of Popery, eſpecially at a Time when there is a pretended Title in a Popiſh Prince, which diſables all, who after the 29th Day of *September* 1700, attaining the Age of eighteen Years, do not within ſix Months after take the Oaths, *&c.* to inherit, or take by *Deſcent*, *Deviſe*, or Limitation, *&c.* any Lands, Tenements, *&c.* and that during the Life of ſuch Papiſt, or until he or ſhe do conform, the next of his or her Proteſtant Kindred ſhall hold and enjoy the ſaid Lands, without being accountable for the Profits, ſubject to wilful Waſtes, and that from the tenth Day of *April* 1700, all Papiſts ſhall be diſabled to purchaſe any Manors, Lands, *&c.* and that all Eſtates, Terms, Intereſts, *&c. made*, *ſuffered*, *or done*, to or for their Uſe, Benefit, Truſt or Behoof, mediately or immediately, ſhall be utterly void to all Intents and Purpoſes.†

† The Eſtates of Papiſts conforming to the Proteſtant Religion are ſecured againſt Diſabilities, by the Stat. 11 Geo. 2. c. 17. which *vide*.

Re-

Religious Perſons are prohibited to purchaſe in Mortmain. ‖ *Vide* 7 Ed. 1. and 2 & 3 Ann.

‖ By 7 & 8 W. 3. c. 37. The King may grant Licences to any Perſon, to alien or purchaſe in Mortmain: But Gifts in Mortmain by Will are reſtrained, by 9 Geo. 2. c. 36. By 17 Car. 2. c. 3. ſ. 8. Parſons and Vicars, not having ſettled Means of 100*l. per Annum*, may purchaſe and annex Lands or Rents without Licence of Mortmain.

Villeins and Bondmen have Power to purchaſe Lands, but cannot retain them againſt their Lords.‡ Co. Lit. 2.

‡ There are not now any ſuch Perſons in this Kingdom.

Of ſuch Perſons as are naturally incapable to purchaſe or inherit, a Monſter not having human Shape cannot purchaſe or inherit, but an Hermaphrodite ſhall inherit or purchaſe *ſecundum prævalentiam ſexus incaleſcentis*; one born deaf and dumb may inherit; ſo may any born deaf, dumb and blind, becauſe it is for their Advantage; but they cannot contract, becauſe they cannot underſtand the Signs of contracting; an Infant, an Idiot, and a Perſon of *Non ſane Memory* may inherit, becauſe the Law, in Compaſſion to their natural Infirmities, preſumes them capable of Property; ſo alſo an Infant or a Perſon of *Non ſane Memory* may purchaſe, becauſe it is intended for his Benefit; and the Freehold is in him till he diſagree thereto, becauſe an Agreement is preſumed, it being for his Benefit, and becauſe the Freehold cannot be in the Grantor, contrary to his own Act, nor can it be in Abeyance, for then a Stranger would not know againſt whom to demand his Right; if at full Age, or after Recovery of his Memory they agree thereto, they cannot avoid it; but if they die during Minority or Lunacy, the Heirs may avoid it; for they ſhall not be ſubject to the Contracts of Perſons who wanted Capacity to contract; ſo if after his Memory recover-*ed, the Lunatick or Perſon *Non Compos* die without Agreement to the Purchaſe, their Heirs may avoid it. Co. Lit. 8. Inſt. 2. 2 Vent. 203, 204. *vide* Tit. *Infancy and Age*, and *Idiots, &c.* * Page 252

A Feme Covert is capable of Purchaſing; for ſuch an Act does not make the Property of the Huſband liable to any Diſadvantage, nor does it ſuppoſe a ſeparate Will or Power of Contracting in the Wife; but here the Will of the Wife is ſuppoſed the Mind of the Huſband, ſince no Man is ſuppoſed not to aſſent to that which is for his Benefit; but in this Caſe the Huſband may diſagree, and it ſhall avoid the Purchaſe; for ſince Huſband and Wife, according to the Inſtitution of Marriage, are reckoned one Perſon, they can have but one Will, and that muſt be ſeated in the Huſband, as fitteſt to govern, therefore the ſupreme Direction of all Affairs in his Family muſt belong to him; but if he neither agrees nor diſagrees, the Purchaſe is good, for his Conduct ſhall be eſteemed a tacit Conſent, ſince it is to turn to his Advantage; but in this Caſe, though the Huſband ſhould agree to the Purchaſe, yet after his Death ſhe may wave it; for having no Will of her own at the Time of the Purchaſe, ſhe is not indiſpenſibly bound by the Contract; therefore if ſhe does not, when under her own Management and Will, by ſome Act expreſs her Agreement to ſuch Purchaſe, her Heirs ſhall have the Privilege of departing from it. Inſt. 3. a But the Queen Conſort, as ſhe is a Woman of greater Dignity than any other of her Sex in the Kingdom, ſo ſhe hath greater Privileges than any of them, for ſhe is conſidered by the Law as a Perſon exempt from the King, and hath Ability to purchaſe and grant without him;

which Oeconomy ſeems to be introduced as well for the greater Ornament and Grandeur of the Monarchy, by enabling the Queen to ſupport and keep a Court of her own, as to encourage Princes to court the Alliance of our Princes by Marriages attended with ſo much Eaſe and Dignity.

(B) The Import of the Word Heir that creates the Eſtate.

1. When it is a Word of Limitation.

Co. Lit. 9. IF Land be given to *J. S.* and his Heirs, *J. S.* can claim it, becauſe he is particularly named, and whoever can make himſelf Heir to *J. S.* that is can ſupport the Character of a legal Repreſentative to *J. S.* may claim it alſo by the Words of the Gift; but if Land be *granted* § to *J. S.* for ever, no Perſon can ſtand in his Place after his Death, or claim any Intereſt, becauſe the Party that is next of Kin by the Law cannot bring himſelf within the Words of the Conveyance.

§ *Contra*, as to a Deviſe, ſee *poſt* 254.

Co. Lit. 9. It is therefore a general Rule, that nothing but the Word *Heir* will create a Fee, for it ſignifies ſuch a neareſt of Kin, with all other legal Qualifications that are neceſſarily required in all Perſons that repreſent or ſtand in the Place of another, by the *Engliſh* Law; but this general Rule has theſe following Exceptions.

For when the Act of Diſpoſal relates to another Thing, that Thing becomes in a Manner Part of the Diſpoſition, for in ſuch Caſes the Mind is carried to the Notion of an Heir as truly and ſurely as if the Word had been in the Inſtrument itſelf; ſo that there is a great Difference between this Caſe and the Caſe where other Words are ſubſtituted inſtead of the Word *Heir*; for ſcarce any other Word can expreſs all the Notions that make up the *Idea* of an Heir; but where there is a Relation to a legal Heir, it is the ſame Thing as if it were expreſſed in the Conveyance itſelf, becauſe the Word is but to put us in Mind of the Thing which is done already by the Relation; for as we ſay not only that which is certain that is ſo in itſelf; but that, alſo, which by ſome other Standard is reducible to a Certainty: So that not only that Conveyance hath Force, which hath Words in it to anſwer the Intent of the Party, but that alſo which borrows Strength from any other Thing to anſwer the ſame Deſign; and this will appear plain by the following Inſtances.

If the Father enfeoff the Son, to hold to him and his Heirs, and the Son enfeoffeth the Father as fully as the Father enfeoffeth him; this Conveyance paſſeth a Fee to the Father.

*Page 253 Co. Lit. 9. * By a Fine *come ceo*, *&c.* a Fee-ſimple will paſs without the Word *Heirs* becauſe it hath Relation to a precedent Feoffment, which is ſuppoſed to paſs the Fee.

Co. Lit. 9. If the Lord releaſes all his Right to the Tenant, the Seigniory is extinct without the Word *Heirs*, for this Inſtrument is to diſcharge the Eſtate of the Tenant, and therefore hath a neceſſary Relation to the Eſtate, which the Lord at firſt created, and conſequently it refers to thoſe Words that in the Original of the Eſtate gave him a Fee-ſimple.

Co. Lit. 9. If there be two Coparceners, and one of them releaſes all her Right to the other, without the Word *Heirs*; this paſſes a Fee, for each Coparcener till Partition, is ſeiſed of the whole Eſtate in Fee, though each of them hath Right or legal Demand to the Fee of a Moiety only; when, therefore, one releaſes all her Right, it hath a neceſſary Relation to the Eſtate whereof the other is ſeiſed, and to which ſhe hath a Right, which is the Fee.

Co. Lit 9. 200. b. If there be two Jointenants, and one releaſes to the other, this paſſeth a Fee without the Word *Heirs*, becauſe it refers to the whole Fee which they jointly took, and are poſſeſſed of by Force of the firſt Conveyance; but Tenants in Common cannot releaſe to each other, for a Releaſe ſuppoſeth the

the Party to have the Thing in Demand; but Tenants in Common have ſeveral diſtinct Freeholds, which one cannot transfer to the other, without the Solemnity of Livery.

A Common Recovery is in Nature of an Action commenced, and Judgment upon it, and therefore paſſeth a Fee without the Word *Heirs*; for it hath Relation to a precedent Right, in the Recoveror, which muſt be ſuppoſed a Right to the Fee. Co. Lit. 9.

If one Coparcener grants a Rent to another for Owelty of Partition, the Grant is good without the Word *Heirs*, for, coming in Recompence of an Inheritance, it has a plain Relation to the Inheritance departed with, as if the Word *Heirs* had been in the Gift. Co. Lit. 9.

A Reſtitution to a Perſon attainted and pardoned will not paſs a Fee without the Word *Heirs*, for ſince the Party forfeited the Eſtate, the Reſtitution is in Nature of a *new* Grant; and here are no Words that create a neceſſary Relation to that Fee, which the Perſon formerly attainted had, for he may be reſtored to his Eſtate during his own Life. Co. Lit. 9. b. It is a new Grant in Nature of a Reſtitution.

Where a Man is called to Parliament by Writ, the Inheritance is in him without the Word *Heirs*, becauſe the Writ is in Nature of a Citation to appear at the Court of Parliament, and the Heir cannot be cited to appear, and therefore there is no Mention made of him; but yet in ſuch Caſe the Peer hath an Inheritance. Inſt. 9. b.

There are ſome Species of Fees that are expreſſed without the Word *Heirs*, for the Words whereby they are created do ſignify Inheritance, with ſome other Notion over and above, not expreſſed by the Word *Heirs*; as the Word *Frankmarriage* ſignifies an Inheritance given in Conſideration of Marriage, which being for the Peopling of the Country had ſeveral Privileges annexed to it; ſo *Frankalmoigne* ſignifies an Inheritance devoted to God, which was mightily favoured by the Superſtition of antient Times; likewiſe if a Feoffment or Grant be made by Deed to a Mayor and Commonalty, or any other Corporation Aggregate of many Perſons capable to purchaſe, they have a Fee-ſimple without the Word *Succeſſors*, becauſe in Judgment of Law they never die; for the ſame Reaſon if Lands are given to the King by Deed inrolled without the Word *Succeſſors* or *Heirs*, a Fee-ſimple paſſeth. Co. Lit. 9. b.

There are likewiſe particular Kinds of Laws within the Kingdom, that allow of the Transferring of Inheritances without the Word *Heirs*, as the Law of the Foreſt, which dependeth on the meer Pleaſure of the King, and not on the Solemnities and Forms of a Contract; and therefore, if the King granted an Aſſart at a Juſtice-Seat, *habend. & tenend. ſibi in perpetuum*, the Party had a Fee without the Word *Heirs*, in as much as the King had ſignified his Pleaſure, that the Party ſhould have the Privilege of Tillage for ever. Co. Lit. 10. a. Co. Lit. 7. * Page 254

In Wills and Teſtaments, where the Mind of the Party appears to transfer a Fee, for the Mind of dying Perſons delivered in haſte ought to receive a benign Interpretation. Co. Lit. 9. But for this *vide* Tit. *Deviſes*.

2. When it is a Word of Purchaſe.

The firſt Rule to be obſerved is this, That where the Anceſtor takes an Eſtate for Life, and a Limitation is afterwards made to his right Heirs, there the Anceſtor has the Reverſion executed in himſelf, and the Right Heirs are not Purchaſers; as if a Leaſe for Life be made to *A.* Remainder to *B.* Remainder to the right Heirs of *A.* ſuch Remainder is executed in *A.* and he may grant it over; but if a Leaſe for Years be made to *A.* Remainder to the right Heirs of *A.* this is a contingent Remainder to the right Heirs of *A.* and *A.* himſelf takes nothing by ſuch Limitation; and the Lit. Sect. 578. 2 Rol. Abr. 415, 417. Co. 104.

the Reaſon of the Difference is this; in the firſt Caſe *A.* having an Eſtate for Life is *Feoffatus* within the Statute *Quia emptores*, &c. and conſequently capable of performing the feudal Services; and then to make the right Heir a Purchaſer would be to ſuſpend the Services of the Feud during the Life of *A.* who is capable of performing them; which would apparently tend to the Weakening of the Tenure and State of the Kingdom; and therefore ſuch Interpretation ought to be made as beſt ſupports the Tenure, when the Words will bear both Senſes; for if, after ſuch Limitation to the right Heirs of Tenant for Life, he ſtill continued but barely Tenant for Life, he would not be in the Homage of the Lord, nor would he be obliged to venture his Life in the Wars for ſuch Eſtate; and he in Remainder would not be obliged to do the feudal Services, becauſe, during the Life of the Tenant for Life, he has no Intereſt in the Land, becauſe his Remainder cannot execute during the particular Eſtate, and conſequently not obliged to do the Services of the Feud; and if ſuch Remainder was to veſt in the right Heirs as Purchaſers, it could not veſt during the Life of Tenant for Life, *quia non eſt hæres viventis*; and then by ſuch Conſtruction the Services of the Feud would be neglected during the Life of *A.* for there would be no one to perform them; but in the laſt Caſe you cannot veſt the Remainder in the Leſſee for Years, for he is not *Feoffatus* within the Statute; for the Perſon that properly takes by the Feoffment is the Freeholder, and then conſequently, although you ſhould conſtrue a Limitation to ſuch right Heirs a Remainder veſted in the Leſſee for Years; yet he, having not the immediate Freehold in him, would not be obliged to do the feudal Services till the intermediate Remainder was ſpent; and therefore the Remainder to the right Heirs is not immediately veſted in the Leſſee for Years, becauſe the Heir is the firſt that can have the Freehold as feudal Tenant to the Lord, and therefore by the Words of the Donation muſt be the firſt Purchaſer of ſuch Remainder; and though in the firſt Caſe they admit ſuch Limitation to be a Remainder executed for publick Convenience, *viz.* that the feudal Services, if poſſible, may be anſwered; yet it would be ridiculous to admit ſuch Conſtruction in the laſt Caſe, ſince it would not make a feudal Tenant to anſwer the Services; as to run counter to the Tenor of a Man's Grant, without a Benefit to any Body, would be moſt abſurd, for ſuch Conſtruction would not make a feudal Tenant, becauſe the Leſſee for Years would not hold of the Lord, nor could the Lord avow upon him.

2 Rol. Abr. 418. * Page 255

But if a Feoffment be made to the Uſe of *A.* and *B.* during their joint Lives, and after the Death of either of them, to the Uſe of *C.* for Life, * and after to the Heir of the Body of *B.* though *B.* hath an Eſtate of Freehold, yet the Remainder limited to the Heirs of his Body does not veſt, but is in Abeyance, becauſe by this Limitation the Eſtate of Freehold may determine in *B.* during the Continuance of his Life; and ſince *B.* is not let into the Eſtate during his whole Life, his Heir cannot take as Repreſentative of him, for ſuch Repreſentative muſt be of an Eſtate of which *B.* was ſeiſed; and ſince by the Intention of this Conveyance the Feoffor hath not limited it in ſuch a Manner, that *B.* in all Events ſhould die ſeiſed of the Eſtate, it is plain he deſigns only a contingent Benefit to the Heirs of the Body of *B.* as original Purchaſers, and not by Derivation from him.

Rol. Abr. 418.

If a Leaſe for Life be made to *A.* Remainder to the right Heirs of *B.* this is a good contingent Remainder if Livery be made, becauſe ſuch Act of Notoriety delivers over the Freehold to *A.* at the Time it is made, and thereby creates a Tenant, who is *Feoffatus* within the Statute to hold of the Lord, who is capable of doing the feudal Services, except Homage, and on whom the Lord may avow; and by this Conſtruction there is no Inconvenience, or Suſpenſion of all the feudal Services; for if *A.* ſhould die during the Life of *B.* the contingent Remainder would become

void, becauſe there would be no feudal Tenant to attend the Services; for the right Heir could not take it during the Life of *B.* and then the Land would return to the Donor, who would be again Tenant to anſwer the Services.

But if *A.* makes a Leaſe for Life, or a Gift in Tail, Remainder to his right Heirs; this is a void Limitation in its original Creation, for it cannot veſt immediately no more than in the former Caſe, *Quia non eſt hæres viventis*; and to conſtrue it a contingent Remainder would be to ſuſpend the Services of the Feud to no Purpoſe; for it is not poſſible that it can veſt during the Life of the Grantor, for ſo long as he lives he can have no Repreſentative or Heirs, and therefore not like the former Caſe, which may poſſibly veſt the Minute after the Grant is made, or at leaſt during the Life of the Grantor; beſides, that in this Caſe, where the Feoffor has not parted with the whole Eſtate out of him, the Feoffee does not hold of the Lord within the Statute *Quia emptores, &c.*‖ and to conſtrue this Limitation to the right Heirs a Parting with the whole Eſtate, would be an abſurd Conſtruction, becauſe the Anceſtor, in caſe he outlives the particular Eſtate, muſt be in of his old Reverſion, ſince he cannot have an Heir during his Life; and the Anceſtor cannot be ſuppoſed to deſign the Heir ſhould take as a Purchaſer, ſince it were an abſurd Intention, that that Eſtate, which would of Courſe deſcend to him, ſhould veſt in him in the ſame Manner as a Purchaſer; and by Conſequence, ſince there is no Alteration by the Conveyance from the Courſe in which the Eſtate would have deſcended, it muſt be a void Limitation.

And. 3. Co. Lit. 20. b. Dyer 156. Rol. Abr. 827. 2 Rol. Abr. 415. Leon. 182. *Fenwick* ver. *Mitford.* Moor 284.

‖ See Tit. *Remainder and Reverſion*, 4 Vol. 292.

Eſtate in Tail.

* Page 256

BEFORE we enter into a Diſquiſition of Eſtates-Tail, as they ſtand on the Statute de *donis conditionalibus*, it will be neceſſary to take a more particular View of the conditional Fee at Common Law, becauſe the Statute *de donis* creates no Eſtates-Tail, but of ſuch Eſtates as were anciently conditional Fees.

See this Statute expounded, 2 Inſt. 333. Fee-Tail was originally termed the *Feudum novum*, in Oppoſition to Fee-ſimple abſolute, or the *Feudum antiquum*, and went only to the Deſcendants, either Male or Female, according to the Words and Limitation of the feudal Donation, and thence came to be diſtinguiſhed into *Feudum Maſculinum* and *Fœmininum*.

If Lands were given to a Man and the Heirs Male of his Body, the Iſſue Female were not inheritable, becauſe the Feudal Donation expreſſing particularly what Heirs of the Donee were to inherit, no Heir, though of the Body of ſuch Feuditary, could inherit, that did not come under the Words and Limitation of the Donation.

Co. Lit. 19. a

Co. Lit. 19. a. 7 Co. 35. a.

And if the Donee had Iſſue two Sons, and died, and the eldeſt died leaving a Daughter, the youngeſt Son came into the Succeſſion of the Feud and excluded the Daughter; and if there had been no Son, the Feud (*a*) reverted to the Donor; for the expreſs Words of the firſt Donation, which regulated all ſubſequent Deſcents, excluded all Females from inheriting ſuch Feud; ſo *e contra* if the Feud had been given to a Man and the Heirs Female of his Body, the Deſcent was to be conveyed to the Females only, excluſive of all Males, according to the Words of the firſt Donation.

(*a*) For the collateral Heirs were excluded, Rol. Abr. 841.

Co. Lit. 13. a. ‖ See *infra* 259. 60. and 262. S. C. (*b*) And therefore this at this Day is a Fee-ſimple. Jon. 105.

But if the Limitation of the Feud had been to a Man and his Heirs Male,‖ ſuch Donation doth not exclude the Females, but lets them and (*b*) all collateral Heirs in, becauſe ſuch Donation, not limiting the Feud to the Deſcendants of any Body, cannot be good as a *Feudum novum*; and if it be conſtrued a *Feudum antiquum*, the Courſe of Deſcent cannot be altered by any Man's private Fancy; and ſince it appears by the Words of the Donation, that the Donor intended an Eſtate of Inheritance, his Words ſhall be taken moſt ſtrongly againſt himſelf, and ſhall paſs the moſt abſolute Eſtate of Inheritance, which is a Fee-ſimple to which not only his lineal Heirs, but alſo his collateral Heirs, are inheritable.

The Power of Alienation was not abſolute in the *Feudum novum*, becauſe ſuch Power might have been employed to diſappoint the Lord of his Reverter; and yet they did not abſolutely take away from ſuch Feuditaries the Power of Alienation, becauſe that would have created a Perpetuity, which was againſt the original Policy of the *Engliſh* Law. To come therefore to a Temper between theſe Extremes, the Donee was not allowed to alien till Iſſue had, becauſe till then he had not a deſcendable Eſtate in him, and therefore could not transfer a deſcendable Eſtate to others; and if he ſhould have been allowed to have aliened whether he had Iſſue or not, ſuch Alienations would have diſappointed the Limitations and Reſtrictions in the Gift, which brought it back to the Lord on Failure of Iſſue; and therefore they conſtrued the Words of the feudal Donation not only as a Limitation but Condition, which the Feuditary was obliged to perform before he had an abſolute Power over the Eſtate; for ſuch Donations were generally made for the Propagation of Families, * and therefore it beſt anſwered the Deſign of ſuch Gifts, to ſuppoſe the Power of Alienation to ariſe on the begetting Iſſue, becauſe in ſuch Caſes the Feuditary had the Contingencies of a Family; for when Iſſue was had, they looked upon the Lord's Poſſibility to be at a great Diſtance, and they admitted of an abſolute Power of Alienation; therefore, if a Man had aliened before Iſſue had, the Lord could not have entred for a Forfeiture, becauſe that would have been contrary to his own Donation, which carried it to the Feuditary and his Deſcendants; and therefore, if Deſcendants were afterwards born, the Lord was excluded during the Continuance of ſuch Iſſue, and the Iſſue born after the Alienation could not have entred, becauſe they only claim as Repreſentatives to their Anceſtor, and therefore his actual Alienation barred them.†

Co. Lit. 19. a. Plow. 246. b. 7 Co. 34. b. Rol. Abr. 840, 841. 2 Inſt. 333.

* Page 257

† See Co. Lit. 19. a. See alſo *infra* 265. d. The Iſſue hath Remedy by a *Formedon in deſcender*, given by *Weſtm.* 2. c. 1. *Vide infra* 587.

Plow. 235. Co. Lit. 19.

But if ſuch Tenant had aliened before Iſſue had, and afterwards had Iſſue, and then the Tenant and ſuch Iſſue had died, ſuch Alienation had not barred the Donor of his Right of Reverter, becauſe the Condition was not performed at the Time of the Alienation, ſo that the Tenant had not an abſolute Property veſted in him for the Purpoſe; wherefore, ſince the Alienation was before the Tenant had ſuch Power, it was ſubject to the Lord's Claim as if no ſuch Alienation had been, and by Conſequence the Lord might

have entered as in his Reverter, as if the Tenant had died without Iſſue, and the ſubſequent Birth of the Iſſue is not a ſufficient Performance of the Condition to make the precedent Alienation valid, ſince that were to allow of the Alienation of a Perſon who had no Power to alien.*

* See *infra* 589.

But if a Gift was made to a Man and the Heirs of his Body, and the Donee had died leaving Iſſue, ſuch Iſſue, without having Iſſue, might have aliened, becauſe, coming in by Deſcent, he had the ſame Power over it as he had over other Eſtates deſcendible, and ſucceeding into his Anceſtor's Eſtate, who had an abſolute Power of Alienation, he took it in the ſame Manner diſcharged of any Reſtraint from the Condition, and the rather, becauſe otherwiſe the Iſſue could not have made the neceſſary Proviſions on his own Marriage by a Family Settlement; but if the Iſſue had not aliened, it had followed the Limitation of the firſt Donation, becauſe the Eſtate had continued in the ſame Condition without Alteration, and conſequently, on Failure of Iſſue according to the firſt Donation, the Lord had been in, in his Feudal Right of Reverter.

7 Co. 34, 35. Co. Lit. 19 a.

And as the Feuditary had Power to alien the Land after he had Iſſue, ſo likewiſe might he have charged it with a Rent, Common, *&c.* for this Power neceſſarily follows an abſolute and intire Property; for if he might have aliened the Feud from his Iſſue, it is but Part of that Power to tranſmit it to his Iſſue under any Charge or Incumbrance he thought fit.

Co. Lit. 19. a. Rol. Abr. 840.

So the Feuditary by having of Iſſue might have forfeited the Feud for Treaſon or Felony.

Co. Lit. 19. a. Rol Abr. 840.

If there was no expreſs Reſervation of Services in the firſt Feudal Donation, the Donee held of the Donor as he held over.

Co. Lit. 19. except where a Man made

a Gift in Frankmarriage, for in ſuch Caſe the Donee held free from all Services till the fourth Degree was paſt; becauſe theſe Gifts being made by the Feuditary on the Marriage of his Daughter, or ſome other Relation, ſuch Promotion was thought a ſufficient Conſideration for the Gift, without an Acknowledgment of an annual Service, or where the Tenant in Grand Serjeanty made a Gift in Tail generally, without any ſpecial Reſervation. Co. Lit. 23. a.

Thus the Law ſtood till the 13 *Ed.* 1. *c.* 1. when the Statute *de donis conditionalibus* was made, which deprived the Feuditary of his antient Power of Alienation, upon his having Iſſue, or performing the Condition; the Pretence of making this Statute, as appears from the Preamble, was to comply with the Will of the Donor, who in all ſuch Grants intended that the Feud ſhould be tranſmitted to the Deſcendants of the Feuditary in the ſame Plight he received it; and upon Failure of the Deſcendants, * that it ſhould revert to the Donor himſelf; but the real Deſign of making the Statute was to introduce a Perpetuity to other Purpoſes; for, towards the End of the Barons War, the Crown took up a new Method of Politicks to break the Intereſt of the Baronage; for when any Feud that was then ſubſiſting in large Diſtricts and Territories eſcheated, or was forfeited to the Crown, the King divided them, and gave them out in leſſer Feuds, thereby to deſtroy the Power of the Peerage; this the Barons ſaw would tend to the Ruin of their Body, and therefore paſt this Act to make all ſuch new Feuds unalienable, and by that Means not forfeitable for Treaſon, though the Condition ſhould be performed by having Iſſue; and from the Time of this Statute, the Donor's Poſſibility or Right of Reverter was turned into a Reverſion; and the Donee, who before had a Fee-ſimple conditional, has now but an Eſtate-tail.

6 Co. 40. a. Sir *Anthony Mildmay's* Caſe. Co. Lit. 21. 2 Inſt. 335. Mo. 155-6. Vent. 299. 2 Mod. 131. Co. Lit. 392. * Page 258

Under

Eſtate in Tail.

Under this Head we ſhall conſider,

(A) What Things may be intailed within the Statute de donis conditionalibus. 258.

(B) What Words are requiſite to create an Eſtate-tail in a Deed or Gift. 259.

(C) Of the ſeveral Sorts of Eſtates-tail. 262.

(D) How far Tenant in Tail may charge his Eſtate, and what Acts of his relating to the Inheritance ſhall bind the Iſſue, though the Intail continues. 265.

(A) What Things may be intailed within the Statute de donis conditionalibus.

Co. Lit. 19. b. 20. a.

THE Statute makes Uſe of the Word *Tenementum*, and therefore the Eſtate to be intailed may be as well incorporeal as corporeal Inheritances, becauſe the Word *Tenementum* comprehends the one as well as the other, and conſequently not only Lands may be intailed, but all Rents, Commons, Eſtovers or other Profits ariſing from Lands.

Co. Lit. 20. a.

But it is not neceſſary that the Thing to be intailed ſhould iſſue out of Land; for if it be annexed to Lands, or any ways concerns or relates to them, it may be intailed within the Statute; and therefore Offices and Dignities may be intailed; and accordingly it has been (*a*) reſolved, That if the King creates a Man Earl of *D.* to him and the Heirs Male of his Body; this is a good Intail of the Dignity within the Statute, becauſe the Title or Dignity relates to Lands; and anciently they were computed from their Poſſeſſions, as a Baron's Fee, an Earl's Fee, *&c.*

(*a*) 7 Co. 33. *Nevil's* Caſe.

Co. Lit. 20. a. 1 Rol. Abr. 838. 7 Co. 33. Plow. 2.

So Offices may be intailed; as the Office of Earl-Marſhal of *England*, or the Office of a Steward, Bailiff, or Receiver of a Manor, becauſe theſe are demandable in a *Præcipe*, *ut Tenementa*, and being exerciſeable within the Manor, are therefore looked upon as Members or Branches of it.

Hard. 465.

An Equity of Redemption is intailable, becauſe the Mortgage being a Pledge for Money, Equity looks upon the Eſtate in the ſame Plight as it was before.

Co. Lit. 20.

Charters may be intailed, becauſe they are Muniments belonging to the Land itſelf; but if the Intail be barred by collateral Warranty, * then the Heir ſhall not have Detinue for them, for then he cannot make Title by Virtue of the Intail.

* Page 258

Co. Lit. 20. a. Plow. 2. b. *Maxwel's* Caſe. Rol. Abr. 837.

But Things merely perſonal, which only charge the Perſon, and neither iſſue out of Land nor relate to it, nor can be demanded *ut Tenementum* in a *Præcipe*, cannot be intailed within the Statute, and therefore, if I grant to *B.* and the Heirs of his Body, to be Maſter of my Hawks, or Keeper of my Hounds, with a Fee or Salary annexed to it; this is no Intail within the Statute, becauſe this can no way fall within the Notion of *Tenementum*.

So if *A.* for him and his Heirs grants an Annuity to *B.* and the Heirs of his Body; this, having no Manner of Relation to Land, is no Intail within the Statute, for ſuch Grant only affects the Perſon of the Grantor. Plow. 3. a. Rol.Abr.837.

No Chattels real can be intailed, and therefore, tho' a Man, poſſeſſed of a Term for Years, ſhould deviſe his Term to *J. S.* and the Heirs of his Body, yet the Term would go on in its old Channel to the Executors, and the Iſſue of the Body of the Donee has no Intereſt in the Term, and *J. S.* may ſell or diſpoſe of it as he pleaſes; for this being no *Tenementum* within the Statute, the Deviſee is not tied up from alienating it by that Act; ſo it is of a Truſt, for a Man can no more intail a Term in groſs by Way of Truſt, than by Way of Deviſe; but a Term for Years, which is created or kept on Foot to attend the Inheritance, is allowed in Chancery to wait upon the Intail of the Inheritance.‡ Co. Lit. 20. a. 10 Co. 87. Rol.Abr.837 Cro.Eliz.143. Chanc. Rep. 200. Vent. 194. 2 Chan. Rep. 233. but for this *vide* Plus Tit. *Deviſe* 76, 79.

‡ The Limitation of a perſonal Eſtate to one in Tail veſts the whole in him. *Vide Fearne on Contingent Remainders.* 3d Edit. fo. 345, *&c.*——In the Duke of *Norfolk*'s Caſe, 3 Chan. Ca. 1, *&c.* Lord *Nottingham* ſaid it was Lord *Coke*'s Error in *Leonard Lovie*'s Caſe to ſay, that if a Term be deviſed to one and the Heirs Male of his Body, it ſhall go to him or his Executors no longer than he ſhall have Heirs Male of his Body; for theſe Words are not a Limitation of the Time, but an abſolute Diſpoſition of the Term.——In the Duke of *Norfolk*'s Caſe a Limitation of a Term (*created*) to take Effect upon a dying without Iſſue, within the Compaſs of a Life then in being, was adjudged a good Limitation to a third Son.——As to a Diſtinction that hath been taken, between the Deviſe of a Term in *groſs*, and of a Term *de novo* out of the Inheritance, *vide Fearne* 342, *&c.*

As to the Intail of Copyholds, vide **Tit.** Copyhold.

(B) What Words are requiſite to create an Eſtate-Tail in a Deed or Gift.

WHEN the Notion of Succeſſion prevailed, it was neceſſary in Feudal Donations to uſe the Word *Heirs* to diſtinguiſh ſuch deſcendible Feud from that which was granted only for Life, but as to the Word *Body*, it was not neceſſary to make Uſe of that in the Donation, but it might be expreſſed by any equivalent Words, and (*a*) therefore a Gift to a Man, and *hæredibus de ſe*, or *de carne, quos ſibi contigerit habere*, or *procreavit*, is a good Eſtate-Tail, for theſe ſufficiently circumſcribe the Word *Heirs* to the Deſcendants of the Feuditary. For the Words which create an Intail in a Will, *vide* Tit. *Deviſe.* (*a*) Co.Lit.20. 7 Co. 41. b. and the Reaſon of the Difference is, for that Inheritances being only derived from the Law, the Law requires the Word *Heirs* that comprehends the whole Notion of ſuch legal Repreſentation, but the Limiting the Inheritance to the Deſcendants of this or the other Body, is only the particular Intention of the Perſon that forms the Gift, and therefore the Law leaves every Man to expreſs himſelf in ſuch Manner as may manifeſt that Intention.

Therefore if Lands are given to a Man *& hæredibus, quos ſibi contigerit habere de uxore ſuâ*; this is an Eſtate-Tail, tho' the Word *Body* be omitted; ſo if the Gift had been to him *& hæredibus ſuis de prima Uxore ſuâ*, for this confines the Word *Heirs* to the Deſcendants of his Body, ſince his Heirs, who can inherit that Gift, muſt be of his Wife, which no collateral Heir can poſſibly be. 7 Co. 41, 42.

A Feoffment was made to the Uſe of *A.* for Life, Remainder to the Uſe of *B.* and of the Heirs Male of the ſaid *B.* lawfully begotten, and for Cro.Eliz.478. Mo. 424. 7 Co. 41. S.C. between *Abraham* and *Twigg.* Lit. Rep. 344. Plow. 541. 3 Leon. 5. Hob. 32, 37. 2 Sid. 41. but it would be otherwiſe in a Will, which being made without the Aſſiſtance of a Lawyer, receives always a favourable Interpretation; *vide* Title *Deviſe.*

for Default of ſuch Iſſue, Remainder over, *A.* dies, this is no Eſtate-
* Page 260 * Tail in *B.* but a Fee-ſimple, becauſe there are no Words to ſhew from whoſe Body the Heirs Male of *B.* muſt proceed; for, to the Creation of an Eſtate-Tail, 'tis requiſite that there be Words ſufficient to ſhew from what Body the Heirs mentioned in the Gift are to proceed, tho' the Word *Body* be not expreſsly uſed; for in this Caſe ſuch may be Heirs Male of *B.* that were never proceeding from his Body, ſince the Words of the Donation leave it at large, and do not require that they ſhould be begotten by any particular Perſon.

2 Salk. 620. pl. 3. *Idle* verſus *Cook.* 2 Ld. Raym. 1144. *Paſch.* 4 Ann. in *B. R.* and *per Cur'*.iti s the rather a Fee-ſimple in this Caſe, becauſe of the Word *Aſſigns*, for an Eſtate-Tail is not aſſignable; but *Gould cont.* becauſe the Intent of the Party was to create an Eſtate-Tail.

So where *A.* ſeiſed in Fee of a Copyhold, ſurrendred the ſame to the Uſe of himſelf for Life, and after to *B.* and *C.* his Wife, *pro & durante termino vitarum ſuarum naturalium & hæred. & aſſignat. prædict.* B. & C. *& pro defectu talis exitus*, to the Uſe of himſelf and his Heirs; and it was held by *Holt* Ch. Juſt. and two Judges, againſt *Gould*, that *B.* and *C.* had a Fee-ſimple, and that *pro defectu talis exitus* imported nothing of their dying without Iſſue, but was to be taken generally, and every Heir is the Iſſue of ſome Body.

Carth. 343. 5 Mod. 266. Ld. Raym. 101. S. C. adjudged between *Leigh* and *Brace*. Hill. 6 W. 3. in *B. R.* and ſame Point ſaid to have been adjudged upon this very Deed in *C. B.* between *Coke* and *Roberts*. Hill. 2 W. 3.

But if *A.* ſeiſed in Fee makes a voluntary Feoffment to the *Uſe* of himſelf for Life, Remainder to the Uſe of *J. S.* and his Heirs for ever; and for Default of Iſſue of the Body of *J. S.* then to the Uſe of the right Heirs of *A.* this being in a Conveyance by Way of *Uſe*, which is always conſtrued like a Will, and according to the Intention of the Party, gives *J. S.* but an Eſtate-Tail.

7 Co. 41.

If Land be given to *A.* and *B.* his Wife, and their Heirs, *& aliis hæredibus* of the ſaid *A. ſi dicti hæredes de* A. & B. *executores obierint ſine hæredibus de ſe*, this is a good Eſtate-Tail, tho' the Word *Body* be omitted, becauſe there are Words equivalent, which equally circumſcribe the general Import of the Word *Heirs* to the Deſcendants of the Body of *A.* and *B.*

Rol. Abr. 838. Co. Lit. 20. b.

If Lands are given to a Man and the Heirs of his Body, Remainder to *J. S.* and his Heirs in *formâ prædictâ*; this is a good Remainder in Tail to *J. S.* for by a neceſſary Relation the Mind is carried to the Words of the firſt Gift, which circumſcribe the Heirs of the Donee to the Deſcendants of his Body; ſo if the Remainder had been limited to *J. S. in formâ prædict.* this Limitation, without the Word *Heirs*, had veſted a good Eſtate-Tail in him in Remainder; or if a Leaſe for Life had been made to *A.* the Remainder to *B.* and the Heirs of his Body, Remainder to *J. S. in eadem formâ*, theſe Words, having ſuch a neceſſary Relation to thoſe Words which immediately precede them, repreſent to us the Intention of the Donor as plainly as if he had expreſſed himſelf in all the Terms of the firſt Limitation.

Co. Lit. 20. b.

But if a Gift be made to *A.* for Life, Remainder to *B.* and the Heirs of his Body, Remainder to *J. S. in formâ prædict.* this, according to my Lord *Coke*, is a void Limitation to *J. S.* for, tho' the Mind is carried to the former Limitations, yet finding no neceſſary Relation to one more than the other, it can determine nothing poſitively as to the Intention of the Donor, and therefore ſuch Limitation is void for Uncertainty.†

† *Note*, Co. Lit. 385. b. ſays, "If a Man letteth Lands for Life, the Remainder in Tail, the Remain-
" der *eadem forma*, this is a good *Eſtate-Tail*, *quia idem ſemper refertur proximo præcedenti*." And this ſeems to be Law, for the Reaſon aſſigned.

If

Eſtate in Tail.

If Lands be given to a Man and his Heirs, *habend.* to him and the Heirs of his Body; this is but an Eſtate-tail, becauſe the *Habendum* expounds the general Word *Heirs* in the Premiſſes; for though it cannot change or alter them, ſo as to retract the Gift in the Premiſſes, yet it * may well conſtrue and explain them while ſuch Conſtruction is conſiſtent with the Premiſſes, and does not deſtroy the Operation of the Words mentioned in them, but only explains in what Senſe they are to be taken, and what Heirs are comprehended; but if the Limitation in the Premiſſes had been to a Man and the Heirs of his Body, *habendum* to him and his Heirs, it had been a Tail with a Fee-ſimple expectant, becauſe this *Habendum* cannot be conſtrued an Expoſition, for that it comprehends all Heirs in general, and doth not confine or interpret the Premiſſes, and therefore, being more comprehenſive than the Premiſſes, paſſes the Fee-ſimple expectant.

Co. Lit. 21.a. 8 Co. 154. b. 2 Rol. Abr. 66, 68.

*Page 261

If Lands be given to a Man and his Heirs, *habendum* to him and his Heirs, if the Donee has Heirs of his Body; and if he dies without Heirs of his Body, that the Land ſhall revert to the Donor, or *habendum* to him and his Heirs, if he hath Iſſue of his Body begotten; and if he dies without Heirs of his Body, that the Lands ſhall revert to the Donor; this is but an Eſtate-tail in the Donee, becauſe the *Habendum* plainly explains in what Senſe the Word *Heirs*, which are uſed generally in the Premiſſes are to be taken, nor does ſuch Explanation retract the Gift in the Premiſſes, becauſe the Word *Heirs* have ſtill their Operation, and by ſuch Conſtruction are more conformable to the Will and Intention of the Donor; but if the *Habendum* had been for Life, that had been a void Limitation, becauſe no Explication can reconcile the *Habendum* to the Premiſſes; and where the laſt Words of the Donation retract the former Gift, they are taken as inſignificant and void, becauſe no Man is allowed to vacate his own Grant.

Rol. Abr. 838. Co Lit. 21.a. Bro. Tit. Tail. 20.

If a Feoffment be made to *A.* and his Heirs, with Warranty to him and his Heirs, and if it happens that he dies without Heirs of his Body, that it ſhall remain to *J. S.* in Fee; this Limitation of a Remainder explains what Heirs of the Donee ſhould take; for 'tis plain that the Donor intended the Word *Heirs* in the Premiſſes ſhould not be taken in their moſt extended Senſe, for then they would convey an abſolute Eſtate, which would bear no Limitation of a Remainder over to *J. S.* and then that Part of the Gift would be void, which, by an eaſy Explication of what Heirs the Donor meant in the Premiſſes, is made good and conſiſtent, without any Force or Violence to the Premiſſes.

Rol. Abr. 839. 2 Rol. Abr. 68.

If Lands are given to a Man and a Woman and their Heirs, *habendum* to them and the Heirs of their Bodies, Remainder to them and the Survivor of them for Life, to hold of the *Chief Lord*; this has been adjudged an Eſtate-tail with a Fee-ſimple expectant; for though the *Habendum* explains what Heirs are meant in the Premiſſes, and there is no Mention of the Word *Heirs* in the Remainder; yet 'tis plainly the Intention of the Donor, that the Intereſt in the Land ſhall not ceaſe upon the Determination of the Eſtate-tail, becauſe there is a Remainder limited over to take Effect when the Tail is ſpent; and if the Limitation of the Remainder paſſes any Thing, it muſt be a Fee, becauſe they had a greater Eſtate already in them than for Life; and this the rather, becauſe the *Tenend.* is expreſly to be of the *Chief Lord*, which ſhews they intended to leave no Eſtate in themſelves.

Cro. Car. 476. 2 Rol. Abr. 68. *Thurmau* and *Cooper.*

If I give Land to a Man and his Heirs, *viz.* the Heirs of his Body; this is but an Eſtate-tail; for here I explain the general Import of the Word *Heirs* to the Deſcendants of the Body of the Donee.

Hob. 172.

A Feoffment was made to *A. habendum* to him and the Heirs of his Body, to the Uſe of him and his Heirs and Aſſigns for ever; this is only an

Cro. Jac. 400. *Cooper* and *Franklin.*

2 Co. 78. Plow. 555. Bro. Tit. Feoffment to Uſes, 40. Co. Lit. 19. b.

an Eſtate-tail in *A.* and no Fee-ſimple, for the Lands are ſo appropriated by the firſt Words to the Donee and his Iſſue, that no Act or Limitation of the Parties can take it out of them; nor does the Statute 27 *H.* 8. *c.* 10. execute the Poſſeſſion to the Uſe; for the Statute never intended to execute any Uſe but that which the legal Tenant had been obliged to execute before the Statute; but the Act *de donis*, as it tied down the Donee * from alienating, ſo it would not permit the Chancery to oblige the Donee to give the Land away from his Iſſue; the ſame Law if the Uſe had been limited over to a Stranger, for the ſame Reaſon.

* Page 262

Cro. Car. 231. *Jenkins* verſ. *Young*. 245. *Meredith* verſ. *Jones*.

Lands were given to Baron and Feme, *habend'* to Baron and Feme to the Uſe of them and the Heirs of their Bodies; this was adjudged an Eſtate-tail; for though ſuch Limitation of a Uſe to a Stranger had not been a good Eſtate-tail, becauſe the legal Eſtate in Baron and Feme had only been for their Lives, yet here being no Feoffee diſtinct from the *Ceſtui que Uſe*, but they being all the ſame Perſon, by Conſequence there is no Uſe diſtinct from the legal Eſtate, and therefore the Word *Uſe* may be very properly rejected, in order to eſtabliſh the Intention of the Conveyance, and then the Caſe amounts to no more than if an Eſtate were limited to Baron and Feme for their Lives, with Remainder to them and the Heirs of their Bodies.

(C) Of the ſeveral Sorts of Eſtates-tail.

Lit. Sect. 14.

IF Lands are given to a Man and the Heirs of *his Body*, this is a *Tail General*; becauſe all his Deſcendants may poſſibly come into the Succeſſion; ſo that if the Donee has ſeveral Wives, the Deſcendants of every Wife may inherit, becauſe they fall within the Words of the Donation; but the Donor might have by particular Expreſſions confined the Succeſſion to any particular Deſcendant, as to the Heirs Male or Heirs Female; and hence the Diſtinction between Eſtates in *Tail Male* and *Tail Female*.

Co. Lit. 25. b. but great Care muſt be taken to limit the Eſtate to the Deſcendants of *the Body* of the Donee; for if Lands be given to a Man and his Heirs Male, this is a Fee-ſimple. Co. Lit. 13. So if the Limitation had been to the Donee and his Heirs Female, or to the Donee and his Heirs Male or Female. Lit. Sect. 31.

If Land be limited to the Son and his Heirs, of the Body of his Father, this is a Fee-ſimple in the Son, and no Intail at all, not being limited to the Son's Deſcendants; nor is there in this Caſe any proper Limitation or Reſtriction of the Word *Heirs*, becauſe it limits it to his Heirs of the Body of the Father; now there is plainly a Deſign to place the Intereſt that is to veſt in the Son; and yet it ſhould not go merely to the Son's Deſcendants, but to all Collaterals, as far as they could claim under the Body of the Father; now ſuch a Limitation the Law will not endure, it not being an Eſtate-tail confined to the Deſcendants only; and therefore it muſt be a Fee-ſimple; for to allow Men to form ſuch new Sorts of Eſtates would be very inconvenient, as it would put it in the Power of private Perſons to make new Limitations touching the Courſe of Deſcents, and thereby render all Deſcents uncertain.

Co. Lit. 27.

But if the Eſtate were limited to the Son, and to the Heirs of the Body of the Father, though the Father was dead at the Time of the Gift; yet it is a good Intail, becauſe here the Word *Heirs* are Words of Purchaſe; and it is a good Name of Purchaſe after the Father's Deceaſe; and the Son, being only Tenant for Life by the Words of the Gift, by the ſecond Words takes the Intail as a Purchaſer; but in the other Caſe, the Words *his Heirs*, * are merely Words of Limitation, and therefore affect an Intail, which the Law will not endure. Lit. Sect. 30.

* Page 263 If there had been Grandfather, Father, and Son, and the Father dies, and the Limitation had been to the Grandfather and to his Heirs of the Body of the Father, this is a good Intail; for it goes to the Deſcendants only, and it limits what Sort of Deſcendants it ſhall go to, *viz.* ſuch only as were begotten by the Father. Co. Lit. 20. b. Bro. *Tail* 10.

If Lands be given to Huſband and Wife, and the Heirs of the Body of the Survivor; this is a good Donation to veſt an Eſtate-Tail General in the Survivor; but the Eſtate-Tail does not veſt till one of them dies; and then, becauſe all the Deſcendants of the Survivor may inherit the Gift, it is a Tail General. Co Lit. 26. a. 10 Co. 51. Reg. 239. b.

Tail Special is where the Eſtate is limited to ſome particular Heirs of the Body of the Donee, as to the Heirs of ſuch a Woman; as if Lands be given to a Man and his Wife, and the Heirs of their two Bodies begotten; for though all the Deſcendants of that Marriage may inherit the Gift, yet all the Heirs of the Body of the Donee cannot inherit; for if the Woman ſhould die, and the Man take another Wife, the Iſſue of the Donee by the ſecond Wife ſhould not inherit, becauſe the Limitation of the Gift was only to the Deſcendants of the Feuditary by the firſt Marriage. Lit. Sect. 16.

If Land be given to a Man and a Woman unmarried, and the Heirs of their Bodies, this is a Tail ſpecial, for the Poſſibility that they may marry, and then the Deſcendants of that Marriage can only inherit; ſo if the Gift be made to a Man that hath a Wife, and to a Woman that hath a Huſband, and the Heirs of their Bodies; this is a Tail ſpecial preſently in them, for the Poſſibility that they may marry; and the Deſcendants of ſuch Marriage may inherit according to the Limitation of the Gift. Co. Lit. 25. b. Bro. *Eſtate* 22. *Tail* 16.

But if Land be given to two Men and their Wives, and the Heirs of their Bodies begotten, they have a joint Eſtate for Life, and ſeveral Inheritances, but no joint Eſtate in Tail; becauſe, tho' the Huſband and the Wife of the other may die, and the Survivors may marry, yet the Gift being made to them all, and the Heirs of their Bodies, it is impoſſible that there ſhould be one Heir or Deſcendant of all their Bodies, and therefore it can be no joint Eſtate-Tail in them all; but they all four take jointly for Life, and each Huſband and his Wife have a ſeveral Inheritance in a Moiety. Plow. 35. a. Co. Lit. 25. b.

If Lands be given to two Men, and the Heirs of their Bodies begotten, they have but a joint Eſtate for Life, and ſeveral Inheritances; for though the Gift be limited to the Deſcendants of their Bodies; yet, it being impoſſible there ſhould be one Deſcendant of both their Bodies, they cannot have a joint Eſtate-Tail. Lit. Sect. 283.

So if Lands be given to one Man and two Women, and the Heirs of their Bodies begotten, they have a joint Eſtate for Life, and ſeveral Inheritances; becauſe there can be no one Iſſue of both the Women's Bodies; and if the Man ſhould marry one of them, yet it is not limited in the Donation, which of them, in caſe of ſuch Intermarriage, ſhould firſt take. Lit. Sect. 283. Co. Lit. 25.

If an Eſtate be limited to Huſband and Wife, and the Heirs of their Bodies, and they are divorced *a Vinculo Matrimonii*, they are only Tenants for Life; becauſe they ſhall not be preſumed to intermarry after they are once legally divorced by Church Cenſures. 3 H. 6. 48. 7 H. 7. 16.

Co. Lit. 24. b. Hob. 31. But there are other Sorts of Eſtates-Tail; as when the Donation is limited not only to the Deſcendants of the Donee by one Woman, but more particularly to one Sort of Deſcendants of ſuch Marriage, excluſive of others; as if Lands be given to a Man and a Woman, and the Heirs Male of their Bodies; this is an Eſtate in Tail Male, for the Donor having expreſſed what Heirs ſhall inherit, none can claim under ſuch Gift that does not come under ſuch particular Deſcription; ſo if the Limitation had been to the Heirs Female; for the Donee being capable of taking by Purchaſe, the Donor may limit the Succeſſion of the Land to which of the Deſcendants of the Donee he pleaſes; but if the Limitation had been to *A.* for Life, Remainder to the Heirs Female of the Body of *J. S.* and *J. S.* has Iſſue a Son and a Daughter, the Daughter can take nothing by ſuch Gift; the Reaſon of the Difference is this; becauſe * Page 264 * in the firſt Caſe the Donation ſpecifies what Sort of Deſcendant of the Donee ſhall take; but in the laſt Caſe it ſpecifies who ſhall take originally; and the firſt Purchaſer muſt come fully up to the Deſcription in the Donation, or elſe there can be no Gift, and while there is a Son of *J. S.* no Female can be Heir, and conſequently not a Perſon capable of taking originally by the Gift; but if *J. S.* hath Iſſue a Son and a Daughter, and the Son hath Iſſue a Daughter, and dies, and a Leaſe for Life is made, Remainder to the Heirs Female of the Body of *J. S.* the Daughter of the Son ſhall be the Purchaſer, becauſe ſhe comes within the Deſcription, being both Heir, and likewiſe a Female, though ſhe was deſcended from a Male.

Lit. Sect. 26, 27, 28. Yelv. 13. *Repps* verſus *Bonham.* If Lands be given to a Man and his Wife and the Heirs Male of the Body of the Huſband; this is a ſpecial Tail in the Huſband, and but an Eſtate for Life in the Wife; ſo if the Limitation had been to the Heirs Male of the Body of the Wife by the Huſband begotten, 'tis an Eſtate for Life in the Huſband, and a Tail in the Wife; for to which ever Body the Word *Heirs* inclines by the Limitation, it creates a deſcendible Eſtate in ſuch Perſon; but if it be not more particularly limited to the Body of one than the other, but inclines to each alike, then it creates a deſcendible Eſtate in both of them; as if Lands be given to Huſband and Wife, and the Heirs which the Huſband ſhall beget on the Body of his Wife, both of them have an Eſtate-Tail, becauſe the Word *Heirs*, which creates the deſcendible Eſtate, is not limited to one more than the other.

Hob. 84. *Skeat* verſus *Oxenbridge.* If a Feoffment be made to the Uſe of *A.* and *B.* Huſband and Wife, and the longeſt Liver of them, and after the Deceaſe of the ſaid *A.* and *B.* then to the Uſe of the Heirs of the Body of the ſaid *A.* begotten on the Body of *B.* this is an Eſtate-Tail in the Huſband, for the Word *Heirs* is limited to the Body of *A.* though to be begotten on the Body of the Wife.

Yelv. 131. If the Limitation had been to the Heirs *ſupra Corpus* of the Feme by the Huſband begotten, So if Lands be given to Baron and Feme, and the Heirs of the Body of the Feme, by the Huſband and *J. S.* engendred; this is an Eſtate-Tail in the Feme, but ſo far inlarged by the laſt Words, that the Heirs of her Body begotten by *J. S.* may inherit after the Iſſue by the preſent Huſband.

whether this had been an Eſtate-Tail in them both, is left a Q. ‡

‡ Does this materially differ from the laſt Part of the Caſe above, where Lit. ſ. 26. is cited?

Lit. Sect. 24. And it is to be obſerved, that in all Inſtances of ſuch ſpecial Tails, which limit the Lands to one particular Sort of Heirs, no Deſcendant of the Donee can make himſelf inheritable to ſuch Gift, unleſs he can convey his Deſcent through that particular Sort of Heir to which the Succeſſion of the Land

was

was firſt limited; therefore if Lands be given to a Man and the Heirs Male of his Body, and he has Iſſue a Daughter, who has Iſſue a Son, this Son ſhall never inherit that Gift; for the Son, being obliged to claim through the Daughter, muſt neceſſarily ſhew himſelf out of the Words of the firſt Donation, which limited the Lands only to the Heirs Male of the Donee, which the Daughter cannot poſſibly be taken to be.

For the ſame Reaſon, if the Lands be given to a Man and the Heirs Male of his Body begotten, the Remainder to him and the Heirs Female of his Body, and the Donee hath Iſſue a Son, who hath Iſſue a Daughter, who hath Iſſue a Son; this Son can inherit neither of theſe Gifts; nor the Tail Male, becauſe whoever claims as Heir to ſuch a Gift, muſt convey his Deſcent wholly through Males, which the Son cannot do in this Caſe, becauſe he muſt neceſſarily ſhew himſelf a Deſcendant of the Daughter, before he can make himſelf Heir to the firſt Son; nor can he inherit the Tail Female, becauſe that Limitation being to that particular Sort of Heir, no Male, though the immediate Deſcendant of a Female, can * inherit, becauſe he is another Sort of Heir than is deſcribed in the Donation; but if in this Caſe the Gift had been to a Man and the Heirs Male of his Body, Remainder to him and the Heirs of his Body; ſuch Son may claim under that Gift, becauſe every Deſcendant of ſuch Donee may claim under the Remainder, it not being limited to one Sort of Heir more than another

Co. Lit. 25. b.

*Page 265

Land given to a Man and his Wife & *hæredi de Corpore & uni hæredi tantum*, was adjudged an Eſtate-tail, though the Limitation be to the Heir in the ſingular Number, becauſe the Word *Heir* is *nomen collectivum*, and extends to all that deſcend from him.

Vent. 228.

(D) How far Tenant in Tail may charge his Eſtate, and what Acts of his relating to the Inheritance ſhall bind the Iſſue, tho' the Intail continues.

THE Statute *de donis* affecting a Perpetuity reſtrained the Donee in Tail, either from alienating or charging his Eſtate-tail; and by that Act the Tenant in Tail was likewiſe to leave the Land to his Heirs as he received it from the Donor; and upon that Statute the Heir in Tail might have avoided any Alienation or Incumbrance of his Anceſtor; and as the Law ſtood upon that Act, ſo might he in Reverſion, when the Heirs of the Donee failed, which were inheritable to the Gift. The Crown long ſtruggled to break through the Perpetuity which was eſtabliſhed by this Law; and in the Reign of *E.* 4. we find the pretended Recompence given againſt the Vouchee in the Common Recovery to be allowed an Equivalent for the Eſtate-tail; and becauſe this Recompence was to go in Succeſſion as the Land in Tail ſhould have done, therefore they allowed the Recovery to bar the Reverſion as well as the Iſſue in Tail, becauſe he in the Reverſion was to have the Recompence upon Failure of Iſſue of the Donee.

6 Co. 40. 10 Co. 39. Vent. 299.

The Statute *de donis*, by an expreſs Clauſe, provides againſt the Operation of a Fine, and by that Law a Fine levied by Tenant in Tail amounted

2 Inſt. 336. Plow. 57. b.

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ed to no more than a Diſcontinuance, like a Feoffment *in Pais* by Tenant in Tail at this Day.

But how theſe Recoveries or Fines affect the Iſſue in Tail, or him in Reverſion or Remainder, *vide* Tit. *Recoveries*, and Tit. *Fines*.

Lit. Sect. 613. But how far the Tenant in Tail may at this Time bind his Iſſue, by making Leaſes purſuant to the 32 *H.* 8. *c.* 28. *vide* Tit. *Leaſes and Terms for Years.*

At the Common Law the Tenant in Tail could not grant or alien, nor make any rightful Eſtate of Freehold to another, but for Term of his own Life; † for though a Feoffment in Fee, or for Life, made by Tenant in Tail, are good againſt the Tenant himſelf, becauſe the Law allows no Man to avoid his own Act; yet after his Death the Iſſue in Tail or thoſe in Reverſion after Failure of Iſſue, may by proper Actions avoid ſuch Feoffments and recover againſt the Feoffee.

† *Vide ante* 257, and *infra* 587.

Bro. Contract, 26. 11 Co. 50. Pop. 194.

The Tenant in Tail is Maſter of the Inheritance, and as ſuch has Power over all the laſting Improvements growing on it; ſo that he may cut down the Timber-Trees, and diſpoſe of them as he pleaſes, without barring the Intail; but this muſt be underſtood with this Reſtriction, that, if Tenant in Tail ſells the Trees growing on the Inheritance, the Vendee muſt ſever them during the Life of Tenant in Tail; for if he dies before they are cut down, his Heirs in Tail ſhall have them as Part of the Inheritance, and the Vendee, tho' obliged to pay the whole Sum contracted for, yet ſhall not * Page 266 * be allowed to cut down one Tree after the Death of Tenant in Tail; for as the Tenant in Tail has Power over the Inheritance but during his own Life, ſo he can delegate that Power to another but for the ſame Time; and conſequently whatever remains Part of the Inheritance at the Death of the Tenant in Tail, at which Time his Power over it ceaſes, muſt neceſſarily go to the Heir to whom the Inheritance belongs.

Rol. Abr. 841. 842.

So if Tenant in Tail grant Eſtovers to another, or the Veſture of his Woods, theſe Grants determine with his Death; for as they are Charges on the Inheritance, ſo they muſt neceſſarily ceaſe when his Power who granted them is determined.

Rol. Abr. 842.

If Tenant in Tail acknowledges a Statute or Recognizance, upon which the Land is extended, the Iſſue may ouſt the Conuſee after the Death of his Anceſtor; for the Tenant in Tail can charge the Intail but during his Life, becauſe the Statute *de donis* preſerves it free from all Incumbrances for the Iſſue in Tail *ut voluntas donatoris obſervetur.*

2 Bulſt. 245. *Crawly* and *Marrow.*

But if Tenant in Tail acknowledges a Recognizance, and dies, and the Conuſee brings a *Scire facias* againſt the Heir in Tail, who pleads *Riens per Diſcent* in Fee-ſimple, and pending the *Scire facias* makes a Leaſe for Years to *J. S.* and the Jury find the Iſſue in Tail had Land in Fee-ſimple by Deſcent, the Court adjudged that the Conuſee ſhould extend the Land againſt the Iſſue in Tail, and that *J. S.* could not falſify; for after the Verdict the Iſſue ſhall not be allowed to ſay, that he is Tenant in Tail; but the Verdict, tho' a Perverſe one, ſhall bind him, and be in Force till diſproved by Attaint; nor can the Leſſee falſify, becauſe the Leaſe was made after Verdict given, when the Iſſue himſelf was bound, and conſequently all that claim under him muſt be ſo too.

Co. Lit. 343. b. Rol. Abr. 842. Plow. 436. 10 Co. 37.

Yet if a Diſſeiſor makes a Gift in Tail to *A.* and *A.* in Conſideration of a Releaſe from the Diſſeiſſee of all his Right to the Land, grants him a Rent-charge in Fee; this ſhall bind the Iſſue, for this turns upon the Reverſe of the former Caſes; for as the Iſſue in Tail may avoid thoſe Grants and Charges, becauſe they tend to the Prejudice of the Iſſue and Deſtruc-

tion of the Intail; ſo this Grant to the Diſſeiſee is good to bind the Iſſue, becauſe it tends to the Advantage of the Donee and his Iſſue by Strengthening their Title, and making that an indefeaſible which before was a precarious Eſtate.

So where a Deviſe was made of Land in Tail, upon Condition that the Donee ſhould grant a Rent-charge out of the Land to another and his Heirs, the Donee granted the Rent purſuant to the Condition; and adjudged the Rent ſhould not determine with the Death of the Donee, but ſhould bind his Iſſue, for this is in Preſervationof the Intail, and for the Benefit of the Iſſue, and is not *contra formam doni*, but in Compliance to the Will of the Donor. Cro. Jac. 427. *Dutton* ver. *Ingram*. Rol. Abr. 842.

A. ſeiſed of Lands in Tail, agrees with *B.* that he and his Heirs ſhall enjoy the intailed Lands, if *A.* and his Heirs may enjoy his Fee-ſimple Lands; this Agreement is executed accordingly; and *B.* had a Decree againſt *A.* to levy a Fine, and ſettle it purſuant to the Agreement; but *A.* died without doing of it, though 'twas decreed that *A.* himſelf was bound by his Agreement to convey, yet ſince he died before he executed the Fine, his Iſſue was not bound by the Agreement; but if the Iſſue in Tail had approved of his Anceſtor's Agreement, as he did in this Caſe, by entering on the Land of *B.* then it becomes his own Agreement, and conſequently in Equity he ſhall be obliged to perform it. Chan. Caſes 171. *Roſs* ver. *Roſs*.

* Eſtate-tail after Poſſibility of Iſſue extinct.

* Page 267

(A) Who may be Tenant in Tail after Poſſibility of Iſſue extinct, and how their Eſtates are to be created. 267.

(B) The Power this Tenant has over the Inheritance, and in what Reſpects he is conſidered as a bare Tenant for Life. 269.

(A) Who may be Tenant in Tail after Poſſibility of Iſſue extinct, and how their Eſtates are to be created.

Lit. Sect. 32. Doct. & Stud. 61.

SUCH Perſon is Tenant in Tail *apres* Poſſibility of Iſſue extinct, as ſurvives the Perſon by whom, or on whom, the Iſſue was to be begotten; as where Lands are given to a Man and his Wife in ſpecial Tail, if the Huſband dies without Iſſue, the Wife is Tenant in Tail after Poſſibility, *&c.* becauſe the Huſband, by whom the Iſſue inheritable to ſuch ſpecial Tail was to be begotten, is dead, ſo that, there being no Iſſue living at his Death, there is now no Poſſibility of any by him; ſo *e converſo*, if the Wife dies without Iſſue the Huſband is Tenant in Tail after Poſſibility, becauſe ſhe being the Perſon on whom the Iſſue inheritable to the Eſtate-tail was to be begotten, when ſhe dies without Iſſue, there is no Poſſibility of the Huſband's having any Iſſue by her inheritable to the Tail.

Lit. Sect. 33. If Lands be given to a Man and his Heirs which he ſhall beget on the Body of his Wife; in this Caſe, though the Wife takes nothing by the Gift, yet if ſhe dies without Iſſue of her Body begotten by her Huſband, he is Tenant in Tail after Poſſibility, becauſe the Wife, on whoſe Body the Iſſue was to be begotten, being now dead without Iſſue, he can have none by her.

Lit. Sect. 32. If Baron and Feme be Tenants in ſpecial Tail, and one of them dies, leaving Iſſue, though the Survivor cannot be Tenant in Tail *apres* Poſſibility during the Life of ſuch Iſſue; yet if that Iſſue dies without Iſſue, ſo as that there is not any Iſſue living which can inherit by Force of ſuch Intail, then the Survivor becomes Tenant in Tail after Poſſibility, *&c.* for ſince the Iſſue inheritable to ſuch Intail was to proceed from both the Bodies of the Donees, upon the Death of either of them without Iſſue, 'tis plainly impoſſible the Survivor ſhould have any Iſſue inheritable to the Intail.

Co. Lit. 28. a. But if Baron and Feme, Tenants in ſpecial Tail, live till each of them be 100 Years old without Iſſue, yet they ſtill continue Tenants in ſpecial Tail; for however improbable it may ſeem that they ſhould have Iſſue at that Age; yet the Law ſees no Impoſſibility of having Iſſue, and there
* Page 268 * muſt be no Poſſibility of having Iſſue, before the Donees or either of them can be Tenants in Tail *apres* Poſſibility; beſides, there is not any particular and certain Period of Time in which the Poſſibility of Iſſue ceaſes, and therefore the Law cannot make either of them Tenant in Tail after Poſſibility, till after the Death of one of them.

11 Co. 80. b. Co. Lit. 28 a. If Lands be given to Baron and Feme and the Heirs of their two Bodies, and they are divorced *cauſâ præcontractus* or *Affinitatis*, here there is no Poſſibility of their having Iſſue which can inherit by Force of the Gift, and yet they are not Tenants in Tail after Poſſibility, *&c.* but the Inheritance is turned into a bare joint Eſtate for Life, for the Impoſſibility of having Iſſue muſt proceed from the Act of God, to make them Tenants in Tail after Poſſibility, *&c.* but in this Caſe it proceeded from the Act of the Parties.

11 Co. 80. b. So if Lands be given to a Man in Tail upon Condition, that if he does ſuch an Act, that he ſhall have the Land but for Life; ſuch Donee, upon Breach of the Condition, is but barely Tenant for Life, and not Tenant in Tail *apres* Poſſibility, *&c.* becauſe here by his own Act it becomes impoſ-

ſible

ſible to have Iſſue inheritable to the Tail, which by his own Act he has deſtroyed and forfeited.

A Feoffment was made to the Uſe of a Man and his Wife for their Lives, Remainder to the Uſe of their next Iſſue Male to be begotten in Tail, Remainder to the Uſe of the Huſband and Wife and the Heirs of their two Bodies begotten, they having no Iſſue Male at the Time of the Feoffment; in this Caſe the Huſband and Wife are Tenants in Tail executed; and upon the Birth of any Iſſue Male, their Eſtate opens, and they become Tenants for Life, Remainder to the Iſſue Male in Tail, Remainder to themſelves in Tail; and if the Huſband dies without having any other Iſſue, the Wife continues but Tenant for Life, becauſe the Eſtate-tail, which was once executed in her and in her Huſband, was changed into an Eſtate for Life by their own Act, yet ſhe ſhall have the Privileges of Tenant in Tail *apres* Poſſibility, *&c.* for the Inheritance which was once in her; for this is not like the former Caſe, where the Breach of the Condition reſpects what was granted; for in this Caſe the Birth of Iſſue Male ſhall not be preſumed to diveſt the Privileges of Tenant in Tail, which were once legally veſted in her. 11 Co. 80, 81. Co. Lit. 28. a. *Lewis Bowle's* Caſe.

Lands were given to a Man and his Wife and the Heirs of the Body of the Huſband, Remainder to the Huſband and Wife and the Heirs of their two Bodies begotten; upon the Death of the Huſband without Iſſue, the Feme ſhall not be Tenant in Tail *apres* Poſſibility, *&c.* for by the firſt Limitation ſhe took only an Eſtate for Life, and the Huſband an Eſtate in Tail General, and the Remainder over was a void Limitation, becauſe it could never take Effect, for whatever Iſſue the Huſband and Wife had muſt inherit by Force of the firſt Limitation of the Tail General, becauſe all ſuch Iſſue are of the Body of the Huſband; and when the Tail General is ſpent in him, there cannot poſſibly be any Iſſue to inherit the Remainder in Tail ſpecial, becauſe ſuch Iſſue muſt be of the Body of the Huſband and Wife; and while there is any Iſſue in Being of the Body of the Huſband, it inherits by Force of the General Tail; ſo that the Remainder being void in its original Creation, the Wife had never an Eſtate of Inheritance in her, and conſequently cannot be Tenant in Tail *apres* Poſſibility, *&c.* becauſe ſuch an Eſtate can be carved only out of an Eſtate-tail. Co. Lit. 28. a.

* (B) The Power this Tenant has over the Inheritance, and in what Reſpects he is conſidered as a bare Tenant for Life.

* Page 269

IF Tenant in Tail *apres* Poſſibility, *&c.* aliens in Fee, 'tis a Forfeiture of his Eſtate, becauſe, having no longer a deſcendible Eſtate in him, he cannot transfer it to another, without the Prejudice and Diſheriſon of him in Remainder. Co. Lit. 28. 11 Co. 80. b. Doct. & Stud. 60.

If Tenant in Tail *apres* Poſſibility be impleaded, and makes Default, he in Reverſion ſhall be received, as upon the Default of any other Tenant for Life, becauſe he having the Inheritance in him only ſhall be admitted to defend it. Co. Lit. 28. a. 11 Co. 80. b. Doct. & Stud. 60.

An Exchange by Tenant in Tail *apres* Poſſibility, *&c.* with a bare Tenant for Life, is good, becauſe both their Eſtates are of equal Continuance and Duration only; ſo for the ſame Reaſon, if any Eſtate of Inheritance in Reverſion or Remainder deſcends upon him, the Eſtate-tail *apres* Co. Lit. 28. a. 11 Co. 80. b.

Poſſibility, *&c.* is merged, becauſe as to it's Duration, 'tis merely an Eſtate for Life, and in theſe Reſpects we may call him but Tenant for Life; yet in other Reſpects he has the Privilege of one who has an Eſtate of Inheritance.

Doct. & Stud. 61. Co. Lit 27.b. 11 Co. 80. a.

For he is diſpuniſhable of Waſte, ſo that he has Power over the laſting Improvements of the Land; for ſince he formerly had the Inheritance in him, which the Act of God has ſtripped him of, without any Default of his, the Privileges and Benefits of the Inheritance ſtill continue in him; beſides, to puniſh this Tenant for Waſte, ſeems to be againſt the Deſign and Intention of the firſt Donation; for by that the Donor gave the Inheritance and an abſolute Power over the laſting Improvements, which are looked upon as Part of the Inheritance for their Duration, and conſequently it can be no Injury to him in Reverſion, nor beſides his Intention in the Donation, if the Donee exerciſes the Power he was intruſted with by the Donor; nor can the Donor revoke it, becauſe the Authority given by the Gift muſt continue as long as the Gift to which it was annexed continues.

Co. Lit. 27.b. 11 Co. 80. b.

He ſhall not have Aid of him in Reverſion, becauſe he having originally the Inheritance by the firſt Gift, has likewiſe the Cuſtody of the Writings which are neceſſary to defend it.

Co. Lit. 27.b. 11 Co. 8.

For the ſame Reaſon he may join the Miſe in a Writ of Right, becauſe, the Deeds belonging to the Inheritance lying in his Hands, he may make out his Title without calling in the Reverſioner.

Co. Lit. 27.b. 11 Co. 80. b. F. N. B. 206. Booth. 199.

The Writ of Entry *in Caſu conſimili* doth not lie upon his Alienation, as it does for him in the Reverſion, upon the Alienation of any other Tenant for Life, becauſe this Caſe is not *conſimilis* to that of Tenant in Dower, becauſe this Tenant had originally the Inheritance in him, which the Tenant in Dower never had.

Co. Lit. 27.b. 11 Co. 80. b. Booth. 181.

If upon the Death of Tenant in Tail after Poſſibility, *&c.* a Stranger intrudes, yet no Writ of Intruſion lies againſt ſuch Intruder, becauſe this Writ is given only upon an Entry and Intruſion after the Death of a bare Tenant for Life, which this Tenant is not.

Co. Lit. 27.b. 11 Co. 80. b.

He ſhall not be called Tenant for Life in a *Præcipe* brought by or againſt him, becauſe his original Infeudation, by which he claims, was of an Eſtate of Inheritance, not of an Eſtate for Life.

*Estate for Life and Occupancy.

* Page 270

(A) What Interest or Property in Land the Law calls an Estate for Life, either when there are express Words in the Deed, or when the Law creates it by Implication. 270.

(B) Who upon the Death of Tenant for Life is to enjoy the Land, and herein of Occupancy. 273.

And,

1. Of what Things a Man may make himself a Title to by Occupation. 273.
2. What makes an Occupant. 275.
3. The Way to prevent the General Occupant; and herein of the Special Occupant, and the Alteration made in the Common Law by the Statute 29 *Car.* 2. *c.* 3. 277.

(C) How far Tenant for Life may dispose of his Estate, either singly by himself, or by joining with him in Reversion; and herein of his Forfeiture, either by Common Law or Statute. 278.

(A) What Interest or Property in Land the Law calls an Estate for Life, either when there are express Words in the Deed, or when the Law creates it by Implication.

IF a Man lets Lands to one for Term of Life of the Lessee, or any other, in this Case the Lessee is Tenant for Term of Life; but in common Speech, he, who holdeth for Term of his own Life, is called Tenant for Term of his own Life; and he, who holdeth for Term of another's Life, is called Tenant for Term of another Man's Life, or Tenant *per auter vie.* Lit. Sect. 56.

Co.Lit. 41. b. 5 Co. 13. a. Cro.Eliz. 182.

So if a Man lets Land to another for Term of his own Life, and the Lives of *A.* and *B.* the Leſſee has a Freehold determinable upon his own Death, and the Deaths of *A.* and *B.* nor can there be any Merger of the Freehold during the Lives of *A.* and *B.* into the Eſtate that the Leſſee has during his own Life; becauſe, though the Eſtate for a Man's own Life is greater than an Eſtate for another Man's Life, yet here the Leſſee has not two diſtinct Eſtates in him, but only one Freehold circumſcribed with that Limitation as the Meaſure of its Continuance.

* Page 271 Rol.Abr.843. But if a Leaſe be made to a Corporation aggregate for their own Lives; this is no Eſtate for Life, but a Fee-ſimple; for the Leaſe being made to them as a Body Politic, which has a continued Succeſſion, and never dies, a Leaſe made to them during their Lives is equal to a Grant made to them while they continue a Body Politic, which by Reaſon of the perpetual Succeſſion of its Members is in Law looked upon to be for ever; and therefore this is a good Gift in Fee, without the Word *Succeſſors*, becauſe the Leſſor cannot have the Land againſt his own Grant till the Corporation is diſſolved; for till their Diſſolution they are in Being and have a Continuance, which is to be alive within the Words of the Leaſe. 21 E. 4. 76. Rol. Abr. 843.

* If a Leaſe be made to a Corporation aggregate for Life of the Leſſor; this is a good Eſtate for Life, becauſe the Life of the Leſſor, which is wearing and will determine, is the Meaſure of its Continuance.

Lit. Sect. 283. Co. Lit. 42, 183. Rol.Abr.846.

If a Man leaſes Lands to another, without ſaying how long the Leſſee ſhall enjoy them, he ſhall have them for his own Life, if Livery be made, becauſe every Man's Gift is taken moſt ſtrongly againſt himſelf, and for the Benefit of the Grantee, to avoid all Equivocation; but there is a Difference between ſuch a Leaſe made by Tenant in Fee-ſimple and Tenant in Tail; for if Tenant in Tail makes a Leaſe generally with Livery, the Leſſee ſhall have the Land but during the Life of the Tenant in Tail, for that is the greateſt Eſtate he can lawfully make, the Power to leaſe then ceaſes; and where a Man's Act will bear different Conſtructions, the Law, for no Conſideration, will make that Conſtruction which muſt be injurious to another,

Co. Lit. 183.

So if Leſſee for Term of his own Life makes a Leaſe generally with Livery; this the Law conſtrues an Eſtate for his own Life only; for if it were to be taken an Eſtate for the Life of the Leſſee, the Leſſor, without any explicit Act of his own, would not only diſcontinue the Reverſion, but alſo forfeit his own Eſtate, which Conſtruction would make the Conveyance uſeleſs and ineffectual; for it would be in the Power of him in the Reverſion to enter into the Land for the Forfeiture; and the Law will make no Conſtruction to do wrong, or in doubtful Expreſſions preſume a wrongful Intention, it being alſo moſt for the Benefit of the Leſſee, that he ſhould have a rightful Eſtate.

Rol.Abr 845. Co.Lit. 42. a. 8 Co. 85. b.

So it is of Things which lie in Grant, as Rents, Reverſions, Commons, *&c.* for if a Man grants theſe Things by Deed, without mentioning any particular Eſtate, the Grantee hath an Eſtate for Term of his own Life, becauſe a Man's own Act is taken moſt ſtrongly againſt himſelf; and where the Words of the Deed will bear two Senſes without Injury to any one, the Purchaſer who comes in upon a valuable Conſideration deſerves the moſt Favour; and the Conſtruction that moſt enlarges his Intereſt is to be preferred; beſides, being granted to him, it cannot be ſuppoſed out of him, as long as the ſame Perſon continues.

Rol. Abr. 845. For ſince the King is ſeldom known to make Market of his Titles, his Grants proceeding from his own Bounty, and not from any valuable Conſideration of the Patentees, ought not to be taken in a larger Senſe than the Words of themſelves import; and therefore where he has not explicitly ſet forth the Extent of his Bounty, the Law, with Reaſon, conſtrues the Grant in favour of the King, who is beſt Judge of the Services of his Subjects, and how far he intended to reward them,

But if the King grants Land or Rent, and limits no particular Eſtate in the Gift, the Patentee has no Freehold, either for his own Life or the Life of the King.

If

Eſtate for Life and Occupancy.

If an Eſtate be given to a Woman *Dum ſola fuerit*, or *Durante viduitate*, or to a Man and Woman during Coverture, or as long as the Grantee ſhall dwell in ſuch a Houſe, or ſhall pay 10*l.* yearly to the Grantor; in all ſuch Caſes, where there is no fixt Time appointed for the Determination of the Eſtate conveyed, the Grantees have Eſtates for Life, if the Ceremony required by Law to paſs a Freehold be obſerved; as if Livery be made * in caſe of Things corporeal, or a Deed be perfected in caſe of Things incorporeal.† Co. Lit. 42. a. * Page 272

† See the Cloſe of the next Caſe.

If I make a Leaſe to another till I go to *Weſtminſter*, the Leſſee has an Eſtate for Life; ſo if *A.* leaſes to *B.* till *A.* makes *J. S.* Bailiff of his Manor, *B.* has the Freehold in him; for ſince there is no particular Time ſpecified, but it is left indefinitely, when I ſhall go to *Weſtminſter*, or *J. S.* be made Bailiff of the Manor, and theſe Contingencies may or may not happen during the Life of the Leſſee, and the Livery transfers the Freehold to him; ſo he muſt conſequently, by the Words of the Gift, enjoy it during his Life, if none of theſe Contingencies happen in that Time, upon which his Eſtate is to determine. Rol. Abr. 844. Co. Lit. 82.

If an Office be granted to a Man, to have and enjoy ſo long as he ſhall behave himſelf well in it, the Grantee hath an Eſtate of Freehold in the Office; for, ſince nothing but his Miſbehaviour can determine his Intereſt, no Man can prefix a ſhorter Time than his Life, ſince it muſt be his own Act, (which the Law does not preſume to foreſee) which only can make his Eſtate of ſhorter Continuance than his Life; ſo if the Office had been granted to a Man *quamdiu ſe bene geſſerit tantum*, his Eſtate had not been leſs for the Word *Tantum*; for a Grant to a Man for ſo long Time as he ſhall behave himſelf well, and for ſo long Time only as he ſhall behave himſelf well, are of equal Extent, and his Miſbehaviour in each Caſe determines his Intereſt. Co. Lit. 42. a. Rol. Abr. 844. Caſes in Parl. 161-2-3. 4 Mod. 173.

If a Man grants a Manor worth 10*l.* *per Annum* to *J. S.* till he has received 100*l.* this is an Eſtate for Life, if Livery ‖ be made; for though at the Time of the Grant the Manor be worth 10*l.* and by that Computation the 100*l.* muſt be paid in ten Years; yet ſince the Profits are uncertain, and may riſe or fall, there can be no definite Time fixed for the Limitation of the Leſſee's Eſtate; and therefore, ſince Livery is made, he muſt have a Freehold in the Manor determinable upon the Levying the 100*l.* but in this Caſe, if no Livery had been made, the Leſſee had been only Tenant at Will; for it cannot be a Leaſe for Years, becauſe the Determination of it is uncertain, and there can be no Freehold without Livery. Co. Lit. 42. a. Rol. Abr. 845. 6 Co. 35. b.

‖ See *infra* 273. the Statute 29 Car. 2. c. 3.

But if I grant a Rent of 10*l.* to *J. S.* till he has received 100*l.* this is an Eſtate for Years in the Grantee, for the determinate Sum, which is payable yearly, muſt neceſſarily in ten Years amount to the 100*l.* and conſequently it is evident at the Commencement of the Grant, when the Intereſt of the Grantee is to determine. Rol. Abr. 845. Co. Lit. 42. a.

If I grant to another common of Turbary in my Land, to dig and carry away at his Will, there being no particular Eſtate limited in the Rol. Abr. 845.

them, where the Words of the Grant do not declare it; and therefore ſuch Grant, being capable of a double Conſtruction, is void for the Uncertainty, and ſhall not paſs ſo much as an Eſtate at Will; becauſe moſt Grants proceeding from the Inſtigation and Application of the Subject, they ought to know what they aſk; and if that does not appear, nothing ſhall paſs from the King for the Uncertainty. Rol. Abr. 845. Dav. 43, 45. Co. 43, 49.

Grant, it muſt be conſtrued in Favour of the Grantee, to continue during the Life of the Grantee, for the Words, *at his Will*, cannot refer to the Eſtate in the Common, but to the Privilege given to the Grantee to dig and carry away, which by the Grant he may uſe at his Will and Pleaſure.

Rol. Abr. 845. If a Man ſeiſed of Land in Right of his Wife for Life, bargains and ſells it by Indenture inrolled, the Purchaſer has an Eſtate for his Life determinable upon the Coverture; for the Conveyance being by Bargain and Sale transfers no more than the Huſband may lawfully paſs, which is an Eſtate during the Coverture; for ſo long he has an Eſtate in the Freehold of his Wife, and may lawfully diſpoſe of it; and ſince it cannot be foreſeen when the Coverture will be diſſolved, the Leſſee muſt conſequently have the Freehold determinable with the Coverture, ſince the Bargain and Sale upon the Statute is equivalent to Livery at Law, to transfer the Freehold.

Co. Lit. 42. a. If the King grants an Office at Will, and grants a Rent to the Patentee for his Life, for the Exerciſe of his Office; this is no abſolute Eſtate for Life, becauſe the Rent being granted on Account of the Office, and * in Diſcharge of the Duty of the Place, whenever his Intereſt in the Office ceaſes, the Rent is determined, becauſe it was firſt granted for the Exerciſe of the Office which he is no farther concerned in.

*Page 273

29 Car. 2. c. 3. And here it may be proper to obſerve, that though, by the Common Law, the Inveſtiture of Livery was the only Solemnity required to convey the Freehold, yet now, by the Statute of *Frauds and Perjuries*, *it is enacted, That all Leaſes, Eſtates, Intereſts of Freehold, &c. in any Lands, Tenements or Hereditaments, made or created by Livery and Seiſin only, and not put in Writing, and ſigned by the Parties ſo making or creating the ſame, or their Agents thereunto lawfully authorized by Writing, ſhall have the Force and Effect of Leaſes or Eſtates at Will only, and ſhall not either in Law or Equity be deemed or taken to have any other or greater Force or Effect.*

(B) Who upon the Death of the Tenant for Life is to enjoy the Land; and herein of Occupancy. †

† Few if any of the following Caſes as to Occupancy are now Law, ſince the Alterations by Statute which *vide poſt* 278. But they ſhew the Learning relative to Occupancy, which may, on ſome Occaſions, be of Uſe.

Co. Lit. 41. b. Cro. Eliz. 182. IF a Man leaſes to *J. S.* and *J. S.* dies, the Land returns to the Leſſor, becauſe, the Life being ſpent for which the Land was granted, it muſt neceſſarily come back to the old Proprietor; but if the Leaſe had been made to *J. S.* during the Life of *A.* and the Leſſee had died leaving *Ceſtui que vie*; or if in the former Caſe *J. S.* had granted over his Eſtate to *B.* and *B.* had died; in theſe Caſes he that firſt took Poſſeſſion of the Land was lawfully the Tenant, for the Reverſioner could not claim in either Caſe, becauſe he had parted with it during the Life of *A.* in one Caſe, and of *J. S.* in the other; and *J. S.* cannot have any Right, for that were to act contrary to his own Grant, and to claim an Intereſt which he had trasnferred to another; and the Tenant *per auter vie* being dead, his Deſcendants could not claim it, becauſe they were not comprehended in the Words of the

the Feudal Donation; and therefore the firſt Occupant muſt be the rightful Tenant, ſince this, like all other Things which are derelict and without an Owner, belongs to the firſt Occupier or Poſſeſſor; but, the better to underſtand this Matter, we ſhall conſider,

1. Of what Things a Man may make himſelf a Title to by Occupation.
2. What makes an Occupant.
3. The Way to prevent the General Occupant; and herein of the Special Occupant, and the Alteration made in the Common Law, by the Statute 29 Car. 2. cap. 3.

1. Of what Things a Man may make himſelf a Title to by Occupation.

There can be no Occupant of Things which lie in Grant, and which cannot paſs without Deed, as Rents, Advowſons, Commons, Reverſions, *&c.* becauſe theſe Things having no natural Exiſtence, but conſiſting purely in the Agreement, and depending on the Inſtitution of the Society for their Being, no Man can enter to poſſeſs them; beſides, as theſe Things are framed and have their Exiſtence by the municipal Laws of the Nation, * ſo thoſe Laws have eſtabliſhed the Solemnity of a Deed to transfer them; from whence it follows, that, ſince no Man can make himſelf a Title to theſe Things without Deed, whoever claims them muſt ſhew he is a Party to the Deed before he can derive himſelf a Title to the Things contained in the Deed.

Vaugh. 109, 200. Co.Lit. 41. b. 2 Rol.Abr. 150. Cro.Eliz.721, 901. * Page 274

Therefore if a Rent be granted to *A.* during the Life of *B.* and *A.* dies, living *B.* the Rent is determined; becauſe the Grant being originally made to *A.* only, and when he dies no Body can claim it as Occupant, becauſe there can be no Entry into it to poſſeſs, nor by the Deed, becauſe no one was Party to it but *A.* it muſt follow, that when nobody can take by the Grant, it muſt ceaſe as a void Grant, or as if it had never been made; and conſequently the Reverſion muſt neceſſarily commence.

Vaugh. 199.

If a Rent be granted to *A.* during the Life of *B.* Remainder to *C.* if *A.* dies living *Ceſtui que vie*, the Remainder which was limited to *C.* commences immediately; for the particular Eſtate in the Rent muſt determine, when nobody can enjoy it; and conſequently the Remainder muſt take Place, which was to commence upon the Determination of the particular Eſtate.

Vaugh. 200. Mo. 664.

But if a Rent be granted to *A.* and *B.* during the Life of *C.* to the Uſe of *C.* if *A.* and *B.* die, *C.* ſhall enjoy the Rent during his own Life; for the Rent being granted to *A.* and *B.* to the Uſe of *C.* is by the Statute of Uſes executed in *C.* as an Eſtate for his own Life; ſo that the Lives of *A.* and *B.* are no ways material; for the Eſtate being executed by the Statute to the Uſe which was limited to *C.* during his own Life, he muſt by the Grant, notwithſtanding the Death of *A.* and *B.* enjoy the Rent during his own Life.

Cro,Eliz.721. *Cawley*'s Caſe.

If there be two Jointenants for Life, and one is a Feme Covert, and the Baron and Feme levy a Fine to the other Jointenant, and thereby grant *totum & quicquid* in the Land, for the Life of the Wife, upon the Death of the other Jointenant, there ſhall be no Occupant during the Life of the Feme; but the Feoffor may enter for the Fine incurred by way of Releaſe, and then the other Jointenant muſt have claimed the whole from the firſt Feoffment, ſo could have had the whole but for his own Life.

2 Rol. Abr. 86, 403. Cro. Jac. 696. *Euſtace* and *Scawen*.

Vaugh. 196. But though there be no Occupancy of Things which lie in Grant, yet they may be occupied as appendant to Things which paſs by Livery, and which may be occupied; as if a Manor conſiſting Part in Demeſne and Part in Services be leaſed to *A.* for the Life of *B.* upon the Death of *A.* whoever firſt enters and occupies the Demeſnes has alſo the Services; ſo the Occupancy of a Manor is the Occupation alſo of the Advowſon appendant to the Manor; for though neither the Services nor the Advowſon are ſeparately in their own Nature capable of an Occupancy, yet as they belong and are appendant to Land which is ſubject to Occupation, the Occupant of the Demeſnes has a Right to the whole Manor, becauſe the Occupancy making no Severance or Alteration in the Manor, he, that has a Right to the whole Manor by Occupation, muſt neceſſarily have a Right to all its Parts.

Vaugh. 196. So the Occupant of a Houſe ſhall have the Eſtovers, or Way leading to the Houſe; for ſince theſe Things pertain to the Houſe, and the Occupation of the Houſe makes no Severance of them, they muſt neceſſarily remain as they were before the Occupant entered, and then the Poſſeſſor of the Houſe enjoyed the Eſtovers or Way alſo.

Cro. Eliz 57. Hob. 313. *Windſmore* and *Hubbard.* If a Leaſe be made of Lands to *J. S.* for Life, *habend.* to him, and *A.* and *B.* ſucceſſively, *A.* and *B.* cannot take the Lands in Poſſeſſion, becauſe not named in the Premiſſes, nor by way of Remainder, becauſe the Intent of the Deed appears to give it them in Poſſeſſion by the copulative Words, and by joining them with *J. S.* who is to take in Poſſeſſion; nor can there be any Occupancy upon the Death of *J. S.* becauſe *A.* and *B.* are mentioned in the Deed, as Perſons to take an Eſtate, and not to make a Limitation of the Lands to *J. S.* during their Lives; ſo that the Leaſe in

*Page 275 * Effect is no more than to *J. S.* during his own Life, and conſequently upon his Death it muſt return to the Leſſor, ſince the Life is ſpent for which he granted it.

Co Lit. 41. 2 Rol. Abr. 150. Palm. 32. *Vide* Cro. Eliz. 58. If Tenant in Dower, or by the Curteſy, of Lands, grant over their Eſtate, and the Grantee dies during their Lives, whoever firſt enters ſhall be Occupant; for tho' their Eſtates are created by Law, yet ſince they are to enjoy it during their own Lives, the Reverſioner has no Right to enter till their Deaths; nor can they enter upon the Death of the Grantee, becauſe this were to act contrary to their own Grant, which conveyed their Eſtates during their own Lives, conſequently, ſince the Poſſeſſion is vacant and derelict by the Death of the Grantee, he that firſt enters to poſſeſs is the Occupant, and ſhall enjoy the Land during the Life of Tenant in Dower, or by the Curteſy, though they cannot be ſaid to be Tenants in Dower, or by the Curteſy.

2 Rol. Abr. 150. If a Leaſe be made to *A.* and *B.* for their Lives, and the Life of the longeſt Liver of them, and they make Partition, and then *A.* dies, the Leſſor ſhall enter into his Part; and there can be no Occupancy, for *B.* has no Title to it, becauſe the Right of Survivorſhip was loſt by the Partition which deſtroyed the Jointenancy; nor will the Words *to the longeſt Liver* be of any Uſe to *B.* becauſe they were void at firſt, being no more than the Law implied in the joint Eſtate; nor can there be any Occupancy, becauſe, after the Partition, each of the Leſſees have but an Eſtate for their own Lives in their ſeveral Moieties, and conſequently the Reverſion, which is to commence when the particular Eſtate determines, muſt neceſſarily take Place, for there can be no Occupant where another has Right, as the Reverſioner has in this Caſe upon the Death of *A.* and *B.*

Co. Lit. 41. 2 Rol. Abr. 150. There can be no Occupant of any of the King's Poſſeſſions; for if the King grants Lands to *A.* during the Life of *B.* and *A.* dies living *B.* the Law allows no Man to gain the Poſſeſſion which is now vacant by the Death of *A.* but preſerves it for the King; for, he being employed in the Care and Buſineſs of the whole Nation, ought not to ſuffer in his private

Eſtate

Eſtate and Concerns; alſo no Man can make himſelf a Title to any of the King's Poſſeſſions without Matter of Record.

2. What makes an Occupant.

Occupancy in Land being nothing elſe than the taking Poſſeſſion or appropriating that Part which every Man had a Right to as much as another, it follows, that a Claim without an actual Entry makes no Occupation, becauſe, notwithſtanding the Claim, the Poſſeſſion is ſtill vacant, and ſuch Claim leaves no Marks of an Appropriation; beſides that, ſince the Occupancy in Civil Societies follows the natural, and a mere Claim makes no natural Occupancy, becauſe a Man's natural Right extends no farther than Poſſeſſion and Uſe, and not to what he may only wiſh for, by Conſequence, if a Claim doth not remove it out of the State of Nature, the Occupancy in Civil Societies, according to the Nature of Things, muſt be an actual Poſſeſſion, and not a bare Claim. Vaugh. 188.

Riding over the Ground to hunt or hawk makes no Occupancy; for tho' this be an actual Entry, yet (being only tranſitory and to a particular Purpoſe, which leaves no Marks of an Appropriation, or of an Intention to poſſeſs for the ſeparate Uſe of the Rider) can gain no Occupancy; the Intention of the Perſon being to denominate his Action according to the Rule *Quod affectio tua imponit nomen Operi tuo.* Co. Lit. 41. b.

If *A.* Tenant *pur auter vie* leaſes to *B.* at Will, and *B.* enters and is poſſeſſed, and then *A.* dies, and *J. S.* enters as Occupant, yet he is no Occupant, becauſe the Poſſeſſion was taken up by *B.* before, and *B.* being found in Poſſeſſion (which prevents any other Occupant) the Law caſts the Freehold on him, not only to prevent any Abeyance, but that there may be a Tenant to do the Services, and to anſwer to the *Præcipe* of Strangers. Vaugh. 189, 191. Cro. Jac. 554. Co. Lit. 4. * Page 276

If Tenant *pur auter vie* makes a Leaſe for Years, and dies, the Leſſee for Years being in Poſſeſſion ſhall be Occupant without any Act of his declaring his Intention to be ſo; for being already in Poſſeſſion, the Law does not put a Man to claim or enter into that of which he has already Poſſeſſion, and in whomſoever the Law finds the Poſſeſſion, there it caſts the Freehold for the former Reaſons; nor is the Leſſee for Years injured by it, for he purchaſed his Eſtate ſubject to this Contingency of being merged by Occupancy. 2 Rol. Abr. 151. 2 Bulſt. 12, 13. Vaugh. 194. Comp. Incum. 348.

But if Tenant in Fee-ſimple makes a Leaſe for Years to *J. S.* and after ouſts him, and makes a Leaſe to *A.* for the Life of *B. J. S.* re-enters, and *A.* dies, the Leſſee for Years is no Occupant; for though he is found in Poſſeſſion, yet it is by a Title ſuperior to the Leaſe for Life, and ſince he did not purchaſe the Term at firſt under the Contingency of a Merger by Occupancy the Law will not permit the Leſſor by any Act of his to deſtroy the Title he himſelf made; nor will the Law merge the Term, for that were to deſtroy the prior Title of *J. S.* contrary to the Rule of Law, that *Actus Legis nemini facit injuriam.* Co. Lit. 41. b. 2 Rol. Abr. 151.

If *A.* Tenant *pur auter vie* leaſes to *B.* for Years, and *B.* makes a Leaſe at Will to *C.* if *A.* dies, living *Ceſtui que vie*, *C.* ſhall be the Occupant, becauſe, being in Poſſeſſion, the Law gives him the Freehold; and though *B.* ſhould enter upon him and claim as Occupant, yet that would make no Alteration in the Caſe, becauſe *C.* becomes Occupant immediately on the Death of *A.* and what one Man is already poſſeſſed of, another cannot gain by Occupation, for Occupancy only gives a Right where no Man had it before, but the Term of *B.* is ſtill in Being, becauſe *C.* is to have the Freehold as *A.* enjoyed it, which was ſubject to the Leaſe for Years. 2 Rol. Abr. 151. Co Lit. 41. b. 2 Bulſt. 11. Dyer 328. *in Margine.* Com. Incum. 348.

If Tenant *pur auter vie* makes a Leaſe for twenty Years to *B.* reſerving 5 *l.* Rent, and *B.* leaſes to *C.* for ten Years, reſerving 3 *l.* Rent, if the Tenant Co. Lit. 41. Vaugh. 190.

nant for Life dies, *C.* ſhall be Occupant, becauſe he is in Poſſeſſion, but yet he ſhall have the Freehold only as a Reverſion on the Leaſe of twenty Years; and therefore, ſince the Term of ten Years is not merged, *C.* muſt pay the 3*l.* to *B.* and *B.* muſt pay the Rent of 5*l.* to *C.* becauſe *C.* as Occupant, comes in the Place of Tenant for Life in all Reſpects, and muſt anſwer the Services over, is ſubject to the Conditions, and to all Charges of Tenant for Life, and conſequently ought to enjoy all the Benefit and Profit of it.

3 Bulſt. 12, 13. So if Tenant *pur auter vie* makes a Leaſe for Years to *A.* Remainder to *B.* for Years, and the Leſſee for Life dies, *A.* ſhall be Occupant and have the Freehold, becauſe the Law finds him in Poſſeſſion; but his Term is not merged, becauſe of the intermediate Intereſt of *B.* which he muſt preſerve, becauſe, coming in the Place of the Tenant *pur auter vie*, he is obliged to take the Freehold under the Charges he laid on it, and in the ſame Manner he enjoyed it, which was ſubject to the Leaſe for Years; and therefore, tho' the Freehold be caſt on him, yet he holds it by way of Reverſion upon the Remainder for Years.

2 Rol. Abr. 151. Vaugh. 192. 2 Bulſt. 11. If Tenant *pur auter vie* dies, and *J. S.* firſt enters, and claims in Right of *J. D.* yet *J. S.* himſelf ſhall be Occupant, becauſe the Freehold, being caſt on him who firſt takes Poſſeſſion, cannot be deveſted out of him without a ſolemn Act of Notoriety.

Lev. 202. Sid. 346. 2 Keb. 148. If Tenant *pur auter vie* makes a Leaſe for Years to *A.* in Truſt for himſelf for Life, and after his Death in Truſt for his Wife for her Life; *A.* enters, but ſuffers the Leſſee for Life to enjoy the Land; the Leſſee for Life dies, and the Wife finding the Poſſeſſion vacant enters, and was adjudged Occupant; for though upon the Death of Tenant for Life (whom he ſuffered to enter and take the Profits) he had ſo far a Poſſeſſion in Law * before any actual Entry, that he might have an Action of Treſpaſs; yet that made him no Occupant, becauſe nothing but an actual Poſſeſſion makes an Occupant, which the Wife firſt took in this Caſe.

* Page 277

3. The Way to prevent the General Occupant, and herein of the Special Occupant, and the Alteration made in the Common Law by the Statute 29 *Car.* 2. *c.* 3.

Lit. Sect. 739. Co. Lit. 41. b. 388. a. If Lands be given to the Leſſee and his Heirs, during the Life of another, the Heir comes in as Special Occupant upon the Death of the Tenant for Life, becauſe he is included in the Words of the Donation, which gave him a Right to the Land upon the Death of the Leſſee, and conſequently prevents an Occupancy, which is admitted in other Caſes, becauſe no Man has a Title to the vacant Poſſeſſion.

2 Rol. Abr. 151. So if Leſſee for his own Life leaſes to *B.* and the Heirs of his Body, during the Life of the firſt Leſſee; if *B.* dies during the Life of his Leſſor, the Heirs of his Body ſhall be Occupant.

2 Rol. Abr. 150. 18 E. 3. 44. b. So if the Leſſee had made ſuch a Leaſe to his Leſſor, and the Leſſor had died during the Life of the Leſſee, the Heir of his Body ſhall be Occupant; for this is no Surrender, becauſe the firſt Leſſee has a Poſſibility of Reverter upon his Leſſor's Dying without Heirs of his Body.

2 Ven. 184. If Tenant *pur auter vie* ſettles the Term to the Uſe of himſelf in Tail, Remainder to *J. S.* Equity will not ſupport ſuch Remainder for the Benefit of *J. S.* Vern. 225-6. Tenant *pur auter Vie* may limit the Term to a Man and his Heirs, or to the Heirs of his Body, and ſuch Eſtate ſhall deſcend, and is not within the Statute *de donis*.

If Lands in Borough Engliſh be given to *A.* and his Heirs, for the Life of *B.* and *A.* dies in the Life of *B.* leaving two Sons, the youngeſt ſhall be the Special Occupant, becauſe the Heir, that is Repreſentative of the Father as to Land of that Nature, muſt be the Occupant, ſince the Heir muſt take by Deſcent, and not by Purchaſe. 2 Lev. 138. 3 Keb. 475, 486. Vaugh. 201.

If a Leaſe be made of *Land* to *J. S.* his Executors and Aſſigns, during the Life of *B.* the Executors of *J. S.* ſhall be the Special Occupants, if he dies in the Life of *B.* for though it be a Freehold, which in Courſe of Law would not go to Executors, yet they may be deſigned by the particular Words in the Grant to take as Occupants; and ſuch Deſignation will exclude the Occupation of any other Perſon, becauſe the Parties themſelves, who originally had the Poſſeſſion, have filled it up by this Appointment. Dyer 328. 2 Rol. Abr. 151. and it was Aſſets in their Hands before the Stat. 29 Car. 2. c. 3. 2 Vern. 720.

But if *a Rent* be granted to *J. S.* and his Executors, during the Life of *B.* by the Death of *J. S.* the Rent is determined, becauſe the Executors cannot take as Special Occupants, ſince the Nature of the Thing lying in Agreement is not capable of Occupation, nor can they take by the Grant, becauſe then they muſt take as Repreſentatives, which they cannot be of a Freehold; and the Law will not permit People at their Pleaſure to vary the Courſe of Deſcents. 2 Rol. Abr. 151.

So if *a Rent* be granted to *A.* his Executors and Aſſigns, during the Life of *B.* and *A.* dies inteſtate, the Adminiſtrator cannot claim the Rent; not as Occupant, becauſe no Man can make himſelf a Title to Rent by way of Occupancy; nor by the Deed, becauſe he is not Aſſignee within the Words of the Grant by the Letters of Adminiſtration, therefore the Rent is determined, ſince none can claim it as Occupant. Vaugh. 199, 200. Cro. Eliz. 901. Mo. 664. Yel. 9. *Salter* and *Butler*.

Yet if the Rent be granted to a Man and his Heirs during the Life of another, and the Grantee dies, his Heirs ſhall take as Special Occupants; * for tho' in Point of Property the Rent is not capable of Occupation, yet ſince the Heirs are included in the Grant, and they are capable of taking the Freehold as Repreſentatives of the Grantee, which the Executors are not in the former Caſe, it is but Reaſon the Rent ſhould not determine while any Perſon compriſed in the Grant is capable of Taking. Vaugh. 201. 2 Rol. Abr. 151. * Page 278 Bulſt. 135. Cro. Jac. 282. *Bowles* and *Poor*. Yel. 9.

So if *an Annuity* be granted to *A.* and his Heirs during the Life of *B.* if *A.* dies before *B.* his Heirs ſhall have the Annuity, becauſe the Heirs of *A.* being the proper Repreſentatives to take the Freehold deſcending from him, ſince they are compriſed in the Grant, the Grant cannot ceaſe or be void while they are in Being, and the Life not ſpent for which the Grant was made. Bulſt. 135. Co. Lit. 388. a. 2 Rol. Abr. 151.

But tho' all or moſt of the above Caſes might formerly have been good Law, yet now by the Statute of *Frauds and Perjuries* it is enacted, That any Eſtate *pur auter vie* ſhall be deviſeable by Will in Writing, ſigned by the Party ſo deviſing the ſame, or by ſome other Perſon in his Preſence, and by his expreſs Directions, atteſted and ſubſcribed in the Preſence of the Deviſor, by three or more Witneſſes; and if no ſuch Deviſe thereof be made, the ſame ſhall be chargeable in the Hands of the Heir, if it ſhall come to him by Reaſon of a Special Occupancy, as (*a*) Aſſets by Deſcent; 29 Car. 2. c. 3. ſ. 12.

(*a*) But ſhall be Aſſets only to pay Debts by Bond or Specialty, in which the Heir is bound, and not Debts by ſimple Contract. 2 Vern 710. If Tenant *pur auter Vie* dies inteſtate, and Adminiſtration is granted to *J. S.* the Adminiſtrator is not obliged to diſtribute this Term amongſt the next of Kin, as Part of the Inteſtate's Perſonal Eſtate, but ſhall have it himſelf as Occupant, for it ſtill continues a Freehold; and the Alteration made by the 29 Car. 2. *c.* 3. was only with reſpect to Creditors, that is, if it comes to the Heir as Special Occupant, he ſhall be anſwerable for his Anceſtor's Debts as far as he is bound; and if to Executors or Adminiſtrators, they for all Debts generally; but it ſhall not be Aſſets to pay Legacies, except ſuch as are particularly deviſed thereout. Mich. 8 Will. 3. in B. R. between *Oldham* and *Pickering*. 2 Salk. 464. *per totam Curiam*. But ſee now 14 Geo. 2. *c.* 20. *ſ.* 9. whereby Diſtribution ſhall be made of Eſtates *pur auter Vie*, whereof there is no Special Occupant, and which are not deviſed.

as in caſe of Lands in Fee-ſimple; and in caſe there be no Special Occupant thereof, it ſhall go to the Executors or Admiſtrators of the Party that had the Eſtate thereof by Virtue of the Grant, and ſhall be Aſſets in their Hands.

(C) How far Tenant for Life may diſpoſe of his Eſtate, either ſingly by himſelf, or by Joining with him in Reverſion; and herein of his Forfeiture, either by Common Law or Statute.

*Digeſt. Feud. Lib.*2.Tit.26. fol. 523. *Vigellius, lib.* 5. *Cauſe* 32. f. 287. *Staundf. Prær.* 28. a.

BY the ancient Feudal Law no Man could alien without Licence from the Lord of the Fee; but any Alienation or Diſpoſition was then a Forfeiture; but in *England*, where the allodial Property prevailed in the *Saxon* Times, they were allowed to alien in (*b*) ſome Caſes, which Privilege was not only confirmed, but alſo enlarged and made general by *Magna Charta*; ſo that by that Act the Feuditary might alien to whom he pleaſed, provided he left ſufficient to anſwer the Lord's Services, which ſeems to have been a Privilege mightily contended for.

(*b*) 1ſt, *In Remunerationem Servitii*, that is, for Services done to the Feud, as for Services done in the Wars by the Feudal Tenant, or in Peace, by Ploughing the Feud at Home; both theſe being either for the Profit or Honour of the Feudal Lord, they formerly valuing themſelves upon the Number and Honour of their Tenants. 2dly, In Frankmarriage with the Daughter of the Feuditary, or ſome other of his Blood, becauſe this multiplied Tenants to the Lord. 3dly, In Frankalmoigne or Free Alms, the Superſtition of the Times allowing it for the Good of the Soul. *Glanvil, lib.* 7. *cap* 1. 44. *Stamf. Prær.* 27, 28.

* Page 279 2 Inſt 65. Rol. Abr. 854. Co. Lit. 251.

* Yet notwithſtanding this Law, if Tenant for Life aliens in Fee, this is ſtill a Forfeiture, for that Statute only permits a lawful Diſpoſition, but does not allow any Alienation to the Prejudice of him in Reverſion, and therefore where Tenant for Life takes upon him to transfer the Fee-ſimple, it is a Renunciation of the Feud, and contrary to his Oath of Fidelity; ſo if Tenant for Life aliens to another for the Life of the Alienee, this is a Forfeiture, for it can be no lawful Alienation within *Magna Charta*, becauſe it is palpably to the Prejudice of him in the Reverſion.

Rol. Abr. 854.

If *A.* Leſſee for Life leaſes to *B.* for the Life of *B.* if *A.* lives ſo long; this is a Forfeiture of *A.*'s Eſtate, becauſe *B.* has an Eſtate for his own Life, though under a Contingency, which muſt neceſſarily deveſt the Reverſion.

Cro. Jac. 200. *Caſtle* verſus *Dod.* Rol. Abr. 854.

But if *A.* Leſſee for Life, levies a Fine to *B.* for the Life of *A.* to the Uſe of *B.* for his own Life, this is no Forfeiture; for the Eſtate granted by the Fine was only for the Life of *A.* and the Limitation of a greater Uſe can be no Forfeiture, for the Eſtate out of which the Uſe ariſes is only during the Life of *A.*

Cro. Eliz. 131. *Piers* and *How.* So if Baron and Feme be Tenants for Life, and they both join

Huſband ſeiſed of Lands in Right of his Wife for Life, and they both by Deed of Feoffment convey the Land to *J. S.* and his Heirs, *habend.* to him and his Heirs, to the Uſe of him and his Heirs, for the Life of the Wife; this is a Forfeiture of her Eſtate; for there being a Fee-ſimple conveyed to *J. S.* by the Deed and Livery, the Words of Reſtraint for the Life of the Wife refer only to the Limitation of the Uſe, ſo that the Fee-

Fee-ſimple remains ſtill in the Feoffee; but this it ſeems is a Forfeiture only during the Coverture. in a Feoffment, or the Huſband

alone; theſe are Forfeitures, but they affect the Wife only during the Coverture; for ſhe can no Act of hers without Examination in a Court of Record. Rol. Abr. 851. 8 Co. 44. be bound by

If Tenant for Life makes a Leaſe for Years, this was never looked upon to be a Forfeiture, becauſe the Leſſee for Years was originally but a Bailiff to the Freeholder, and the Tenant for Life only had the Freehold, and was to anſwer the Services, and he in Reverſion was no ways affected by it, becauſe there was no Inveſtiture or other Act of Notoriety done to diſpoſſeſs him of his Reverſion; but upon the Death of Tenant for Life the Termor's Intereſt ceaſed, becauſe the Perſon from whom he derived his Authority as Bailiff being dead, the Authority muſt neceſſarily ceaſe with the Perſon that granted it; and in this Caſe, if Tenant for Life enters upon his Leſſee, and makes a Feoffment to another, this is a Forfeiture of his whole Eſtate, but the Term for Years continues, becauſe the wrongful Act of Tenant for Life ſhall not prejudice a Stranger's Intereſt; and if he in Reverſion enters, he muſt take it ſubject to the Charges he had Power by Law to lay on it; yet in this Caſe, if Tenant for Life had entred and committed Waſte, this had been a Forfeiture of his Eſtate, and the Term had been loſt too; but this is by the expreſs Words of the Statute of *Glouceſter*, which gives the Place waſted as a Penalty to him in Reverſion, and cannot be done if the Term continues notwithſtanding the Waſte. 8 Co. 45. Co. Lit. 233. b. But for this *vid.* Tit. *Waſte.*

Of Things which may be transferred without the Notoriety of Livery and Seiſin, ſuch as Rents, Advowſons, *&c.* which lie in Grant, a Man cannot by any Diſpoſition or Act *in Pais* forfeit them; and therefore, if a Man ſeiſed of a Rent, Advowſon, or Common for Life, grants them by *Deed* to another in Fee, this is no Forfeiture,† for this can be no way prejudicial to him in Reverſion, becauſe, ſhould the Grantee claim an Eſtate in Fee, he can make no Title without the original Grant made to his Grantor, by which it muſt appear what Intereſt he had, and conſequently what Eſtate he could convey; and ſo the Grantee, notwithſtanding the Grant in Fee, can claim no larger Eſtate than his Grantor had Power to make, and ſo he in Reverſion can receive no Prejudice. Co. Lit. 251. Co. 1. Rol. Abr. 854.

† *Contra* of a Fine. See *infra* 280.

* So if Tenant for Life of Lands, by Indenture inrolled, bargains and ſells them to *J. S.* and his Heirs; this is no Forfeiture, but the Bargainor paſſes only what he may lawfully paſs; for though by the Statute 27 *H.* 8. *c.* 10. Deeds inrolled grew a common Conveyance for transferring of Lands, which could not paſs at Common Law without the Inveſtiture of Livery; yet being a Manner of Conveyance known before at Common Law, it was conſtrued to have no new Effect given it by the Statute, but what the Statute expreſſed. * Page 280 6 Co. 14. b.

But if a Man be ſeiſed of a Manor for Life, to which an Advowſon is appendant, and he aliens one Acre, or the whole Manor, with the Advowſon in Fee; this is a Forfeiture of the Advowſon; for as it is a Forfeiture of the Acre or Manor to which it is appendant, ſo it muſt be alſo of the Advowſon, ſince the Alienation makes no Severance of them. Rol. Abr. 854.

If Leſſee for Life of Lands aliens in Fee upon Condition, and enters for the Condition broken, yet the Leſſor may enter for the Forfeiture. Rol. Abr. 856. Co. Lit. 252. Palm. 202.

So if Tenant for Life aliens upon Condition, that if he himſelf pays 10 *l.* that he ſhall re-enter, and that if he fails in Payment, that then the Alienee ſhall have the Fee-ſimple, tho' he pays the Money; yet the Reverſioner may enter for the Forfeiture, becauſe the Fee was transferred immediately upon the Alienation, which was a Renunciation of the Feud, and conſequently a Forfeiture. Rol. Abr. 856.

If

Co.Lit.251.b. If Tenant for Life levies a Fine, by which the Reverſion is deveſted; this is a Forfeiture, becauſe it is a more ſolemn Renunciation of the Feud than any Alienation *in Pais* can be.

Rol.Abr.852. Co.Lit. 251. So it is of a Rent, Advowſon, or any Thing elſe that lies in Grant; for if Tenant for Life of them levies a Fine, it is a Forfeiture; for though the Fine being of a Rent, *&c.* paſſes no more than it may lawfully paſs, yet being a public and ſolemn Renunciation of the Eſtate for Life, in a Court of Record, this amounts to a Forfeiture, and ſo differs from a Grant *in Pais.*

Vigellius Cauſe 32. f. 287-8. Another Way of Forfeiture in a Court of Record is, by claiming a greater Eſtate than he had by the Feudal Donation, or by affirming the Reverſion to be in any other Perſon than his Lord. This ſeems to be grounded on a Rule in the old Feudal Law, that if a Vaſſal denied that he held the Feud of his Lord, and it was proved againſt him, ſuch Denial was a Forfeiture; now this Denial may be when the Vaſſal claims the Reverſion himſelf, or accepts a Gift of it from a Stranger, or acknowledges the Reverſion to be in a Stranger; for in all theſe Caſes he denies that he holds the Feud from the Lord; but, as by the Feudal Law, the Vaſſal was to be convicted of this Denial, ſo in our Law theſe Acts which plainly amount to a Denial muſt be done in a Court of Record, to make them a Forfeiture; for ſuch Act of Denial appearing on Record is equivalent and equally concluſive as a Conviction upon ſolemn Trial; and all other Denials, that might be uſed by great Lords for the Trepanning their Tenants, and for a Pretence to ſeize their Eſtates, by our Law were rejected, for ſuch Convictions might be made by ſuch great Lords where there was no juſt Cauſe; but the Denial of the Tenure upon Record could never be counterfeit, or be abuſed to any Injuſtice; and therefore this notorious and ſolemn Act of the Tenant was retained as a juſt Cauſe of Forfeiture by our Law.

7 Co. 55. Co.Lit.251.b. So if in a *Quid juris clamat* brought againſt him, he claims the Fee-ſimple; this is a Forfeiture. Rol. Abr. 853. 2 Co. 68. b. And therefore, if Tenant for Life be diſſeiſed, and brings a Writ of Right, this is a Forfeiture of his Eſtate, becauſe by ſuing a Writ of Right he admits the Reverſion in Fee to be in himſelf, and by Conſequence denies that he holds over; ſo it is, if, in a Writ of Right brought againſt him, he ſhould join the Miſe on the mere Right; for by Taking upon him the Privileges of Tenant in Fee, he admits the Inheritance in him, which is a Denial of the Tenure.

*Page 281 Dyer 148. Co. Lit. 252. Rol.Abr.852. 9 Co. 106. *If Tenant for Life accepts a Fine *come ceo, &c.* of a Stranger, this is a Forfeiture of his Eſtate; for this is a Denial of the Tenure on two Accounts: *1ſt*, In admitting the Reverſion to have been in the Stranger to convey. *2dly*, In Accepting of it himſelf to the Prejudice of him in Reverſion.

2 Lev. 202. *Smith* and *Abill.* If *A.* be Tenant for Life, Remainder to *B.* for Life, and *A.* levies a Fine to *B.* this is a Forfeiture of both their Eſtates; for by their own Act on Record, they have denied the Reverſion to be in the Lord, the firſt by giving, and the latter by receiving of it.

2 Co. 55. Moor 423. *Buckler*'s Caſe. Co.Lit.252.a. If Tenant for Life be diſſeiſed, and the Diſſeiſor makes a Leaſe at Will, and Tenant for Life levies a Fine *come ceo, &c.* to the Leſſee; this is a Forfeiture, and he in the Reverſion, though he had but a Right, may take Advantage of it.

Co. Lit. 252. Rol Abr.853. If a Stranger brings an Action of Waſte againſt Tenant for Life, and the Leſſee pleads *Nul Waſte fait*, in Bar to the Action; this is a Forfeiture, becauſe by his Plea he admits the Stranger to be the proper Perſon to puniſh the Waſte, if there had been any committed.

Eſtate for Life and Occupancy.

If the Demandant in a real Action recovers againſt the Tenant for Life by Default or *Nient dedire*, or by Pleading covenouſly to the Diſheriſon of him in the Reverſion; theſe are Forfeitures of his Eſtate, for Tenant for Life is intruſted with the Freehold, and is to anſwer to Strangers *Præcipes*, and defend his own as well as the Reverſioner's Intereſt; but when he gives Way to the Demandant's Action, he admits the Right of Reverſion to be in him, and by Conſequence denies any Tenure of his Reverſioner, which is a Forfeiture. Co.Lit.252 a Rol.Abr.853.

If Tenant for Life prays in Aid of him in Reverſion, and has it granted him, and *J. S.* comes into Court without Proceſs, and ſays, he is the Perſon of whom Aid is prayed, and that he is ready to join in Aid; but Tenant for Life denies him to be the Perſon, and is adjudged to anſwer ſole; if this be the Perſon that has the Reverſion, Tenant for Life has forfeited his Eſtate by his Denial of him, becauſe the Prayer in Aid being always of him in Reverſion, and the Tenant denying of him to be the Perſon of whom he prayed in Aid, he has denied the Reverſion to be in him, and conſequently has denied to hold of him; ſo it is if he had at firſt prayed in Aid of a Stranger; this had been a Forfeiture for the ſame Reaſon. Rol.Abr.853. Co. Lit. 252.

If a Stranger grants the Reverſion by Fine, and the Conuſee brings a *Quid juris clamat* againſt the Leſſee, who attorns to the Grant; this is a Forfeiture, becauſe he thereby admits the Reverſion to be in a Stranger; but if he be erroneouſly adjudged by the Court to attorn, and he does it in Obedience to the Court; this is no Forfeiture, becauſe he was bound by the Judgment to attorn and did nothing wilfully to the Prejudice of him in Reverſion. Co.Lit.252.a. Rol.Abr.855.

Where he in Reverſion is Party to the Conveyance, there Tenant for Life may by ſolemn Inveſtiture convey a greater Eſtate than he had by the firſt Feudal Contract; as if *A.* Tenant for Life makes a Leaſe to *B.* who is in Reverſion, for the Life of *B.* this is neither a Surrender nor Forfeiture; not the Firſt, becauſe *A.* has not wholly parted with his own Eſtate, but hath left a Reverſion in himſelf after the Death of *B.* who may poſſibly die firſt; and therefore if *B.* takes a Wife, ſhe ſhall not be endowed of ſuch Eſtate, becauſe *B.* is but Tenant for Life by the Conveyance; a Forfeiture it cannot be, becauſe he in Reverſion is Party, who cannot take Advantage of it as a Forfeiture, contrary to his own Concurrence and Approbation, for that were to render his own Act void and ineffectual. Co.Lit. 42. a.

If *A.* Tenant for Life infeoffs *B.* in Remainder for Life; this is a Surrender, for a Forfeiture it cannot be, becauſe *B.* in Remainder was Party, and *A.* can have no Reverſion, becauſe he conveyed the whole Eſtate. Co. 76. b. Co.Lit. 42. a. S. P.

* But if *A.* be Tenant for Life, Remainder to *B.* in Tail, Remainder to *C.* in Fee, and *A.* makes a Feoffment to *B.* and his Wife, and their Heirs, and then *B.* dies without Iſſue, *C.* may enter for the Forfeiture; for this could be no Surrender, becauſe the Feme, who had no Intereſt in the Land, was Party to the Feoffment, and ſhe muſt claim under the Feoffment, which being made to a Stranger muſt neceſſarily deveſt the Remainder, which is a Forfeiture of *A.*'s Eſtate, and conſequently *C.* may enter, ſince the Eſtates of *A.* and *B.* which hindered him are ſpent and determined. * Page 282 41 Aſſ. pl. 2. Co. 76. b. Co. Lit. 42. a. Rol.Abr.855.

Therefore if Tenant for Life, Remainder in Tail, Remainder in Fee, and the Tenant for Life infeoffs him in the laſt Remainder, the mean Remainder-man may enter, becauſe this deveſted his Remainder, and by Conſequence was a Forfeiture. Rol.Abr. 857. 1 Co. 140.

If Tenant for Life makes a Feoffment in Fee to Baron and Feme, ſeiſed of the Reverſion in Right of the Feme; this can be no Surrender; for whatever veſts in the Huſband by the Feoffment, muſt neceſſarily be de- Rol.Abr. 855.

veſted out of the Wife, and when ſhe enters into the Land ſhe is remitted to her former Right.

Rol.Abr.855. Co. Lit. 42.a. If Baron and Feme, ſeiſed in Right of the Feme for Life, leaſe for Life by Indenture to him in Reverſion, being within Age, for the Life of the Huſband; this is a Forfeiture; for though he in Reverſion be Party to the Leaſe; yet being an Infant he is not bound by the Contract to his own Prejudice; but if he in Reverſion had been of full Age, the Leaſe had been good, becauſe he had diſpenſed with the Advantage of the Forfeiture by his Acceptance of the Leaſe.

Co. 76. 6 Co. 15. a. Plow. 140. The next Thing to be conſidered is, where Tenant for Life and he in Reverſion join in the Conveyance, * and this has a different Operation, as the Feoffment is with or without Deed; for if it be without Deed, then this is conſtrued to be a Surrender of the Eſtate for Life, and the Feoffment of him in Reverſion, for no other Interpretation can make the Feoffment effectual; for if the Eſtate paſſes from the Tenant for Life to the Feoffee, it will be a Forfeiture of his Eſtate, whereof he in Reverſion may take Advantage, notwithſtanding his joining; for he having only the Reverſion had nothing to do with the Freehold, and by Conſequence could make no Feoffment or Livery; and it cannot be a Grant or Confirmation of him in Reverſion for Want of a Deed; therefore, to make it effectual, it is conſtrued the Surrender of the Tenant for Life, and the Feoffment of him in Reverſion.

* *i. e.* to a third Perſon.

Co. 76. Plow. 140. But if Tenant for Life and he in Reverſion join in a Feoffment by Deed, then each paſſes only his own Eſtate, the Tenant for Life the Freehold in Poſſeſſion, and he in Reverſion his Reverſion; and this cannot be a Forfeiture, becauſe he in Reverſion joined in a proper Conveyance to transfer his Reverſion; and having paſſed it to another, has no Intereſt left to intitle him to take Advantage of the Forfeiture, if it was one.

Co. 76. b. 77. a. So if Tenant for Life, Remainder in Tail, join in a Feoffment by Deed; this is no Diſcontinuance, but each gives only his own; and upon the Death of Tenant for Life and him in Remainder in Tail, the Iſſue, or thoſe in Reverſion may lawfully enter, becauſe then the Eſtate that paſſed is determined; but if ſuch Feoffment had been by Parol, then it had been the Surrender of the Tenant for Life, and the Feoffment of him in Remainder, which would have made a Diſcontinuance.

Co. 76. *Bredon's* Caſe. Cro.Eliz 827. Mo. 634. Vent. 160. *A.* Tenant for Life, Remainder in Tail to *B.* Remainder in Tail to *C.* *A.* and *B.* join in a Fine *come ceo, &c.* to a Stranger; this is neither a Diſcontinuance nor Forfeiture, for each gives what he may lawfully diſpoſe of; the Tenant for Life his Eſtate, and *B.* a Fee determinable on his Eſtate-tail; and to prevent any Diſcontinuance or Forfeiture, it ſhall be firſt conſtrued to be the Grant of *B.* in Remainder, and then of *A.* the Tenant for Life.

* Page 283 Dyer 339. Rol.Abr. 855. 1 Co. 76. * But if *A.* Tenant for Life, and *B.* in Remainder for Life, join in a Feoffment; this is a Forfeiture of both their Eſtates, and he in Remainder or Reverſion may enter preſently, becauſe this Feoffment paſſed a greater Eſtate than both of them could lawfully make, and conſequently muſt deveſt the Reverſion or Remainder in Fee, and ſo amount to a Forfeiture; ſo it would be if a Remainder had been to *C.* in Tail, Remainder to the right Heirs of *B.* for the Feoffment conveying a Fee in Poſſeſſion, which *B.* had not in him, muſt neceſſarily deveſt the Remainder to *C.* and conſequently be a Forfeiture, whereof he may take Advantage.

So if *B.* in Remainder for Life, with ſuch laſt Remainder to his right Heirs, levy a Fine *come ceo, &c.* to a Stranger; this is a Forfeiture of his Remainder for Life, becauſe the Fine conveys a Fee-ſimple in Poſſeſſion by Eſtoppel, againſt which he can make no Averment; or, by making Fractions of the Eſtate, ſay, he only paſt an Eſtate for Life *in præſenti*, with a Fee-ſimple expectant on the Death of *C.* without Iſſue, becauſe the Fine ſuppoſes a precedent Gift in Fee-ſimple, which he could not lawfully make whilſt the Eſtate for Life of *A.* and the intermediate Remainder of *C.* in Tail were ſubſiſting; and therefore ſuch Fine is a Forfeiture, though during the Life of *A. C.* can take no Advantage of it. Rol. Abr. 855.

Tenant for Life, the Reverſion in Fee being in an Infant, and they both join in a Fine, which is afterwards reverſed by the Infant for his Nonage; yet the Conuſee ſhall hold during the Life of Tenant for Life, becauſe diſtinct Intereſts paſſed from each of them, and the Defect in one ſhall give no Advantage to the other. Co. 76. b. Vent. 160.

If Tenant for Life and he in Reverſion join in a Gift in Tail, reſerving Rent; this can be no Forfeiture, becauſe he in the Reverſion joined, and the Tenant for Life ſhall have the Rent during his Life, becauſe the Rent comes in Lieu of the Land, and therefore ſhall go according to the Eſtates they had reſpectively in the Land. 6 Co. 15 a.

Tenant for Life and he in Reverſion join in a Leaſe for Life, the Leſſee commits Waſte, they both ſhall join in an Action of Waſte, and the Tenant for Life ſhall recover the Place waſted, becauſe he in Reverſion by joining hath admitted a Reverſion to be in the Tenant for Life, and conſequently the Forfeiture to belong immediately to him; but he in the Reverſion ſhall have the treble Damages, becauſe they are given for the Waſte and Deſtruction done to the Inheritance wherewith the Tenant for Life has nothing to do. Co. Lit. 42. a.

If *A.* and *B.* Jointenants, and to the Heirs of *B.* join in a Leaſe for Life, *A.* has a Reverſion, and ſhall join in an Action of Waſte; but the Writ muſt be *ad exhæreditationem* of *B.* becauſe he only hath the Inheritance. Co. Lit. 42. a.

If *A.* Tenant for Life, and *B.* in Remainder in Fee join in a Leaſe for Years by Deed; this, upon the Delivery of the Deed, is the Leaſe of *A.* during his Life, and the Confirmation of *B.* for *A.* being Tenant in Poſſeſſion, the Poſſeſſion could only paſs from him; and the Leaſe being made by Deed carries the Approbation of the Reverſioner, and therefore is conſtrued his Confirmation; and therefore, where the Leſſee declared of a joint Demiſe by *A.* and *B.* it was adjudged he had failed of his Title, becauſe during the Life of *A.* 'twas only his Demiſe, and *B.* having only an Intereſt in Reverſion could give the Leſſee no Intereſt in Poſſeſſion.‡ 6 Co. 14. b. *Treport's* Caſe. Mo. 72. Co Lit. 45. a.

‡ This was in an Ejectment. According to the modern Practice in Ejectment, the Plaintiff ſhould be fictitious, and the Leſſor of the Plaintiff ſhould declare on his own Demiſe.

But in this Caſe, upon the Death of *A.* it becomes the ſole Demiſe of *B.* for it can be no longer the Demiſe of *A.* who is not in Being, and whoſe Intereſt in the Land determined with his Death; but the Leaſe does not determine by the Death of *A.* becauſe, though *A.* could transfer the Land only during his own Life, yet the Term having the Approbation of *B.* who has the abſolute Property, ſuch Joining and Approbation has made the Leſſee's Intereſt abſolute and Indefeaſible during the Term; * and therefore upon the Death of *A.* it becomes the Demiſe of *B.* for *B.* has the ſole and abſolute Intereſt in the Land, and the Leſſee can hold of none elſe; and therefore it ſeems, that if *B.* brings an Action of Waſte againſt the Leſſee, he may declare of a Demiſe by himſelf, without taking Notice of *A.* becauſe upon the Death of *A.* it becomes the ſole Leaſe of *B.* Dyer 234. b. 235. Mo. 72. *Newdigate's* Caſe. 6 Co. 15. a. Co. Lit. 45. a. *Page 284

Evidence.

AS in Publick Judicatures it is neceſſary to ſearch into the Truth of Facts as they really are; hence, whatever may be exhibited to a Court or Jury, whether it be by Matter of Record or Writing, or by the Teſtimony of Witneſſes, in order to enable them to pronounce with Certainty concerning the Truth of any Matter in Diſpute, whether ſuch Matter relates to a Perſon's Life, Liberty or Property, is called Evidence.

As the Diſcovery of Truth is of the utmoſt Conſequence to the Good of Society, ſo it lays Men under the ſtrongeſt Obligations, when called upon to give their Evidence, to adhere inviolably to Truth; and this is a Matter, not only enjoined by the Precepts of Religion, but alſo by thoſe of Reaſon; the Violation of Truth being a Sin againſt human Society, as it breaks in upon that Correſpondence that is neceſſary to ſocial Creatures, by deſtroying the End of Language, which is the common Tie and Band of Society; and as Raiſing a different Idea in the Mind of the Hearer from that which is formed in the Mind of the Speaker, deſtroys all Intercourſe between Mankind; ſo it prevents that Truſt from being repoſed in them which is ſo neceſſary to their own Preſervation and the Good of others.

From the Importance therefore of this Matter, the Wiſdom of our Laws has laid down ſeveral Rules relating to Evidence, which we ſhall conſider under the following Heads:

(A) Who may be a Witneſs. 285.

And herein,

1. Whether a Huſband or Wife may be Witneſs for or againſt each other. 286.
2. Whether a Judge or a Juror may be a Witneſs. 286.
3. Whether a Counſel, Attorney or Solicitor, may be a Witneſs againſt his Client. 287.
4. Whether Plaintiffs or Defendants in the Cauſe may be Witneſſes. 287.
5. Whether an Accomplice in a Crime may be a Witneſs for or againſt his Companion. 288.
6. How far a Perſon is diſabled from being a Witneſs in reſpect of his having been attainted or convicted of a Crime. 288.

* (B) How far a Perſon is diſabled from being a Witneſs in reſpect of his being intereſted in the Succeſs of the Cauſe. 289. * Page 285
(C) Of the Number of Witneſſes required in our Laws. 293.
(D) Of compelling a Witneſs to appear and give Evidence. 294.
(E) Of the Manner of giving Evidence. 295.

And herein,

1. Where the Examination is in open Court, and herein of ſuch Queſtions as may be aſked a Witneſs. 295.
2. Of Examinations and Proofs in Chancery. 297.

(F) Of written Evidence, and herein of admitting Exemplifications or Copies of Records, &c. Evidence. 305.
(G) Whether Parol Evidence is to be admitted to explain What appears on the Face of a Deed or Will. 309.
(H) Of Preſumptive Proof. 311.
(I) Where the Law requires the higheſt Proof the Nature of the Thing is capable of. 312.
(K) Of hearſay Evidence. 313.
(L) Of the Party's Confeſſion. 313.
(M) Of Similitude of Hands. 313.
(N) Whether the Depoſitions of Witneſſes in another Cauſe may be given in Evidence. 314.

What Evidence will maintain the Plaintiff's Action, *vide* under the Titles of the ſeveral Actions, and what the Defendant muſt plead, and cannot give in Evidence, *vide* alſo under the Titles of the ſeveral Actions and Head of *Pleadings*.

(A) Who may be a Witneſs.

ALL Perſons may be Witneſſes who appear to have ſufficient (*a*) Diſcretion, and who from their (*b*) Principles muſt be preſumed to have a right Senſe of the Sanctity of an Oath, and of the Obligations it lays them under to depoſe the whole Truth, and nothing but the Truth; therefore Infants, Aliens, Villeins, Bondmen, *&c.* may be Witneſſes. Co. Lit. 6.

(*a*) An Infant of the Age of nine Years has been allowed to give Evidence. H.P.C. 263.

(*b*) But an Infidel cannot be a Witneſs, *i.e.* ſuch a one as neither believes the *Old* or *New Teſtament* to be the Word of God, on one of which our Laws require the Oath ſhould be adminiſtered. 2 Keb. 314. 2 Hawk.

But

But as our Law has diſabled ſeveral Perſons from being Witneſſes, who may be ſuppoſed ſo far biaſſed, as to be induced to go beyond the Truth, I ſhall conſider this Matter,

* Page 286 * 1. In Relation to Huſband and Wife, and whether they may be Wineſſes for or againſt each other.

Co. Lit. 6. b. 2 Rol. Abr. 686. pl. 4. H. P. C. 263. Brownl. 47. Hutton 116. Raym. 1. 2 Keb. 403. 2 Hawk. P. C. 431.

Huſband and Wife are conſidered as one and the ſame Perſon in Law, and to have the ſame (*a*) Affections and Intereſt, from whence it has been eſtabliſhed as (*b*) a general Rule, that the Huſband cannot be a Witneſs for or againſt the Wife, nor the Wife be a Witneſs for or againſt the Huſband, by Reaſon of the implacable Diſſenſion which might be cauſed by it, and the great Danger of Perjury from taking the Oaths of Perſons under ſo great a Bias, and the extreme Hardſhip of the Caſe.

(*a*) But no other Degree of Kindred or Affection, as that of Parent to a Child, &c. will diſable a Perſon from being a Witneſs. Sid. 75. Salk. 289. pl. 28. (*b*) And holds as well in the Courts of Equity as in the Common Law Courts. 2 Chan. Ca. 39. 2 Vern. 79.—But where, from the Nature and Difficulty of the Caſe, the Wife's Evidence, being corroborated by other Circumſtances, was admitted to be read againſt the Huſband, *vide* Abr. Eq. 226-7.

Raym. 1. Stat. Trials, Vol. 4. fol. 754. S. P. admitted in *Fielding*'s Trial, and 3 Keb. 490.

Hence it hath been adjudged, that the Huſband cannot be a Witneſs againſt the Wife, nor the Wife againſt the Huſband, to prove the firſt Marriage, on an Indictment on the Statute of 1 *Jac.* 1. *cap.* 11. for a ſecond Marriage; but the ſecond Huſband or Wife may be allowed to give Evidence, ſuch ſecond Marriage being void, and therefore they were never Huſband and Wife.

S. P. admitted in Sir *John Savil*'s Caſe, who was convicted of marrying a ſecond Wife.

(*c*) *Vide* Sid. 431. (*d*) Cro. Car. 488. *Fulwood*'s Caſe. Vent. 243-4. 4 Mod. 8. 2 Vern. 79.

But ſome Exceptions have been allowed to this general Rule, eſpecially in Caſes of (*c*) evident Neceſſity; and therefore it hath been (*d*) adjudged, and is the conſtant Practice at this Day, that on an Indictment for a Forcible Marriage grounded on the 3 *H.* 7. *c.* 2. the Wife may be a Witneſs againſt the Huſband; ſo (*e*) where Huſband or Wife have Cauſe to demand Sureties of the Peace againſt each other.

Ld. Raym. 396. Salk. 283. pl. 12. 286. pl. 20. 287. pl. 22. 2 Ld. Raym. 752. Will. Rep. 611. 10 Mod. 193. 11 Mod. 224. pl. 19. Stra. 633. 2 Stra. 1095. (*e*) 2 Hawk. P. C. 432.

Alſo

2 Hawk. P. C. 434. ‡ The Anſwer of an Infidel, taken by Commiſſion at *Calcutta* in *Bengal* in the *Eaſt-Indies*, after the Manner of that Part of the World, was allowed good Evidence by the late Lord Chancellor *Hardwicke*, after hearing the Arguments of Lord Chief Juſtice *Lee*, Lord Chief Juſtice *Willes*, and Lord Chief Baron *Parker*, at *Lincoln's Inn Hall*, 23d *February* 1744. Hil. Term 18 Geo. 2. but his Lordſhip declared, it was permitted to be read on Account of the eſpecial Circumſtances of that particular Caſe, and that he carried it no further. *Omichund* and *Barker*, 2 Eq. Abr. 397. pl. 15. Atk. Rep. 21. pl. 10. 2 Str. 1104.

‡ A Jew does not come within this Deſcription, becauſe he is ſworn on the *Old Teſtament*. But *qu.* If the Courts would not (where an abſolute Neceſſity appeared to examine a Witneſs, not believing either the *Old* or *New Teſtament*) permit him to be ſworn, according to the Form preſcribed by his own Religion; and eſpecially if the Witneſs would likewiſe aſſent to being ſworn on one of thoſe Books, according to the Form preſcribed by our Laws, ſo as to ſubject him to an Indictment, if he ſwore falſely?——A Mahometan was admitted a Witneſs, and ſworn on the *Koran*. At Council, preſent two Chief Juſtices. *Fachina* v. *Sabine*, M. 12 Geo. 2. Stra. 1104. And *Niſi prius*, *fo.* 288. concurs, in Opinion, with what I have obſerved, hat Infidels may be ſworn according to the Ceremonies of their own Religion.

Alſo in Lord *Audley*'s Caſe, who held his Wife's Hands and Legs, while his Servant, by his Command, raviſhed her, the Wife was admitted an Evidence. Hutt. 116. 2 Hawk.P. C. 432. But in Raym. 1. this Caſe is denied to be Law; and in Vent. 244. it is doubted of by my Lord Ch. Juſt. *Hale*, becauſe here is a Wife *de Jure*, and ſo not like the Caſe, where a Woman is admitted to prove a Forcible Marriage.

Alſo in (*f*) *Raym.* 1. it is ſaid, that a Huſband and Wife may be Witneſſes againſt one another in Treaſon; but the contrary is adjudged in (*g*) 1 *Brownl.* (*f*) Raym. 1. (*g*) Brownl. 47. and with this laſt Book 2 Hawk. P. C. 432. ſeems to agree.

2. Whether a Judge or a Juror may be a Witneſs.

It ſeems (*b*) agreed, that it is no Exception againſt a Perſon's giving Evidence, either for or againſt a Priſoner, that he is one of the (*i*) Judges who is to try him; and therefore in the Caſe of (*k*) *Hacker*, two of the Perſons in the Commiſſion for the Trial came off from the Bench, and were ſworn and gave Evidence, and did not go up to the Bench again during his Trial. (*b*) 2 Hawk. P. C. 432. (*i*) A Commiſſioner, by virtue of a Commiſſion out of Chancery may himſelf be examined as a Witneſs at the Commiſſion, but then he muſt be examined firſt by the other Commiſſioners, after which he may proceed in the Execution of the Commiſſion. (*k*) Kelynge 12. Sid. 133. Style 233.

* Nor is it any Exception to a Witneſs, that he is one of the Jurors; but then he is, if called upon, to give his Evidence on Oath openly in Court, and not to be examined privately by his Companions. * Page 287

3. Whether a Counſel, Attorney or Solicitor, may be a Witneſs againſt his Client.

It ſeems agreed that neither (*l*) Counſellors, Attornies or Solicitors are obliged to give Evidence, or to diſcover ſuch Matters as came to their Knowledge in the Way of their Profeſſion, for by the Duty of their Offices they are obliged to conceal their Clients Secrets, and every Thing that they are intruſted with, is (*m*) *ſub ſigillo confeſſoris*; for were it otherwiſe, no Perſon could ever with Safety employ a Counſel, *&c.* Style 449. Keb. 505. (*l*) That the ſame Rule extends to Counſellors, Attornies and Solicitors. Vent. 197.——And to a Scrivener. Skin. 404. (*m*) From his Truſt and Confidence repoſed in Counſellors, *&c.* it has been eſtabliſhed as a Rule in the Courts of Equity, that if an Attorney or Solicitor, at the Time that he is treating for his Client about a Purchaſe, or Mortgage, has Notice of a prior Title, ſuch Notice ſhall not affect his Client, tho' Notice before, or in another Tranſaction, ſhall. 2 Vern. 474.——But in the Caſe of *Fitzgerald* and Lord *Fauconberge* it was determined in the Houſe of Lords, 4 Geo. 2. that Notice to a Counſel ſhould in no Caſe affect his Client. 16 Vin. Abr. 12. pl. 3. Fitzgib. 111, 113.

But as the Inconveniency would be very great, if a Counſel, *&c.* were not at all to be made Uſe of as Witneſſes, for by this Means every ſuch Perſon's Evidence may be taken off by giving him a Fee; ſo the Courts have come to this Mean, *viz.* upon every Queſtion, to aſk him if he knew it of his own Knowledge, or from his Client, *&c.* for tho' the Oath is general, to ſwear the whole Truth; yet the Intention thereof, and of the Law, is only, that he ſhould declare what he knew of his own Knowledge, and not to reveal what he was intruſted with by his Client. Vent. 197. Skin. 404. pl. 40.

4. Whe-

4. Whether Plaintiffs or Defendants in the Cauſe may be Witneſſes.

Sid. 441. but for this *vide* Style 401, 404. Savil 34. 2 Rol. Abr. 685. Sid. 237.

In an Action of Treſpaſs againſt ſeveral Perſons, one of them, whom the Plaintiff deſigned to make Uſe of as a Witneſs, was by Miſtake made a Defendant, and on Motion the Court gave him Leave to omit him, and have his Name ſtruck out of the Record, tho' after Iſſue joined, in order to have the Benefit of his Teſtimony.†

† If an Action of Treſpaſs be brought againſt ſeveral Defendants, and the Plaintiff, on the Trial, does not give ſufficient Evidence to affect all of them, thoſe againſt whom there is not any Evidence may be acquitted by the Jury, before the other Defendants go into their Defence, who may then have the Benefit of the Teſtimony of thoſe ſo acquitted: And ſometimes Defendants, againſt whom there hath not been any Evidence, have been examined on Behalf of the other Defendants, without the Form of an Acquittal, as there cannot be any reaſonable Objection.——If there is any Doubt as to the Evidence given, whether ſufficient or not to affect all the Defendants, it ought to be left to the Jury, whether they will or will not acquit them, before the other Defendants have entered into their Evidence.

2 Chan. Ca. 214. Vern. 230.

According to the Law and Practice in the Courts of Equity, Defendants in a Cauſe may be Witneſſes, for they are forced into the Cauſe; and if their being made Parties ſhould abſolutely invalidate their Teſtimony, it would be in the Power of any one who had a Mind to oppreſs another, to deprive him of his Defence, by making the moſt material Witneſſes Defendants in the Suit; and therefore any of the Defendants to a Suit may be examined as Witneſſes, ſaving juſt Exceptions to their Credit.

Vern. 230. Abr. Eq. 225.

But Plaintiffs cannot examine each other as Witneſſes in the Cauſe; becauſe if the Cauſe miſcarries, the Plaintiffs will be liable to Coſts, and therefore their Swearing is to exempt themſelves.

And the Practice is, that if a Plaintiff wants to examine a Defendant as a Witneſs, he muſt obtain an Order by Motion or Petition for that Purpoſe; this Order is of Courſe, and muſt be ſerved on the adverſe Party's Clerk in Court; alſo the Defendant may obtain the like Order to examine a Co-Defendant as a Witneſs for him; but all theſe Orders are upon Suggeſtion, that the Defendant is not concerned in Point of Intereſt in the Matters in Queſtion, and they are never granted but with a Clauſe of (Saving juſt Exceptions to the other Side); and this muſt be

*Page 288 * made at the Hearing of the Cauſe; and this Order for examining a Defendant muſt be produced at the Commiſſion-Office, or in the Examiner's, when the Defendant attends to be examined, without which he cannot be examined; for it is by virtue of that Order, and the Authority given them by the Court, that impowers them to examine him, and they cannot do it otherwiſe.

5. Whether an Accomplice in a Crime may be a Witneſs for or againſt his Companion.

(a) 2 Hawk. P. C. 432.

As to this, the following Particulars are laid down as Law by Mr. Serjeant (a) *Hawkins:* 1ſt, That it hath been long ſettled, that it is no Exception againſt a Witneſs, that he hath confeſſed himſelf guilty of the ſame Crime, if he hath not been indicted for it; for if no Accomplices were to be admitted as Witneſſes, it would be generally impoſſible to find Evidence to convict the greateſt Offenders.

Alſo it hath been often ruled, That Accomplices, who are indicted, are good Witneſſes for the King, until they be convicted.

Alſo it hath been adjudged, that ſuch of the Defendants in an Information, againſt whom no Evidence is given, may be Witneſſes for the others.

It hath alſo been adjudged, that where *A.* *B.* and *C.* are ſued in three ſeveral Actions on the Statute, for a ſuppoſed Perjury in their Evidence concerning the ſame Thing, they may be good Witneſſes in ſuch Actions for one another.

6. How far a Perſon is diſabled from being a Witneſs in reſpect of his having been attainted or convicted of a Crime.

It ſeems now agreed, that a Conviction, and therefore *a fortiori* an Attainder or Judgment of Treaſon, Felony, Piracy, *Præmunire*, or Perjury, or of Forgery on 5 *Eliz. c.* 14. and alſo a Judgment in Attaint for giving a falſe Verdict, or in Conſpiracy at the Suit of the King, and alſo Judgment for any Crime whatſoever to ſtand in the Pillory, or to be whipped or branded, being in a Court which had a Juriſdiction, are good Cauſes of Exception againſt a Witneſs, while they continue in Force. 2 Hawk. P.C. 452. and ſeveral Authorities there cited, and *vide* Skin. 578. pl. 1.

But no ſuch Conviction or Judgment can be made Uſe of to this Purpoſe, unleſs the Record ‡ be actually produced in Court; alſo it is a general Rule, that a Witneſs ſhall not be aſked any Queſtion, the anſwering to which might oblige him to accuſe himſelf of a Crime, and that his Credit is to be impeached only by general Accounts of his Character and Reputation, and not by Proofs of particular Crimes whereof he never was convicted. 2 Hawk.P.C. 433.

‡ The Record ſhould be complete, *i. e.* the Conviction, *&c.* duly entered.

It is alſo agreed, that Outlawry in a Perſonal Action is not a good Exception againſt a Witneſs, as it is againſt a Juror; and that a Perſon convicted of Felony, who is admitted to his Clergy and burnt in the Hand, is thereby re-enabled to be a Witneſs. 2 Hawk.P.C. 433.

Alſo it ſeems agreed, that the King's Pardon of Treaſon or Felony, after a Conviction or Attainder, reſtores the Party to his Credit; and it is holden by Chief Juſtice *Holt*, that the King's Pardon will remove a Man's Diſability to be a Witneſs in all Caſes whatſoever, wherein it is only the Conſequence of the Conviction or Judgment againſt him, and not an expreſs Part of the Judgment, as it is in Conſpiracy at the Suit of the King, and in Perjury on the Statute. 2 Hawk P.C. 423.

* It hath been ruled that a Conviction of Perjury doth not diſable a Man from making an Affidavit in Relation to the Irregularity of a Judgment. * Page 289 2 Hawk.P.C. 433.

4. Whether Plaintiffs or Defendants in the Cauſe may be Witneſſes.

Sid. 441. but for this *vide* Style 401, 404. Savil 34. 2 Rol. Abr. 685. Sid. 237.

In an Action of Treſpaſs againſt ſeveral Perſons, one of them, whom the Plaintiff deſigned to make Uſe of as a Witneſs, was by Miſtake made a Defendant, and on Motion the Court gave him Leave to omit him, and have his Name ſtruck out of the Record, tho' after Iſſue joined, in order to have the Benefit of his Teſtimony.†

† If an Action of Treſpaſs be brought againſt ſeveral Defendants, and the Plaintiff, on the Trial, does not give ſufficient Evidence to affect all of them, thoſe againſt whom there is not any Evidence may be acquitted by the Jury, before the other Defendants go into their Defence, who may then have the Benefit of the Teſtimony of thoſe ſo acquitted: And ſometimes Defendants, againſt whom there hath not been any Evidence, have been examined on Behalf of the other Defendants, without the Form of an Acquittal, as there cannot be any reaſonable Objection.——If there is any Doubt as to the Evidence given, whether ſufficient or not to affect all the Defendants, it ought to be left to the Jury, whether they will or will not acquit them, before the other Defendants have entered into their Evidence.

2 Chan. Ca. 214. Vern. 230.

According to the Law and Practice in the Courts of Equity, Defendants in a Cauſe may be Witneſſes, for they are forced into the Cauſe; and if their being made Parties ſhould abſolutely invalidate their Teſtimony, it would be in the Power of any one who had a Mind to oppreſs another, to deprive him of his Defence, by making the moſt material Witneſſes Defendants in the Suit; and therefore any of the Defendants to a Suit may be examined as Witneſſes, ſaving juſt Exceptions to their Credit.

Vern. 230. Abr. Eq. 225.

But Plaintiffs cannot examine each other as Witneſſes in the Cauſe; becauſe if the Cauſe miſcarries, the Plaintiffs will be liable to Coſts, and therefore their Swearing is to exempt themſelves.

And the Practice is, that if a Plaintiff wants to examine a Defendant as a Witneſs, he muſt obtain an Order by Motion or Petition for that Purpoſe; this Order is of Courſe, and muſt be ſerved on the adverſe Party's Clerk in Court; alſo the Defendant may obtain the like Order to examine a Co-Defendant as a Witneſs for him; but all theſe Orders are upon Suggeſtion, that the Defendant is not concerned in Point of Intereſt in the Matters in Queſtion, and they are never granted but with a Clauſe of (Saving juſt Exceptions to the other Side); and this muſt be

*Page 288 * made at the Hearing of the Cauſe; and this Order for examining a Defendant muſt be produced at the Commiſſion-Office, or in the Examiner's, when the Defendant attends to be examined, without which he cannot be examined; for it is by virtue of that Order, and the Authority given them by the Court, that impowers them to examine him, and they cannot do it otherwiſe.

5. Whether an Accomplice in a Crime may be a Witneſs for or againſt his Companion.

(a) 2 Hawk. P. C. 432.

As to this, the following Particulars are laid down as Law by Mr. Serjeant (a) *Hawkins:* 1ſt, That it hath been long ſettled, that it is no Exception againſt a Witneſs, that he hath confeſſed himſelf guilty of the ſame Crime, if he hath not been indicted for it; for if no Accomplices were to be admitted as Witneſſes, it would be generally impoſſible to find Evidence to convict the greateſt Offenders.

Alſo it hath been often ruled, That Accomplices, who are indicted, are good Witneſſes for the King, until they be convicted.

Alſo it hath been adjudged, that ſuch of the Defendants in an Information, againſt whom no Evidence is given, may be Witneſſes for the others.

It hath alſo been adjudged, that where *A.* *B.* and *C.* are ſued in three ſeveral Actions on the Statute, for a ſuppoſed Perjury in their Evidence concerning the ſame Thing, they may be good Witneſſes in ſuch Actions for one another.

6. How far a Perſon is diſabled from being a Witneſs in reſpect of his having been attainted or convicted of a Crime.

It ſeems now agreed, that a Conviction, and therefore *a fortiori* an Attainder or Judgment of Treaſon, Felony, Piracy, *Præmunire*, or Perjury, or of Forgery on 5 *Eliz. c.* 14. and alſo a Judgment in Attaint for giving a falſe Verdict, or in Conſpiracy at the Suit of the King, and alſo Judgment for any Crime whatſoever to ſtand in the Pillory, or to be whipped or branded, being in a Court which had a Juriſdiction, are good Cauſes of Exception againſt a Witneſs, while they continue in Force. 2 Hawk. P.C. 452. and ſeveral Authorities there cited, and *vide* Skin. 578. pl. 1.

But no ſuch Conviction or Judgment can be made Uſe of to this Purpoſe, unleſs the Record ‡ be actually produced in Court; alſo it is a general Rule, that a Witneſs ſhall not be aſked any Queſtion, the anſwering to which might oblige him to accuſe himſelf of a Crime, and that his Credit is to be impeached only by general Accounts of his Character and Reputation, and not by Proofs of particular Crimes whereof he never was convicted. 2 Hawk.P.C. 433.

‡ The Record ſhould be complete, *i. e.* the Conviction, *&c.* duly entered.

It is alſo agreed, that Outlawry in a Perſonal Action is not a good Exception againſt a Witneſs, as it is againſt a Juror; and that a Perſon convicted of Felony, who is admitted to his Clergy and burnt in the Hand, is thereby re-enabled to be a Witneſs. 2 Hawk.P.C. 433.

Alſo it ſeems agreed, that the King's Pardon of Treaſon or Felony, after a Conviction or Attainder, reſtores the Party to his Credit; and it is holden by Chief Juſtice *Holt*, that the King's Pardon will remove a Man's Diſability to be a Witneſs in all Caſes whatſoever, wherein it is only the Conſequence of the Conviction or Judgment againſt him, and not an expreſs Part of the Judgment, as it is in Conſpiracy at the Suit of the King, and in Perjury on the Statute. 2 Hawk P.C. 423.

* It hath been ruled that a Conviction of Perjury doth not diſable a Man from making an Affidavit in Relation to the Irregularity of a Judgment. * Page 289 2 Hawk.P.C. 433.

(B) How far a Perſon is diſabled from being a Witneſs, in reſpect of his being intereſted in the Succeſs of the Cauſe.

Co. Lit. 6. Sid. 237.

IT has been always (*a*) held a ſacred and inviolable Rule of Evidence in all Caſes (*b*) whatſoever, not to admit the Teſtimony of a Witneſs, who is either to be a Gainer or Loſer by the Event of the Cauſe, whether ſuch Advantage be direct or immediate, or conſequential only.

(*a*) And this Rule has been ſo ſtrictly adhered to, that it is ſaid, that though a Witneſs is examined an Hour together; yet if in any Part of his Evidence it appears, that he was a Party intereſted, the Court will direct the Jury, that he is no Witneſs, nor his Evidence to be regarded. 2 Vern. 463—But if a Witneſs who lies under an Objection of this Kind, be croſs examined by the adverſe Party; this makes him a good Witneſs, and his Credit muſt be left with the Jury. Vern. 254. ‖

(*b*) That he who is Bail for another cannot be a Witneſs for him without Conſent. 2 Hawk. P. C. 433.

‖ Therefore the uſual Way is to ſwear and examine a doubtful Witneſs on a *Voire dire*, before he is examined in chief.—The true Notion of who may be a Witneſs may be gathered from the Queſtions therein, *viz.* Whether he is to get or loſe by the Event of the Suit? if he can anſwer that fully he muſt be a Witneſs. *Per Hardwicke*, C. J. on Conſideration, *Rex* v. *Bray*. H. 10 Geo. 2. B. R. Caſes Temp. Hardw. 358.

2 Hawk. P. C. 433-4.

From this General Rule ſeveral Doubts and Difficulties have ariſen with Regard to thoſe Caſes where the Party may be ſaid to have an Intereſt, and from the Extreme Difficulty attending certain particular Caſes, which ſeem in ſeveral Inſtances to leave this Matter very unſettled, and which can only be learned from the Nature and Circumſtances of the Caſes themſelves.

Salk. 283. pl. 13. Ld. Raym. 724. Ruled by *Treby* Ch. J.

Therefore it has been held, that an Heir apparent may be a Witneſs concerning the (*c*) Title of the Land, for the Heirſhip of the Heir is a mere Contingency; but if there be a Tenant in Tail, Remainder in Tail, he in Remainder cannot be a Witneſs concerning the Title of thoſe Lands; for he hath an Eſtate, ſuch as it is.

(*c*) Where the Leſſor of the Plaintiff, who had the Inheritance, was admitted to prove the Leaſe in Ejectment. Style 482. ‡

‡ *Qu.* if now, there is, in any Caſe, Occaſion to prove a Leaſe, in Ejectment, as Defendant by Rule, agrees to confeſs Leaſe, Entry, and Ouſter?

Skin. 174. pl. 4.

It ſeems to be agreed, that one Commoner cannot be a Witneſs to prove the Right of Common in Action brought by another; for the Right being intire, his Swearing tends to intitle himſelf.

Skin. 174. pl. 4 *Sands* v. *The Cuſtom-houſe Officers.*

So where the Maſter of a Ship brought an Action againſt the Cuſtom-houſe Officers, for refuſing to clear his Ship and re-deliver his Cockets; and it was held, that the Owners of the Goods on board could not be admitted as Witneſſes to prove him Maſter, *&c.* for that they were all concerned in (*d*) one Bottom, and in one Adventure.

(*d*) But one Mariner may be admitted, as a Witneſs to prove Wages due to another, for there the Contracts are ſeveral. Skin. 174. pl. 4. ſeems to be admitted. And this is certainly Law, and every Day's Practice.

Salk. 287. pl. 22. ruled by *Holt* Ch. Juſt.

In an Action againſt the Maſter of a Ship for ſo negligently managing the Ship, that it ran over the Plaintiff's Barge; it was held that the Pilot

Ld. Raym. 1007.

could

could not be a Witneſs, becauſe he was anſwerable, if faulty in Steering, to the Maſter. *

* But he might have been releaſed by the Maſter and Owner, and made a good Witneſs.——On an Action brought againſt a Maſter, for a Carman's driving his Cart negligently, *per quod*, &c. the Carman was admitted Witneſs for his Maſter. *Jarvis* v. *Hayes*. Stra. 1083.

The Maſter of a Ship took a Prize, and diſpoſed of 100 Cheſts of Lemons to *A.* for which he brought his Action, and a Mariner was allowed to be ſworn as a Witneſs though it appeared, that by the Admiralty Law he was to have a Share of the Prize; for the Maſter is accountable to the Mariners for their Share, which they ſhall recover from him, whether he recovers in this Action or not. Skin. 403. pl. 38.

* It ſeems agreed clearly, that a Legatee in a Will cannot be a Witneſs to (*a*) prove the (*b*) Will, becauſe he is (*c*) preſumed to be partial in Swearing for his own (*d*) Intereſt.† * Page 290 Hard. 331. 2 Salk. 691. pl. 5.

(*a*) But he may be a Witneſs againſt the Will, for when he ſwears againſt the Will, he ſwears againſt his own Intereſt, and is therefore the ſtrongeſt Witneſs. 2 Salk. 691. pl. 5.——So Freemen of a Corporation were allowed Witneſſes againſt the Corporation. 2 Show. 146. pl. 127. (*b*) Yet he may be examined as a Witneſs to prove a Deed or other Thing which has no Relation to the Will. Style 370.—So if the Parſon ſues one of his Pariſhioners for Tithes who pleads a *Modus*, the other Pariſhioners, though they cannot be Witneſſes as to the Cuſtom, yet they may be Witneſſes as to the Value of the Tithes. (*c*) But if the Legacy be ſo inconſiderable, as that he cannot be preſumed to be biaſſed by it; as if it be 5*s.* to a private Perſon, or 5*l.* to a Nobleman, it is ſaid that he may be a Witneſs for the Will. Vern. 254.—*Vide* 2 *Vern.* 317. Where it is ſaid, that the Minuteneſs of the Intereſt is no Anſwer to the Objection, and that therefore where the Party is concerned in Intereſt, tho' never ſo ſmall, he cannot be a Witneſs, *& vide* Vent. 351. (*d*) Where a Witneſs hath a Legacy by the Will, by a Releaſe of the Legacy, though at the Trial, he becomes diſintereſted, and ſo is a good Witneſs. Sid. 315.——So a Bankrupt, who has aſſigned and releaſed all his Eſtate and Right to the Aſſignees, may be examined as a Witneſs for them. 2 Vern. 637. 2 Barnes 253. S. P.

† By 25 Geo. 2. *c.* 6. Creditors are made competent Witneſſes to Wills.

So if *J. S.* deviſes Lands to *A.* and the Will is ſigned, ſealed, and publiſhed in the Preſence of the ſaid *A.* and *B.* and *C.* who atteſted the ſame; yet this is no good Will to paſs thoſe Lands; for the Statute of Frauds requires Three or more competent Witneſſes, which *A.* cannot be, being concerned in Intereſt as Deviſee of the Lands, and therefore not a credible Witneſs. Carth. 514. *Hiliard* and *Jennings*, *vide* Tit. Wills. Ld. Raym. 507.

It is ſaid by *Hale* Ch. Juſt. that he knew it to have been adjudged, that an Executor in a Cauſe (*e*) concerning the Teſtator's Eſtate, if he hath not the Surpluſage given to him by the Will, may be a Witneſs for the Will. Mod. 107. 8 Mod. 60. 10 Mod. 151. 12 Mod. 340, 345, 385, 512. Will Rep. 289, 290. 3 Will Rep. 181, *contra* 281. Vern. 20. 2 Vern. 700. Comyns 90. pl. 60. Ld. Raym. 507. Freem. 509. pl. 685. 2 Ld. Raym. 1166. Stra. 34, 101. 2 Stra. 1253. Gilb. Evid. 123.

(*e*) That the Children of an Inteſtate cannot, by Reaſon of their Intereſt, under the Statute of Diſtributions, be Witneſſes in any Thing relating to the Inteſtate's Eſtate. Skin. 223.

He who borrows Money upon an uſurious Contract, cannot be a Witneſs upon an Information for the Uſury (unleſs he hath paid the Money) whether ſuch Information be brought by himſelf or any other; for if in ſuch Caſe a Man might be a Witneſs, he would in Effect ſwear for himſelf, by proving a Matter which may avoid his own Contract. Co. Lit. 6. b. 2 Rol. Abr. 685. Raym. 191. 2 Hawk. P.C. 433.

Hence alſo it hath been held, that he, who by a Slight has been impoſed upon to ſet his Hand to a Note for more Money than he intended, is no good Witneſs on an Information for the Cheat; becauſe a Conviction may be a Means to avoid the Note, by being made uſe of by the Party when ſued Salk. 283. pl. 12. Ld. Raym. 396. but *vide* Sid. 431. Vent. 49. 2 Keb. 572. which ſeem contrary.

ſu ed upon it, as a Motive to influence the Jury, which cannot well be prevented, though in Law it be no Evidence.

Salk. 283. pl. 12. Ld. Raym. 396.

Alſo it ſeems generally agreed, that he, whoſe Property may be prejudiced by a (*f*) Forgery, is no Evidence to prove it on an Indictment or Information.

(*f*) And if it be a Forgery within 5 Eliz. *c.* 14. a farther Reaſon is given in 2 Hawk. P. C. 433. why ſuch Perſon cannot be an Evidence, becauſe he may have an Action on the Statute.

2 Rol. Abr. 685. and the ſame Point is taken for granted.

So upon this Reaſon it hath been adjudged, that he, againſt whom a Verdict is given, cannot be a Witneſs to prove Perjury in the Evidence. Sid. 237. Keb. 836. *& vide* Salk. 283. pl. 12.—*Sed qu.*

Sid. 211, 237. 2 Keb. 384. Salk. 286. pl. 20.

Yet notwithſtanding theſe Caſes and the Force of theſe Reaſons, there are ſeveral Inſtances, where, in Caſes of (*g*) Neceſſity, a Perſon to whoſe (*h*) Damage an Indictment or Information concludes, has been allowed and admitted an Evidence, and his Credit left to the Jury.

2 Ld. Raym. 1179. 6 Mod. 301, 311. 7 Mod. 119. (*g*) On the Statute of Robberies, a Man ſwears himſelf, becauſe there can be no other Witneſs. 3 Mod. 114, 115. *per Cur'*. 2 Rol. Abr. 685. *Tri. per Pais* 308, 309. 10 Mod. 193. Forteſc. 246. 12 Vin. Abr. 13. Vent. 351. 12 Mod. 340. Gilb. Evid. 131. Law of Evid. 51. pl. 8, 9. Style 233. Clayt. 35. (*h*) As in an Indictment for a Battery, *&c.* 2 Hawk. P. C. 433.—Where a Perſon reſcued was admitted a Witneſs for the Perſon againſt whom an Action was brought for the Reſcue, and his Credit left with the Jury. 6 Mod. 211. See Ld. Raym. 396, 730, 744. 2 Ld. Raym. 752, 871, 1007, 1166. Stra. 129, 414, 507, 575, 595, 632, 633, 650. 2 Ld. Raym. 1411. Stra. 652. 9 Mod. 31. 2 Stra. 728, 828, 1043, 1083, 1104, 1229.

*Page 291 2 Salk. 690. pl. 3. *The King* and *Ford*.

*If the Warden of the *Fleet* ſuffers a voluntary Eſcape, and an Inquiſition, by virtue of a ſpecial Commiſſion iſſuing out of Chancery, is taken thereof, which he traverſes, the Perſon eſcaping, though he gave a Bond to be a true Priſoner, is a good Witneſs to prove the Eſcape; for this does not make the Bond void, as a Conviction on the Statute of Uſury does; beſides, this is a Matter privately tranſacted between the Party and Officer, of which there can be no other Evidence.

(*i*) Where there has been a Diſpute between two Counties, *vide* Sid. 192. (*k*) By *Scroggs* Chief Juſt. 2 Lev. 231.

Upon this Rule, that an intereſted Perſon cannot be a competent Witneſs, it has been often doubted, how far (*i*) Freemen of a Corporation, the Inhabitants of a Hundred † or Pariſh, ſhould be admitted as Witneſſes in Matters which concern thoſe Places; and here it is (*k*) ſaid, that no general Rule can be laid down, but that every Caſe muſt ſtand upon its own particular (*l*) Circumſtances, *viz.* Whether the Intereſt be of that Nature, or ſo conſiderable as by Preſumption to produce Partiality in the Witneſſes.

(*l*) Where the Party releaſed all his Right to the Corporation, and this made them good Witneſſes. 2 Jon. 116. 2 Lev. 236.—[The uſual Way is to diſfranchiſe thoſe, a Corporation calls as Witneſſes.]

† *Vide infra* 292.

2 Lev. 281. *The King* ver. *The Mayor of London*.

Hence in an Information in Nature of a *Quo Warranto*, for taking 1 *d. per* Chaldron for all Sea-Coals brought to *London*, where the Defendants preſcribed for the Duty, upon which Iſſue was taken and tried at the Bar, it was held, that the Freemen of *London* were good Witneſſes to prove the Preſcription, though the Mayor, *&c.* have the whole Profit of this Toll, which is for the Benefit of the Corporation, of which all the Citizens and Freemen are Members; for it cannot be preſumed, that for an Advantage ſo ſmall and ſo remote, they would be partial and perjure themſelves.

Vent. 351. In 1 Vern. 254. it is held ge-

So in the Caſe of the City of *London*, concerning the Duty of Waterbailage, where the Mayor and Commonalty brought an *Indebitatus Aſſumpſit*

ſit againſt *A. B.* for 5 *l.* for ſo much due to them for divers Tons of Wine brought from beyond the Seas to the Port of *London*, at 4 *d. per* Ton; and ſome Freemen being produced as Witneſſes, it was objected, that the Commonalty of *London* comprehending all the Freemen, this made them intereſted in the Succeſs of the Cauſe; but it was held by three Judges againſt one, that ſo ſmall and remote an Intereſt did not diſable them from being competent Witneſſes, yet they were laid aſide by Conſent.

nerally, that Freemen of a Corporation cannot be Witneſſes, and this Caſe is there cited, as a Caſe in which ſuch Evidence was rejected, and ſo ſaid to be reſolved, 2 Vern. 317.

At a Trial at Bar concerning Boundaries of Lands; the Parſon of the one Pariſh, the Land lying in two Pariſhes, was refuſed, becauſe he might enlarge his own Pariſh, and by Conſequence the Tithes; but one, who about ſeven Years before had taken the Profits, under the Title of one of the Parties, was received a Witneſs, becauſe now he might plead the Statute of Limitations.

7 Mod. 63. Lord *Wharton* and Sir *John Robinſon*.

It is ſaid in 2 *Sid.* to have been ruled on Evidence at a Trial at Bar, that if a Remainder after an Eſtate for Life be limited to the Miniſter and Church-wardens of a certain Pariſh, for the Uſe and Benefit of the Poor of the Pariſh, (*a*) that any of the Pariſhioners may be Witneſſes to prove this Deviſe.‡

2 Sid. 109. *Townſend* and *Row*.

(*a*) But in 2 Vern. 317. where the Queſtion related to the Loſs and Miſapplication of a Sum of Money given for the Benefit of the Pariſhioners, it was held, that an Inhabitant of the Pariſh could not be a Witneſs; and that the Caſes where the Party was concerned in Intereſt, though never ſo ſmall, have always prevailed.—[See *infra* 292. By Stat. 25 Geo. 2. c. 6. Creditors, atteſting Wills, though real Eſtate charged with Payment of Debts, are made good Witneſſes.]

‡ *Vide* Lord *Camden*'s Argument in the Caſe of *Doe ex Dm. Hindſon & al.* v. *Kerſey*, E. Term, 5 Geo 3. *C. P.*

* In an Action againſt the Hundred, upon the Statute of *Winton*, an Hundredor (*b*) cannot be a Witneſs.

* Page 292 Vent. 351. admitted.

(*b*) Mod. 73. S. P. though he be poor, and pays no Taxes, or Pariſh-Duties; for when the Money recovered of the Hundred comes to be levied, he may then be worth ſomething; but now by Stat. 8 Geo. 2. c. 16. ſ. 15. Inhabitants of Hundreds are declared competent Witneſſes at Trials on the Statutes of Hue and Cry. Servants, and thoſe who receive Alms, may be Witneſſes. 2 Keb. 73. S. P.

On an Indictment againſt the County for not repairing (*c*) a Bridge it has been doubted, whether an Inhabitant of the County could be a Witneſs.

Vent. 351.

(*c*) If there be a Diſpute between two Pariſhes, which of them ſhall repair a certain Highway, the Inhabitants of neither of the Pariſhes can be Witneſſes. 4 Mod. 48, 49. Vern. 159, 254. 2 Vern. 317, 375, 463, 637. 10 Mod. 150, 292. 11 Mod. 225. pl. 20. 12 Mod. 40, 339, 345, 372, 385, 512, 520. Ld. Raym. 711. Fitzgib. 80. Will. Rep. 595. pl. 172, 600. Stra. 583. 2 Ld. Raym. 1353. Stra. 658. 2 Stra. 1069.

But now by the 1 *Ann. ſt.* 1. *cap.* 18. reciting, That whereas many private Perſons, or Bodies Politic or Corporate, are of Right obliged to repair decayed Bridges, and the Highways thereunto adjoining; but becauſe the Inhabitants of the County, Riding or Diviſion, in which ſuch decayed Bridge or Highways lie, have not been allowed, upon Informations or Indictments brought againſt ſuch Perſon or Perſons, Bodies Politic or Corporate, for not repairing ſuch decayed Bridges and the Highways thereunto adjoining, by the Judges before whom ſuch Information or Indictment is to be tried, to be legal Witneſſes; it is enacted, "That in all Informa-
"tions or Indictments to be brought and tried in any of her Majeſty's

" Courts of Record at *Weſtminſter*, or at the Aſſizes or Quarter-Seſſions of " the Peace, the Evidence of the Inhabitants, being credible Perſons, or " any of them of the Town, Corporation, County, Riding or Diviſion, " in which ſuch decayed Bridges or Highway lies, ſhall be taken and ad- " mitted in all ſuch Caſes in the Courts aforeſaid."

And by the 3 & 4 *W.* 3. *cap.* 11. " In all Actions to be brought in the " Courts of *Weſtminſter*, or at the Aſſizes, for Money miſ-ſpent by Church- " Wardens, the Evidence of the Pariſhioners, other than ſuch as receive " Alms, ſhall be taken and admitted."

Skin. 586. pl. 5. On this Rule, that an intereſted Perſon cannot be a Witneſs, the Time and Manner of a Witneſs's becoming intereſted ſeems alſo material; and therefore it has been held, that it is no good Exception againſt a Witneſs, that he hath a Promiſe of a Reward, on Condition of giving his Evidence, eſpecially unleſs ſuch Reward be promiſed by the Perſon for whoſe Benefit he is to ſwear, and by way of Contract for giving ſuch and ſuch particular Evidence; alſo it has been held, that a Witneſs's laying a Wager about the Succeſs of the Cauſe is no Objection againſt his being ſworn as a Witneſs, for the Party hath an Intereſt in his Teſtimony, which to deprive him of by his own Act would be unreaſonable ‡

‡ *Sed qu.* If both Exceptions are not good? —— But, a Proſecutor, on an Indictment, though he had laid a Wager, that he convicted the Defendant, was allowed. *Rex* verſus *Fox*, Stra. 652. In this Caſe, and in every Caſe on an Indictment, it may, for good Reaſons, be right, to ſay, the Proſecutor, or his Witneſſes, ſhall not be diſabled by ſuch Means: The Conſequences might be very fatal. But *qu.* If ſuch Reaſons apply in Civil Caſes?

Mod. 21. 2 Keb. 576. Gilb. Evid. 124. and ſee 10 Mod. 193. 12 Mod. 372. 2 Ld. Raym. 1008. 2 Vern. 375, 463. Eq. Caſ. Abr. 223. Chan. Preſ. 234. Comyns 90. pl. 60. See Freem. 509. pl. 685. Carth. 514. Ld. Raym. 505. Will. Rep. 557, 558. So ruled at a Trial at Bar by three Judges againſt *Twiſden*, who held, that it was like a Man's promiſing another, that, if he recovered the Lands, he ſhould have a Leaſe of them, which, he ſaid, diſabled him from being a Witneſs.——[And *qu.* if *Twiſden* was not right?]

Hence it hath been held, that on a *Scire facias* againſt the King's Patentee, a Perſon, who has a Promiſe of being made a Deputy, may be a Witneſs.

3 Lev. 152, 153. *Reſcous* and *Williams*, adjudged, and *Jones* Ch. Juſt. held that laying a Wager, or being a Better, did not deſtroy the Teſtimony of the Witneſs, but went only to the Credit of it. —— [*Sed qu.* If the Event of the Suit may be ſuch as may be beneficial to the Witneſs?]

But it has been held, that if ſeveral Perſons lay Wagers at a Horſe-Race, *&c.* and an Action is brought againſt one of them for the Money loſt, that a Better on the ſame Side cannot be a Witneſs for him who loſt; but if ſuch Perſon acknowledges that he loſt the Wager, and pays the Money, he may be a Witneſs.

2 Vern. 699. Abr. Eq. 224. * Page 293 It has been held in Chancery, that if a Perſon is examined as a Witneſs, who is no ways concerned in Intereſt, and afterwards he becomes * Heir at Law, and thereby intereſted in the Matter, that notwithſtanding his Depoſitions, when thus diſintereſted, may be read, even (*a*) at a Trial at Law; and that it was like the Caſe, where the only ſurviving Witneſs to a Deed becomes the Party intereſted, or where a Witneſs to a Deed becomes blind, in which Caſes his Hand may be proved at Law.

(*a*) But at a Trial at Bar in *C. B.* on an Iſſue directed out of Chancery, the Judges refuſed to have ſuch Depoſitions read, becauſe the Witneſs was ſtill living. Abr. Eq. 224. But in 2 Vern. 699. ſuch Depoſitions were read in Chancery, and there ſaid, that the Reaſon of rejecting ſuch Evidence at Law was, becauſe it was againſt the Rule, *viz.* that where the Witneſs is living, and might be produced at the Trial, the Depoſition of ſuch Witneſs cannot be read.

A Wit-

A Witneſs was examined whilſt ſhe was intereſted, before the Hearing; and the Cauſe being heard and decreed to an Account, ſhe was re-examined after the Hearing, before the Maſter, on the Account, having firſt releaſed her Intereſt; and it was objected, that ſhe ought not to be heard, for having been examined whilſt intereſted, and her Depoſitions publiſhed, ſhe was thereby engaged, and almoſt under a Neceſſity of ſtanding to what ſhe had before ſworn, and could not be free to retract or contradict it; but the Lord Keeper over-ruled the Objection. 2 Vern. 472. *Callow* and *Mint.*

It is no good Exception againſt a Witneſs, that he has a Maintenance from the King or other Perſon, for every one may maintain his own Witneſſes; nor is it any Exception againſt a Witneſs, that he has received a Reward for having made a Diſcovery of the Crime to be proved againſt the Priſoner, nor that he hath the Promiſe of a Pardon on Condition of giving his Evidence. 2 Hawk. P. C. 434.

(C) Of the Number of Witneſſes required in our Laws.

IT is holden by my Lord Chief Juſtice *Holt*, that at Common Law it was not neceſſary in any Caſe, that a Proof of Matter of Fact ſhould be made by more than one Witneſs, and that the ſingle Teſtimony of one credible Witneſs was ſufficient to prove any Fact, and that the Authorities cited by my Lord (*b*) *Coke* do not warrant the Opinion founded on them. Carth. 144.

(*b*) Co. Lit. 6. *a.* where my Lord *Coke* ſays, that when a Trial is by Witneſſes, as of the Challenge of a Juror, or Summons of a Tenant, the Affirmative ought to be proved by two or more Witneſſes; but when the Trial is by Verdict, there the Judgment is not given upon Witneſſes, or other Kind of Evidence, but upon the Verdict; and upon ſuch Evidence as is given to the Jury they give their Verdict.

But the Civil Law requires two Witneſſes to prove a Fact; and therefore it has been holden, that if the Spiritual Court, which proceeds according to the Civil and Canon Law, refuſes, where a Temporal Matter is pleaded in Bar of an Eccleſiaſtical Demand, to admit the Evidence of one Witneſs, they ſhall be prohibited; as where an Executor proves Payment of a Legacy by one Witneſs, *&c.* Show. 158. 3 Mod. 172, 283. Comb. 160. Holt. 752. pl. 1. Ld. Raym. 220.

Vent. 291. Carth. 142. 2 Salk. 547. pl. 1.

Hence it hath been eſtabliſhed as a fundamental Rule in the Courts of Equity, that a Decree cannot be made on the Teſtimony of one ſingle Witneſs againſt the flat and poſitive Denial of a Fact by the Defendant's Anſwer; (*c*) becauſe the Oath of the Party is ever looked upon in Equity to be as good as the Oath of a ſingle Perſon. Vern. 161. 3 Chan. Ca. 123.

(*c*) If an Executrix to a firſt Huſband marries a ſecond, and a Bill is exhibited againſt them to diſcover a Truſt, and they in their Anſwers diſagree in the Matter, the Wife confeſſing what the Huſband denies, and what the Plaintiff can prove only by one Witneſs, the Plaintiff can have no Relief; for one Witneſs is not ſufficient againſt the Huſband's Anſwer; and the Wife's Confeſſion will not avail, for ſhe can be no Witneſs againſt her Huſband. 2 Chan. Ca. 39.

Yet

* Page 294 *Vide* 2 Vern. 554. Abr. Eq. 229.

* Yet Caſes may, and do often fall out, that the Court may ground a Decree upon the Oath of a ſingle Witneſs, attended with other Circumſtances to corroborate it; as where the Anſwer of the Party appears to be notoriouſly falſified, by which Means it comes to loſe that Credit which otherwiſe it would and ought juſtly to have.

But for this *vide* Head of *Wills*.

Alſo by ſeveral Acts of Parliament, a certain Number of Witneſſes is required, as by the 29 *Car.* 2. *cap.* 3. "That all Deviſes of Lands ſhall be "atteſted and ſubſcribed in the Preſence of the Teſtator, by three or four "credible Witneſſes, or elſe ſhall be void.

By the 7 *W.* 3. it is enacted, "That no Perſon ſhall be indicted, tried "or attainted for High Treaſon, but upon the Oaths of two lawful Wit-"neſſes, either both of them to the ſame Overt-Act, or one of them to "one, and the other of them to another Overt-Act of the (*a*) ſame "ſame Treaſon.

(*a*) There muſt be one Witneſs to one, and another Witneſs to another Overt-Act of the ſame Species of Treaſon, or at leaſt one Witneſs to an Overt-Act, and another to a material Circumſtance to prove it. 2 Hawk. P. C. 428. But for this *vide* Tit. *Treaſon*.

(D) Of compelling a Witneſs to appear and give Evidence.

21 H. 6. 6. a. 11 H. 6. 4. b. Bro. Maintenance, 5, 51. 2 Rol. Abr. 118.

IT is held to be Maintenance for a Perſon officiouſly to give Evidence in a Cauſe, without being called upon to do it; ‡ alſo if a Man, who is not *ſubpœnaed*, happens to be in Court during a Trial, he ſhall not be forced to be ſworn againſt his Will; but if he conſents, the want of a *Subpœna* is not material; alſo in certain Caſes, the Court will in Diſcretion wait till a *Subpœna* can be procured.

‡ *Qu.* If this Poſition is right, and if Law, whether it is not too general; and if the Intention of the Witneſs, and the Truth or Falſity of his Evidence, muſt not determine, whether it is, or is not, Maintenance?

From hence it follows, that the Parties have (*b*) a Right to Proceſs to bring in their Witneſſes, and to this Purpoſe it is enacted by 5 *Eliz. cap.* 9. *ſect.* 12. "That if any (*c*) Perſon or Perſons, upon whom any Proceſs out "of any of the Courts of Record within this Realm, or *Wales*, ſhall be "(*d*) ſerved, to teſtify or depoſe concerning any Cauſe or Matter depend-"ing in any of the ſame Courts, and having (*e*) tendred unto him or them,

(*b*) And therefore Witneſſes are privileged *eundo & redeundo*, for which *vide* Tit. *Privilege*

(*c*) A Feme Covert is within the Statute, and if ſhe be ſerved with a *Subpœna*, and refuſes to appear the Action lies againſt the Huſband and Wife. Cro. Eliz. 122. *Havithlome* and *Harvy*, adjudged. Jon. 430. S. C. and S. P. adjudged. (*d*) A Delivery of a Ticket containing the Subſtance of the Writ, is a ſufficient Service within the Act. 5 Mod. 355. Cro. Car. 540. S. P. for there being two, three, or four Names of Witneſſes in one Writ, he cannot leave the Writ with every one of them; and to have ſeveral Writs for every Witneſs would be very chargeable to the Subject. ‖——(*e*) If a Feme Covert be the Perſon to apppear as a Witneſs, the Tender muſt be to her and not to her Huſband. Cro. Eliz. 122. Jon. 430. S. P.

‖ *Sed qu.* if it hath not of late been underſtood that Service of the Writ itſelf, or an actual full Copy, and Production of the Original is neceſſary to ſupport the Action? At all Events, 'tis moſt adviſable to purſue that Method, with every unwilling or doubtful Witneſs.

"according

" according to his or their Countenance or Calling, ſuch (f) reaſonable " Sums of Money for his or their Coſts and Charges, as, having Regard to " the Diſtance of the Place, is neceſſary to be allowed in that Behalf, do " not appear according to the Tenor of the ſaid Proceſs, having not a law- " ful and reaſonable Let or Impediment to the contrary, that then the " Party in making Default to loſe and forfeit for every ſuch Offence ten " Pounds, and to yield ſuch further Recompence to the Party (g) grieved, " as by the Diſcretion of the Judge of the Court out of which the ſaid * " Proceſs iſſues ſhall be awarded, according to the Loſs and Hindrance " that the Party which procured the ſaid Proceſs ſhall ſuſtain, by reaſon of " the Non-appearance of the ſaid Witneſs or Witneſſes; the ſaid ſeveral " Sums to be recovered by the Party ſo grieved againſt the Offender or Of- " fenders, by Action of Debt, Bill, Plaint or Information, in any of the " Queen's Majeſty's Courts of Record."

*Page 295

(f) If the Party gives the Witneſs a Shilling, which he accepts, and promiſes, that on his Appearance he will pay him all further reaſonable Charges; this is ſufficient. Cro. Car. 522, 540. March 18. (g) In Cro. Eliz. 130. and the S. C. Leon. 122. it is adjudged, that the Plaintiff need not ſet forth any ſpecial Damage which he ſuſtained by the Negligence of the Defendant in not appearing to give Evidence, where the Action is brought for 10*l.* only, and not for any more Damages; but the contrary has ſince been reſolved in Cro. Car. 522, 540. *Goodwin* and *Weſt*, Jon. 430. and 5 Mod. 355. *Maddiſon* and *Shore*, which was affirmed on a Writ of Error; for there muſt be a Party grieved, otherwiſe there is no Cauſe of Forfeiture, and a particular Damage muſt be ſet forth, &c.

If a Perſon, who can give Evidence againſt one who is accuſed of Felony, refuſes to be bound to give Evidence, at the General Gaol-Delivery, &c. the Juſtice of Peace may either commit to Priſon ſuch Perſon ſo refuſing, or may bind him to his good Behaviour, and to appear at the next Gaol-Delivery or Quarter-Seſſions. Dalt. Juſt. 111.

Lord *Preſton* was committed by the Court of Quarter-Seſſions for refuſing to be ſworn to give Evidence to the Grand Jury on an Indictment of High Treaſon; he was brought by *Habeas Corpus* in *B. R.* and *Holt* Ch. Juſt. ſaid, it was a great Contempt, and that had he been there, he would have fined him, and committed him till he paid the Fine; but being otherwiſe, he was bailed. Salk. 278. pl. 2.

It ſeems that by the common Law the Defendant, in capital Caſes, had no Right to any Proceſs againſt his Witneſſes, without a ſpecial Order of the Court; but now by the 7 *W.* 3. *c.* 3. it is enacted, That all Perſons accuſed and indicted for any High Treaſon, whereby any Corruption of Blood may enſue, ſhall have the like Proceſs of the Court, where they ſhall be tried, to compel their Witneſſes to appear for them at any Trial or Trials, as is uſually granted to compel Witneſſes to appear againſt them; and now ſince the Statute of 1 *Ann. cap.* 9. which ordains, that the Witneſſes for the Priſoner ſhall be ſworn, Proceſs may be taken out againſt them of Courſe in any Cauſe whatſoever. 2 Hawk. P. C. 435.

On a Commiſſion iſſuing out of Chancery for the Examination of Witneſſes, there muſt be a *Subpæna ad Teſtificandum* taken out, directed to the Witneſſes, and a Summons from two of the Commiſſioners, of the Time and Place where they are to be examined; and, if the Witneſs ſo ſummoned and ſerved does not appear, the Court will grant an Attachment againſt him, unleſs he comes up at his own Expence to be examined before the Examiner; or if he be ſummoned by the Commiſſioners without a *Subpæna ad Teſtificandum*, and do not appear, the Court will order ſuch Witneſs to attend at his own Expence, and to be examined; and if he diſobey ſuch Order, then an Attachment ſhall go againſt him.

(E) Of the Manner of giving Evidence: And herein,

1. Where the Examination is in open Court; and therein of ſuch Queſtions as may be aſked a Witneſs.

Hob. 325. Hale's Hiſt. C. L. 253 & 259.

THE Examination of Witneſſes *viva voce*, in open Court, is juſtly eſteemed one of the greateſt Excellences of our Law, not only from the Awe and Reverence which the Solemnity of the Manner is ſuppoſed to produce in the Witneſs, and the Regard which from thence he muſt have for Truth, but alſo from the Benefit of croſs-examining; as alſo the Air and Manner of giving Evidence often carry ſuch Convictions with them, as will induce the Court and Jury to believe or reject what the Witneſs has ſworn.

Pref. to Forteſc. Rep. ii. to iv. Vaugh. Rep. 143, 144. 2 Hawk. P. C. 428.

Hence it hath always been held as a ſettled Rule, That in Caſes of Life, no Evidence is to be given againſt a Priſoner, but in his Preſence.

* Page 296 Cro. Eliz. 189. *Mettalfe* and *Dean*.

* Alſo in a Civil Cauſe, where the Jury withdrew to confer about their Verdict, one of the Witneſſes, that was before ſworn on the Part of the Defendant, was called by the Jurors, and he recited again his Evidence to them, and they gave their Verdict for the Defendant; and Complaint being made to the Judge of Aſſize of this Miſdemeanor, he examined the Jury, who confeſſed all the Matter, and that the Evidence was the ſame in Effect that was given before *& non alia nec diverſa*; and this Matter being returned upon the *Poſtea*, the Opinion of the Court was, that the Verdict was not good, and a *Venire facias de novo* was awarded.

Style's Pract. Reg. 671, 672.

But it is ſaid, that a Witneſs, who by reaſon of Sickneſs, extreme Age, or (*a*) other Cauſe, cannot come to a Trial, may, by Order of Court, be examined in the Country before any Judge of the Court where the Cauſe depends; and the Teſtimony ſo taken ſhall be allowed to be given in Evidence at the Trial.†

(*a*) In Comb. 63. it is ſaid, that Witneſſes may be examined before a Judge, by Leave of the Court, as well in Criminal Cauſes as in Civil, where a ſufficient Reaſon appears to the Court, as going to Sea, *&c.* and then the other Side may croſs-examine them; but for this *vide* Keb. 36, 249, 787. 2 Keb. 13.

† *Qu.* If it can be done without the Conſent of both Parties? And *vide* 2 Barnes 352.

2 Salk. 691. pl. 4.

But if a Witneſs going to Sea be by Rule of Court examined upon Interrogatories before a Judge, and the Trial come on before he is gone, his Depoſition ſhall not be read, but he muſt appear; for the Rule was made on Suppoſal of his Abſence.

(*b*) Cro. Car. 292. 2 Bulſt. 147.

Every Perſon produced as a Witneſs muſt, before he gives his Evidence, be ſworn to depoſe the Truth, the whole Truth, and nothing but the Truth; this the Law required in all Caſes, (*b*) except on Indictments for capital Offences, where by (*c*) immemorial Practice, the Witneſſes againſt the King were not ſuffered to be ſworn.

(*c*) But my Lord *Coke* ſays, that he never read in any Statute, ancient Author, Book, Caſe or Record, that in Criminal Caſes the Party accuſed ſhould not have Witneſſes ſworn for him; and therefore that there is not ſo much as *Scintilla Juris* againſt it. 3 Inſt. 79.——And in H. P. C. 264. it is ſaid, that there is no known Law againſt it.——But in 2 Hawk. P. C 434. it being the conſtant Practice not to ſuffer Witneſſes to be ſworn againſt the King upon Indictments of Capital Crimes, the Judges preſumed it founded originally on ſome Statute, or other good Foundation, and were therefore tender of departing from the ſettled Practice.

But now by 1 *Ann. cap.* 9. it is enacted, "That every Perſon who ſhall "be produced, or appear as a Witneſs on the Behalf of the Priſoner, "before he or ſhe be admitted to depoſe, or give any Manner of Evi- "dence, ſhall firſt take an Oath to depoſe the Truth, the whole Truth, "and nothing but the Truth, in ſuch Manner as the Witneſſes for the "Queen are by Law obliged to do; and, if convicted of any wilful "Perjury in ſuch Evidence, ſhall ſuffer all the Puniſhments, Penalties, "Forfeitures and Diſabilities, which by any of the Laws and Statutes of "this Realm are or may be inflicted upon Perſons convicted of wilful Per- "jury."

By the Practice of the Courts, if one be produced and ſworn for the Plaintiff or Defendant, being once ſworn, the other may examine him to any Thing whatſoever, though it be the Solicitor of the Party who produces him; alſo either Party may, on Application to the Court, have the Witneſs examined a-part, and out of the Hearing of the others.

It is a general Rule, that a Witneſs ſhall not be aſked any Queſtion, the anſwering to which might oblige him to accuſe himſelf of a Crime, and that his Credit is to be impeached only by general Accounts of his Character and Reputation, and not by Proofs of particular Crimes againſt which he cannot be preſumed prepared to defend himſelf. 2 Hawk. P. C. 433. Fareſl. 119.

If a Witneſs, when under Examination, through Surprize or Inadvertency, gives a wrong Anſwer to a Queſtion that is aſked him, he is always allowed to recollect himſelf, and that, which he affirms on due Deliberation, is to be taken for the Truth; alſo if he miſtakes the true State of the Queſtion, in ſuch a Manner as ſhews, that it is rather owing to * his Weakneſs than Perverſeneſs, he cannot be puniſhed for it as guilty of Perjury. 5 Mod. 350. & Tit. *Perjury.* * Page 297

If a Perſon is produced as a Witneſs for the King, upon a Trial in an Information, and he is guilty of Perjury he cannot be puniſhed for it on the 5 *Eliz.* by Way of Indictment, which is the Suit of the King, and ſuch a one diſcharged accordingly. * Cro. Jac. 120. *Price's* Caſe. * *Qu. de hoc?*

If a Witneſs in giving Evidence reflects on the Character of another, or makes Uſe of ſuch Words as are actionable; yet this being in a judicial Way, he cannot be puniſhed for it, nor will an Action lie for ſuch Words. † Rol. Rep. 61.

† *Sed qu.* If they are not pertinent to the Matter in Queſtion?

2. Of Examinations and Proofs in Chancery.

By the Civil and Canon Law it was abſolutely neceſſary, that there ſhould be a Citation taken out againſt the Defendant previous to the Examination of Witneſſes; and the Reaſon is, that the Defendant, if cited, might either examine or object to their Credibility, or put ſuch croſs Interrogatories to them, as might bring out Circumſtances in his Favour, which he would not have an Opportunity to do, if he were not cited; but it was not neceſſary for the Defendant to appear, becauſe the Citation is in his Favour, and he might renounce a Privilege introduced in his Favour.

Hence it is, that in Chancery, after the Plaintiff has replied to the Defendant's Anſwer, before he proceeds to examine any Witneſſes, he muſt take out a *Subpæna* againſt the Defendant to rejoin; but if the Plaintiff ſerves the Defendant with a *Subpæna* to rejoin before he has filed a Replication, the Defendant appearing upon ſuch *Subpæna* ſhall have his Coſts

taxed, becauſe the Plaintiff has not cloſed the Conteſt of the Anſwer before he ſerved the *Subpœna* to rejoin.

The Defendant being ſerved with a *Subpœna* to rejoin, the Plaintiff, of Courſe, upon producing an Affidavit thereof, is to have an Order for the Defendant to rejoin and join in Commiſſion in four Days, giving the Defendant's Solicitor Notice thereof; and the Plaintiff thereupon may, in eight Days afterwards, leaving his Commiſſioners Names at the Office, have, at his own Coſts a Commiſſion *ex parte* directed to two of the Plaintiff's Commiſſioners, and two ſuch as the Officer ſhall think fit to nominate.

Alſo it is uſual to apply by Petition or Motion, that a *Subpœna* to rejoin *return' immediate* may be awarded againſt the Defendant; and that Service thereof on the Defendant's Clerk may be deemed good Service of the Defendant; and to this is often added, eſpecially in a Country Cauſe, that the Defendant may join and ſtrike Commiſſioners Names ſometimes in four Days, ſometimes in a Week, that the Plaintiff may have a Commiſſion *ex parte*, directed to his own Commiſſioners, and all this is of Courſe.

But the more uſual Way is for each Party to name four Commiſſioners for the Examination of Witneſſes, and two a-piece are ſtruck out of each Side; and if a Defendant joins in a Commiſſion and names Commiſſioners, and yet afterwards refuſes to ſtrike, the Court, upon Petition, will ſtrike out ſuch two of them as they pleaſe, and the Commiſſion ſhall go to ſuch of the four as are left ſtanding.

But here it is neceſſary to obſerve, that there is an Office called the Examiner's Office, which extends itſelf, and has a Right to examine all Witneſſes in Town, or within ten Miles of the Town, which is the Circuit of the Court; and if any Commiſſion be made out, or Witneſſes examined within that Diſtrict, the Depoſitions taken by Commiſſion will, upon Complaint, be ſuppreſſed, and the Clerk who made out the
* Page 298 * Commiſſion will ſtand committed for a Miſbehaviour, and Breach of the known Duty of his Office.

When Interrogatories are filed in the Examiner's Office, the Witneſs is carried to the Seat of the Examiner, and a Note in Writing is there taken of his Name and Place of Abode, to the End the other Side may croſs-examine, if they think fit, and, to prevent the perſonating of any Witneſs, he is conſtantly carried in Perſon, and, ſhewn at the Seat of the adverſe Party's Clerk in Chancery; this being done, he returns back to the Examiner's Office, and is there examined.

If Interrogatories are filed for his Croſs-Examination, the Party who produces him muſt ſee that he ſtays, or returns, and attends to be examined; but if no ſuch Interrogatories are filed, or he is not demanded to be croſs-examined at the ſame Time when he is under Examination, and if he goes away about his Buſineſs, the Party who intends to croſs-examine him, muſt get him examined as well as he can; and the adverſe Party is not in that Caſe bound to produce him over again, to attend to be croſs-examined, ſince it was the Party's Fault he had not his Interrogatories ready to have croſs-examined him whilſt he was under his former Examination.

If the Examiner is ſerved with an Order whereby Publication is to paſs on ſuch a Day, he cannot afterwards examine any Witneſs, tho' it often falls out, that three or four Witneſſes have been before that Time ſworn to the Interrogatories, but have not attended to be examined; in this Caſe the Party cannot examine them without Leave of the Court, which is ſeldom denied on Motion.

If a Witneſs is duly *ſubpœnaed* to attend and be examined, and he refuſes to attend, then, upon a Certificate from the Examiner, that Interrogatories are filed, and the Witneſs hath not attended to be examined, he ſhall ſtand

committed, unleſs he attends and is examined in four Days after Notice; and this is ſometimes allowed as a good Cauſe for the enlarging Publication or putting off the Cauſe; but where Publication is actually paſſed, and Depoſitions are delivered out, if the Party moves for enlarging Publication, he muſt offer good Reaſons, by Affidavit, of ſome material Witneſſes which he hath to examine, and the Reaſons why they could not attend and be examined before Publication paſſed.

And in this Caſe the Plaintiff or Defendant, as the Caſe falls out, muſt make Oath, and ſo muſt his Clerk or Solicitor, that they have neither ſeen, heard, read, or been informed of any of the Contents of the Depoſitions taken in that Cauſe, nor will they ſee, hear, read, or be informed of the ſame, till Publication is duly paſſed in the Cauſe; and upon ſuch an Affidavit it is uſual for the Court to enlarge Publication, and give the Party an Opportunity to examine his Witneſſes; but he is to be limited to a Time, and ſo as not to put off the Hearing of the Cauſe; for otherwiſe it would be hard to put the Defendant to hear his Cauſe without Proof.

If the Party examines ſome Witneſſes in Town, and others by Commiſſion, he is not obliged to exhibit or file his whole Set of Interrogatories in the Examiner's Office; he only files ſuch and ſuch alone as he hath Occaſion to examine in Town; for if this were otherwiſe, it would put the Plaintiff to a double Expence of paying for Copies of the whole Interrogatories twice over.

Here alſo we muſt obſerve, that antiently the Examination was before a Judge of the Court, who was to conſider whether the Witneſs anſwered readily, or whether he brought a Story, formed, to the Judge; the Examination in Chancery was originally before the Maſter of the Rolls, who was one of the Judges of the Court; and therefore it ſhould ſeem that the Examination might be upon the Bill without Interrogatories drawn and framed, as the Examination with the Canoniſts may be upon the *Libellus Articulatus*; but afterwards the Maſter of the Rolls having * left the Examination of the Witneſſes to his Clerks, as the Barons of the Exchequer did to theirs, from thence-forward the Judge did not, but the Counſel for the Party, whoſe Witneſſes were to be examined, framed the Interrogatories upon which the Clerks examined; and ſo from thence-forward it became the Practice to ſend the Commiſſion to the Commiſſioners to examine upon Interrogatories, as the Examiners did above. * Page 299

But as Witneſſes often lived remote from the Court, it was thought more convenient to appoint Commiſſioners to examine ſuch Witneſſes, the Court ſending a Notary of their own, who was often in Commiſſion with them, and with thoſe Commiſſions they ſent a Copy of the Articles; thoſe Commiſſioners are to examine themſelves, and cannot delegate their Power, for *Delegata Poteſtas non poteſt delegari.*

The Commiſſioners were likewiſe to be indifferent, for, upon Exception to the Partiality of any of them, the Court will ſupply their Places by putting in others; for though they are named by the Parties, yet that is but by way of Propoſal to the Court; for they are the Miniſters of the Court, and therefore muſt be impartial.

Theſe Commiſſioners were to have their Charges, and the (*a*) Rule was, that rich Perſons were to have their Expences only, becauſe they were not to be paid for their Duty; but the Poor were to have not only their Expences, but the Price of their Labour over and above, that they might not be damaged for doing their Duty.

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Theſe Commiſſioners were to have their Charges, and the (*a*) Rule was, that rich Perſons were to have their Expences only, becauſe they were not to be paid for their Duty; but the Poor were to have not only their Expences, but the Price of their Labour over and above, that they might not be damaged for doing their Duty.

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The Interrogatories were anciently annexed to the Commiſſion, and ſo now they are ſuppoſed to be; but by Conſent of Parties they are delivered to the Commiſſioners at the Opening of the Commiſſion; and this is the preſent Practice.

The Commiſſioners can only examine upon the Set of Interrogatories that are firſt put in before them, and no new ones can be examined upon before them, without Leave of the Court, becauſe their Commiſſion is to examine upon ſuch Interrogatories as are ſuppoſed to be annexed to the Commiſſion, or ſuch as are delivered in at the Opening of the Commiſſion.

But before the Examiner they may examine upon a new Set of Interrogatories, becauſe that is preſumed to be the Examination of the Judge; and the Judge might examine upon Interrogatories *ex re nata* out of the Articles.

The Plaintiff has regularly the Carriage of the Commiſſion, and ſo is to appoint Time and Place; but if the Defendant ſuppoſes that the Plaintiff will aggrieve him by ſuch Appointment, he may move for a Duplicate of the Commiſſion, and that the Officer may appoint Time and Place.

But if the Officer appoints Time and Place, yet the Commiſſioners may agree to adjourn, becauſe the Appointment of the Maſter is only for the Opening of the Commiſſion; and therefore, if the Commiſſioners agree, they have yet Power to make proper Adjournments.

If the Plaintiff, or his Commiſſioners, abuſe the Carriage of the Commiſſion, by making unneceſſary Adjournments, or an irregular Examination of the Witneſſes, that will intitle the Defendant to a Commiſſion of his own, and he may have the Carriage of it himſelf, becauſe he ſhall not be obliged to produce and examine his Witneſſes where it cannot be done impartially.

The fair Examination by Commiſſioners is not to adjourn without Neceſſity, becauſe that would be to harraſs the Defendant by obliging him to travel from Place to Place to croſs-examine; but if it be neceſſary, they may adjourn not only as to Time but Place.

* Page 300 * And this Affair muſt be performed as far as it is poſſible *uno actu*, that there may be as little Opportunity as poſſible to divulge the Depoſitions, that neither Side may better their Proof.

When a Witneſs is produced, he muſt firſt be examined upon the Interrogatories of the Producer, and then forthwith, without ſuffering him to go abroad, upon the Croſs-interrogatories of the other Side; and the Depoſitions are to be read over to him, every Sheet whereof he is to ſign, that ſo they may have the Senſe of the Witneſs, without being tampered with.

The Depoſitions thus taken are to be bound up, and ſigned and ſealed by the Commiſſioners, and ſent by a Meſſenger of their own to the Court out of which the Commiſſion iſſued, who is to ſwear that they were not opened or altered ſince they were delivered to him.

If there be due Notice of executing the Commiſſion, and at the Day appointed the Commiſſioners meet, and the Commiſſion is opened, but no Witneſſes examined nor Adjournment made, the Commiſſion is loſt; but if it be not opened, they may give new Notice, and proceed, unleſs in the mean Time the Court be moved, and Order be made to pay the Coſts of the former Day before they proceed; and the Reaſon of this Rule ſeems to be, that the not adjourning is a Refuſal of the Commiſſioners to act any further upon it; for though the Court itſelf never adjourns, becauſe it is always open; yet the delegated Power muſt adjourn, becauſe they have no ſtanding and conſtant Power, as the Seal has, but their Power ariſes from the Words of their Commiſſion, which are *quod Mandamus quod & certos dies & locos quos ad hoc provideritis Teſtes præd. coram*

coram vobis Venire faciatis & advocetis; ſo that if they do not provide Time and Place by an Adjournment, they have no Authority further to act by that Commiſſion, for the delegated Authority muſt purſue the Words of the Commiſſion, or elſe it will be conſtrued a Refuſal to act; but if they do not open the Commiſſion, their not acting at that Time will not be conſtrued as a Refuſal to act; but it is an Harraſſing of the Defendant, for which he may complain to the Court and have his Redreſs; and tho not acting before the Commiſſion is opened, is not conſtrued to be a Refuſal, becauſe they do not know what their Authority is till the Commiſſion is opened.

Where one of the Plaintiff's Commiſſioners and one of the Defendant's meet, and the Commiſſioner for the Plaintiff refuſes to act, the Commiſſion is loſt, but the Plaintiff ſhall pay the Defendant his Coſts, and the Defendant ſhall have a new Commiſſion and the Carriage of it; and ſo it is when any Commiſſion is loſt through the Default of him that has the Carriage of it; for he is unworthy to have the Carriage of the Commiſſion, who appears to make Default in the Execution of it.

If due Notice be given, and the one Side proceeds and examines his Witneſſes; the other, if he does not examine, ſhall not have a new Commiſſion, unleſs Affidavit be made of ſome reaſonable Cauſe of his Non-attendance, and that neither the Party who did not examine, nor any for him, or by his Direction or Knowledge, have ſeen, heard, or been informed of the Depoſitions taken, or any Part of them, nor willingly will ſee, *&c.* till he has examined, or till Publication; and the Reaſon hereof is, that the Defendant may not have an Opportunity to know what has been proved for the Plaintiff, and ſo have an Opportunity to conteſt it.

And where ſuch a new Commiſſion is granted, it ſhall all be at the Charge of the Defendant, and the Plaintiff is permitted to croſs-examine without Charge.

But if the Plaintiff, will, upon ſuch new Commiſſion, produce any Witneſſes, he muſt be at equal Charges of the Commiſſion, becauſe he has equal Benefit by the Examination of his own Witneſſes.

* But he, at whoſe Inſtance a Commiſſion is renewed, muſt examine all his Witneſſes upon ſuch Commiſſion, or in Court, before the Return of it, becauſe he cannot be indulged a farther probatory Term. * Page 301

If the Commiſſioners on both Sides attend the Execution of the Commiſſion, and the one Side examines, and the other neither examines nor puts in Interrogatories, he ſhall never afterwards examine, unleſs upon ſpecial Order of Court, upon good Cauſe ſhewn, becauſe he might form his Interrogatories upon the Diſcovery made to his Commiſſioners of what the other Side examined to.

Where the Commiſſioners meet and examine, and afterwards adjourn, and one of the Defendant's Commiſſioners takes away the Commiſſion, and the other Commiſſioners meet at the Day adjourned, and examine Witneſſes and return the Depoſitions, the Court will order ſuch Depoſitions to lie, and the *Subpæna duces tecum* to iſſue againſt the Commiſſioner, that he may bring in the Authority by virtue of which the Depoſitions were taken; for if they had a proper Authority, the not having the Commiſſion before them does not impeach the Depoſitions.

There muſt be fourteen Days Notice given by the Commiſſioners to all the Defendants, of the Time and Place of the Execution of the Commiſſion, or elſe it is not good Notice, and the Depoſitions will ſtand ſuppreſſed for Irregularity, in not purſuing the Tenor of the Commiſſion; this Rule ſeems to be taken from the Common Law, which requires fourteen Days Notice of Trial; but where it is a ſhort Vacation, as between *Eaſter* and *Trinity Term*, ten Days, or leſs, is good Notice.

No Commiſſion can be executed in Term-time, unleſs by Leave of the Court, or Conſent of the Parties; for the Commiſſioners being generally

Country Attornies, it is more than probable they are in Town attending the Term, on their other Client's Affairs, and conſequently cannot attend upon the Execution of the Commiſſion.

If two of the Plaintiff's Commiſſioners attend at the Time and Place appointed for the Execution of the Commiſſion, they may proceed therein *ex parte*, if the Defendant's Commiſſioners do not then attend; but if the Defendant's Commiſſioners attend at the Time and Place appointed, and the Plaintiff's Commiſſioners are not there, they cannot go on, becauſe the Plaintiff having the Carriage of the Commiſſion, he will not produce it, if he is diſappointed of his Commiſſioners, and conſequently there can be no Proceedings for Want of the Commiſſion; this makes a Duplicate of the Commiſſion more neceſſary; for in this Caſe, if the Defendant's two Commiſſioners meet, they may proceed in the Execution of the Commiſſion; but where there is no Duplicate, and the Defendant's Commiſſioners attend at the Time appointed, and none attend for the Plaintiff, the Party grieved is to be recompenſed in Coſts upon Complaint made thereof to the Court; and in that Caſe the Court will give him Leave to ſue out another Commiſſion.

There muſt, at leaſt, one Commiſſioner attend on each Side; for if the Plaintiff hath but one Commiſſioner that attends on his Side, he cannot proceed to execute the Commiſſion, unleſs one of the Defendant's Commiſſioners attends and joins with him therein; but if one Commiſſioner for each Party attends, they may proceed in the Execution of the Commiſſion, and not otherwiſe.

It having been found by common Experience, that Country Commiſſioners were apt to publiſh and divulge all the Evidence taken before them, and this even before the paſſing Publication, and that in ſuch a Manner, as that it could rarely, if ever, be detected, becauſe they uſually diſcloſed it to the Attorney or Solicitor who employed them, and who was always their Friend; and ſince the very Life and Vitals of almoſt every Cauſe, and of every Man's Property, lies in keeping cloſe and ſecret his Evidence, till after the Depoſitions are publiſhed, becauſe after that there is an End of Examin-
* Page 302 * ing unleſs it is to prove Exhibits, which may be done after the Hearing, or by Order *viva voce*, and then they muſt be particularly named in the Order, that the other Side may have Notice what is to be proved; and this can only be to prove the Execution of Deeds, or ſigning Receipts or Acquitances; but a Man cannot have Leave to prove a Will *viva voce* at the Hearing, becauſe the due Execution may come in Queſtion, which cannot be examined at the Hearing *ore tenus*, but ought to have been done before Publication paſſed,

To remedy this Inconvenience, the following Order was made the 9th of *February*, the 8th Year of *Geo.* 1. in Chancery.

Whereas this Court hath been informed, that Commiſſioners and their Clerks attending the Execution of Commiſſions for Examination of Witneſſes in Cauſes depending in this Court, do frequently before Publication is paſſed, and even before the Executing of ſuch Commiſſions, diſcloſe to or inform the Parties, or their Agents, the Contents of the Depoſitions of Witneſſes taken on ſuch Commiſſions, which leads to introduce Perjury, and occaſions tedious and unneceſſary Examinations; for remedying and preventing whereof for the future, the Right Honourable the Lord High Chancellor of *Great Britain*, by and with the Advice and Aſſiſtance of the Right Honourable the Maſter of the Rolls, doth order, that from and after the laſt Day of this preſent *Hilary Term*, where any Commiſſion iſſues for Examination of Witneſſes, all and every the Commiſſioners named in ſuch Commiſſion ſhall, before they act in or be preſent at the Swearing or Examining any Witneſs or Witneſſes upon Interrogatories in ſuch Cauſes, ſeverally take the Oath following: "You ſhall, according to the beſt of

" your Skill and Knowledge, truly, faithfully, and without Partiality to " any or either of the Parties in this Cauſe, take the Examinations and De- " poſitions of all and every Witneſs and Witneſſes produced and examin- " ed by virtue of the Commiſſion hereunto annexed, upon the Interroga- " tories now produced and left with you, and you ſhall not publiſh, diſ- " cloſe, or make known to any Perſon or Perſons whatſoever, except to " the Clerk or Clerks by you employed and ſworn to Secrecy in the Exe- " cution of this Commiſſion, the Contents of all or any of the Depoſitions " of the Witneſſes, or any of them, to be taken by you and the other Com- " miſſioners in the ſaid Commiſſion named, or any of them, by virtue of " the ſaid Commiſſion, until Publication ſhall paſs by Rule or Order of " the High Court of Chancery."——Which ſaid Oath is to be annexed in a Schedule to the ſaid Commiſſion.——And it is further ordered, that all and every the Clerk or Clerks attending the Execution of ſuch Commiſſion, and employed in taking, writing, tranſcribing or ingroſſing the Depoſition or Depoſitions of Witneſſes examined on ſuch Commiſſion, ſhall, before he or they be permitted to act as Clerk or Clerks, as aforeſaid, or be preſent at the Execution of ſuch Commiſſion, ſeverally take the Oath following—, " You ſhall truly and faithfully, and without Partiality to any or " either of the Parties in this Cauſe, take and write down, tranſcribe and " ingroſs the Depoſitions of all and every Witneſs and Witneſſes produced " before and examined by the Commiſſioners, or any of them named in " the Commiſſion hereunto annexed, as far forth as you are directed and " employed by the ſaid Commiſſioners, or any of them, to take, write " down or ingroſs the ſaid Depoſitions, or any of them, and you ſhall not " publiſh, diſcloſe, or make known to any Perſon or Perſons whatſoever, " the Contents of all or any of the Depoſitions of the Witneſſes, or " any of them, to be taken, wrote down, tranſcribed or ingroſſed by " you, or whereto you ſhall have Recourſe, or be any ways privy, un- " til Publication ſhall paſs by Rule or Order of the High Court of Chance- " ry."—Which ſaid Oath is likewiſe to be annexed in the ſame Schedule to the ſaid Commiſſion.—Which Oaths the ſaid Commiſſioners are by ſuch Commiſſions to be impowered jointly and ſeverally to adminiſter to each other, and alſo to the Perſons attending as Clerks to the ſaid Commiſſioners.

*If any Practiſer, or other Perſon, goes about to tamper with or ſuborn any Witneſs, upon Complaint made thereof, and upon Examination of the Matter upon Oath, he muſt ſtand committed. * Page 303

When the Parties have examined, they give a Rule, as they do in the Civil and Canon Law for Publication; and if no Cauſe be ſhewn to the contrary within four Days, the Rule is made abſolute.

When Publication is moved for to be enlarged, it muſt be upon Notice, and upon good Reaſons offered to the Court, and upon Affidavits, ſhewing the Reaſons why the Party could not examine his Witneſſes ſooner; and it is ſeldom or never done where it is to put off the Hearing of the Cauſe.

But where the adverſe Party can ſuffer no Injury, as where the Cauſe is not ſet down, or where the Party is not ſerved to hear Judgment, there the Court will inlarge Publication for aſking for.

And in ſome Caſes they will do it, though the Cauſe is ſet down, and the Party is ſerved to hear Judgment; but this muſt be when it is ſhewn to the Court, that it is not poſſible for the Cauſe to come on very ſoon, and the Court will in this Caſe expect the Party to appear *gratis* to hear Judgment, on ſix Day's Notice to be given to his Clerk in Court, and pray no Day over, and will often oblige him to take no Advantage for Want of Parties at the Hearing; this forwards the Plaintiff; for if Default is made at the Hearing, the Decree cannot be made abſolute till the next ſuc-

ceeding Term; but if the Party who moves to inlarge Publication, will not appear *gratis*, and pray no Day over, he is often denied his Motion, and with great Juſtice, becauſe in that Caſe he intends only Delay, which the Courts always avoid when in their Power.

When Publication is paſſed, and the Depoſitions are copied and delivered out, and either Party has a Mind to examine touching the Credit or Reputation of any of the Witneſſes, the Way is,

They muſt file Objections or Articles, ſo called, in the Examiner's Office; theſe contain in Subſtance the Objections they make to the Reputation of the Witneſs, as in Caſes of Felony, Burglary, Perjury, Forgery, ſtanding in the Pillory, or any other criminal Caſe that would diſable the Party from being a good Witneſs at the Common Law; for the Rule of Evidence is the ſame in Equity as at Law; and if the Party cannot be a good Witneſs at Law, no more can he be in Equity; theſe Articles may be founded upon the Party's leading a lewd Life, or being a common Drunkard or Swearer, or of ill Repute and Character in his Neighbourhood, a common Vagabond, a Man not known, that hath no Abode, or ſuch like; though all theſe latter Objections ſeldom come to any Thing; for notwithſtanding all this, the Man is a legal Witneſs, and the Court will hear his Evidence, and judge of the Probability or Improbability accordingly.

Theſe Articles being filed, and a Certificate from the Examiner they are ſo, the Court, upon Application, by Motion or Petition (or it may be done without) will give Leave to the Party to examine Witneſſes thereon; and the other Party, who is to ſupport the Credit and Reputation of his Witneſs, may examine accordingly *toties quoties*, and their Depoſitions muſt be publiſhed, as in other Caſes; but this is a Caſe which but very rarely happens, and generally ſpeaking it ends in nothing more than putting the Party to an Expence to no Purpoſe.

When the Depoſitions are thus copied and delivered out, and both Parties come to ſee the Interrogatories examined by each Side, if they find them to be leading or impertinent, then it is the proper Time to refer them to a Maſter, for being too leading, impertinent, or ſcandalous; this is done by Motion or Petition of Courſe.

* Page 304

* If the Maſter reports the Interrogatories to be leading, and this Report is not excepted to, then all the Depoſitions taken to theſe Interrogatories muſt ſtand ſuppreſſed, as of Courſe, by Motion or Petition; but if the Report is excepted to, as, on the one Hand, the Court never countenances leading or impertinent Interrogatories; ſo on the other Hand they are not over curious in thoſe Matters, becauſe it may fall out that the Interrogatories be reported leading in the very Vital of the Examination, and on the very Point on which the Cauſe turns; and when this comes to be the Caſe, the Party who referred them hath gained his End; for perhaps he had a very bad Cauſe, if the Depoſitions had ſtood; whereas if they are ſuppreſſed, he hath a very good one, ſince his Adverſary muſt have his Cauſe without any Proof at all, unleſs the Court is pleaſed to grant him another Commiſſion on Payment of Coſts, for his leading Interrogatories, which is ſeldom or never done after the Depoſitions are publiſhed; and 'tis hard, that in Equity a Man ſhould be deprived of a plain Right, through the Slip of another Man's Pen, or the Inadvertency or Unſkilfulneſs of his Counſel's Penning his Interrogatories; and therefore, if 'tis poſſible for the Court to help him, they will, from the manifeſt Inconvenience which muſt attend ſuch a Caſe; indeed, if the Interrogatories are reported to be leading in Points upon which the Jet of the Cauſe does not turn, if the Depoſitions in theſe Points ſhould be ſuppreſſed, and the Party have Evidence enough left without it, there's no hurt done; but if the Merits and very Life turns upon

upon it, he will ſtruggle to the laſt before he will let his Depoſitions be ſuppreſſed.

Therefore, where Interrogatories and the Depoſitions of a Witneſs taken on them had been ſuppreſſed, for that the Interrogatories were leading, and the Court being moved, that a new Set of Interrogatories might be drawn, and ſettled by the Maſter for the Examination of this Witneſs, whoſe Evidence was very material, and yet would be wholly loſt, unleſs the Court would indulge them this Way, and though the Practice was admitted to be always againſt it, and it was urged to be of dangerous Conſequence; yet one Precedent being produced to this Purpoſe; and the Interrogatories, which had been ſuppreſſed, being ſuch as might be drawn by many other Counſel, without any Apprehenſion of their being leading, the Court, to let in the Party to the Benefit of his Witneſs's Teſtimony, ordered Interrogatories to be put in, and ſettled by a Maſter for his Examination over again.

If the Commiſſioners miſbehave themſelves, or if the Commiſſion is executed contrary to Notice given to the Party, or if the Depoſitions returned by Commiſſion are ſo ingroſſed, or ſo interlined, that they are not legible, in thoſe and many other Caſes of the like Nature, there may be good Reaſon to ſuppreſs the Depoſitions; but in this laſt Caſe the Record or Ingroſſment of the Depoſitions is always brought into Court by the proper Officer; the Court takes the Ingroſſment into their Hands; and if it is poſſible to be read, or if it is handed down to the Six Clerk, and he can read it, they will hardly ſuppreſs the Depoſitions, or put the Parties to a new Trouble, or to the Expence of Examining all over again.

When the Depoſitions are copied, they muſt be ſigned by the Examiner or proper Six Clerk; for if either of the Six Clerks, who conſtantly attend the Court every Day of Hearing, ſtands up and ſays, that the Books are not ſigned, they are not to be admitted to be read.

The Civilians had a Manner of examining Witneſſes *(a) in perpetuam rei memoriam*, which was two-fold, either the common Examination, or *in meliori forma*; the common Examination was, when Witneſſes were very old and infirm, or ſick and in Danger of Death, or were going into *other Countries; in this Caſe it was uſual to file a Libel, and without ſtaying for the *Litis Conteſtatio*, the Plaintiff examined his Witneſſes immediately, and gave Notice, if it were poſſible, to the other Side, of the Time and Place of the Examination, that he might come and croſs-examine ſuch Witneſſes if if he thought fit, and theſe Depoſitions ſtood good, in caſe the Witneſs died or went abroad; but the Plaintiff was obliged to *edere actionem* within a Year, otherwiſe theſe Examinations went for nothing; but if the Witneſſes lived, or did not go abroad into other Countries, then they were to be examined *poſt litem conteſtatam.*

(a) In what Caſes a Bill to examine Witneſs *in perpetuam rei memoriam* will now lie, *vide* Vern. 105, 185, 331, 354. 2 Vern. 159. Abr. Eq. 233-4.

* Page 305

The Examination *in perpetuam rei memoriam in Meliori forma* is *Ad tranſumenda Inſtrumenta*; and in this Caſe there muſt be a *Litis conteſtatio* before the Examination, becauſe there is no Need of ſo much in proving of Inſtruments, as there is where the Witneſſes are likely to die, or are going into remote Parts; in theſe Caſes they are not confined to proceed in any Action upon theſe Inſtruments within a Year.

But now the uſual Method is, where one Man brings a Bill againſt another, and hath a moſt material Witneſs to examine, upon Affidavit made, that this Witneſs is in a languiſhing Condition or Danger of dying before he can be examined in Chief, or where the Witneſs is going a long Voyage to *India*, or other remote Parts, from whence he cannot return by the Time he is to be examined in Chief, and to which Place he is bound, and cannot poſſibly ſtay; in either of theſe Caſes, the Court upon Motion or Peti-

tion of either Party will, and never denies to make an Order as of Courſe, for Leave to examine ſuch Witneſs *de bene eſſe*, ſaving juſt Exceptions to the other Side.

If the Witneſs lives till he can be examined in Chief, he muſt be examined over again as other Witneſſes in Chief are; but if he dies in the mean Time, then, upon producing and proving the Regiſter of his Death, the Party for whoſe Benefit he was examined, may apply, by Petition or Motion, for an Order, with Liberty to publiſh his Depoſitions, (it cannot be publiſhed without ſuch an Order); and to the Petition muſt be annexed a Certificate of the Death of the Witneſs, and the Party muſt ſhew that he died before the Time that he could be examined in Chief; and hereupon the Court makes an Order, not only to publiſh his Depoſitions, but to read them as a Witneſs at the Hearing, ſaving Exceptions; and Notice of this Order is always given to the Adverſe Clerk to prevent Surprize, and give him an Opportunity to object thereto, as he ſhall ſee Occaſion.

If the Witneſs beyond Sea be not returned, there muſt be an Affidavit of it, and that the Party had not heard from him of ſuch a Time, nor doth he know whether he is living or dead; and in this Caſe there will be the like Order, as in the Caſe of the Witneſs, who died before he could be examined in Chief.

(F) Of written Evidence, and herein of admitting Exemplifications, or Copies of Records, &c. as Evidence.

Co. Lit. 283. a. THE Word *Evidence*, as has been obſerved, comprehends not only the Teſtimony of Witneſſes, but alſo Matters of Record, as Letters Patent, Fines, Recoveries, Inrolments, and the like, as alſo Writings under Seal, as Charters and Deeds, and other Writings without *Page 306 * Seal, as Court-Rolls, Accounts, &c. and (a) theſe are ſaid to prove themſelves, and to admit of no Averment againſt the Truth of them.

(a) That a Jury may and muſt take Knowledge of any particular Record, either Patent, Statute or Judgment, if it be given in Evidence to them, for that is their *Allegata* verbally alledged and produced, if it make to the Iſſue. Hob. 227. & *vide* Leon. 206. And. 37. Plow. 92. a. 411. Dyer 118. 9 Co. 12. Co. Lit. 227.

Skin. 623. pl. 17. Salk. 281. pl. 9. Alſo a Public Hiſtory or Chronicle may be given in Evidence to prove a Matter relating to the Kingdom in (b) general, becauſe the Nature of the Thing requires it.

(b) So a Year Book may be Evidence to prove the Courſe of the Court. Salk. 281. pl. 9. —— So *Speed's* Chronicle was given in Evidence to prove the Death of *Iſabel*, Queen Dowager to *E.* 2. Skin. 15.

Salk. 281. pl. 9. *Stainer* ver. *Burgeſſes of Droitwich.* Skin. 623. pl. 17. S. C. ſo ruled. But theſe will not be admitted as Evidence to prove a particular Right; and therefore where the Queſtion was, whether by the Cuſtom of *Droitwich* Salt-Pits could be ſunk in any Part of the Town, or in a certain Place only, and on a Trial at Bar, *Camden's Britannia* was offered in Evidence, but refuſed.

But the Books of Heralds are admitted as Evidence to prove Pedigrees, becauſe the Nature of the Thing will not admit of better Evidence; alſo this is their proper Buſineſs, and about which they are converſant, and therefore deſerve the more Credit.

But for this *vide* 2 Rol. Abbr. 686. Yelv. 34. 2 Jon. 164. 224.

Salk. 281. pl. 9. Comb. 63. and Skin. 623. pl. 17. where it is ſaid, that, from the negligent Manner of keeping them, they deſerve but little Credit. *

* This is certainly true, yet there are Exceptions, as a Viſitation made by Heralds, entered in their Books, and kept in their Office, has been admitted Evidence of a Pedigree. *Pitton* v. *Walter*. H. 5 G. Stra. 162.——So the minute Book of a former Viſitation, ſigned by the Heads of the ſeveral Families, and found in a private Library (Lord *Oxford's*) *Ibid.*

An (*c*) Almanack is ſufficient Evidence to prove a Day Sunday, &c.

Cro. Eliz 227. Leon. 242.

S. C. and S. P. 8id. 300. 6 Mod. 41. S. P. See Ld. Raym. 4, 281. 2 Ld. Raym. 870, 1544, 1556.

(*c*) That the Almanack to go by is that annexed to the Common Prayer-Book. 6 Mod. 81.

So an Almanack, in which the Father wrote the Nativity of his Son, was admitted and allowed to be ſtrong Evidence at a Trial at Bar, to prove the Nonage of the Son.

Raym. 84. *Herbert* and *Tuckal.*

So Pariſh-Books and Regiſters are good Evidence to prove Births and Marriages.

Cro. Eliz. 411. Moor 451.

So Books belonging to a Publick Company are good Evidence; and therefore a Party concerned in Intereſt may, on Motion, have Copies of them to be made Uſe of as Evidence; for, being Tranſactions of a publick Nature, the Publick is concerned in them.

7 Mod. 129. Ld. Raym. 744. *Gery* and *Hopkins*, on a Motion for Copies of the Books of the *Eaſt-India* Company, & *vide* 5 Mod. 395. Ld. Raym. 337.

If Land be pleaded to be Parcel of a Manor in Ancient Demeſne, and Iſſue be, if the Manor be Antient Demeſne, or not, it ſhall be tried by Domeſday-Book; and in this Caſe it is ſaid, that Domeſday-Book is not an Evidence of the Thing, but it is the Trial, from which the Court cannot vary.

9 Co. 31. & *vide* Tit. *Antient Demeſne* Letter (A)

By the 7 *Jac.* 1. *cap.* 12. reciting, That whereas divers Men of Trades and Handicraftſmen, keeping Shop-Books, do demand Debts of their Cuſtomers upon their Shop-Books, long Time after the ſame hath been due, and when, as they ſuppoſed, the Particulars and Certainty of the Wares delivered to be forgotten, then either they themſelves, or their Servants, have inſerted into their ſaid Shop-Books divers other Wares ſuppoſed to be delivered to the ſame Parties, or to their Uſe, which in Truth never were delivered; and this of Purpoſe to increaſe, by ſuch undue Means, the ſaid Debt; and whereas divers of the ſaid Tradeſmen and Handicraftſmen, having received all the juſt Debt due upon their ſaid Shop-Books, do oftentimes leave the ſame Books uncroſſed, or any Way diſcharged, ſo as the Debtors, their Executors or Adminiſtrators are often by Suit of Law enforced to pay the ſame Debts again to the * Party that truſted the ſaid Wares, or to his Executors or Adminiſtrators, unleſs he or they can produce ſufficient Proofs by Writing or Witneſſes of the ſaid Payment, that may countervail the Credit of the ſaid Shop-Books, which few or none can do in any long Time after the ſaid Payment; it is therefore enacted, " That no Tradeſman or Handicraftſman keeping (*a*) a Shop-" Book as aforeſaid, his or their Executors or Adminiſtrators, ſhall be al-" lowed, admitted, or received to give his Shop-Book in Evidence in any " Action for any Money due for Wares hereafter to be delivered, or for

* Page 307

(*a*) In an Action by a Brewer, his Manner of Dealing was

" Work hereafter to be done, (*b*) above one Year before the ſame Action " brought, except he or they, their Executors or Adminiſtrators, ſhall have " obtained or gotten a Bill of Debt or Obligation of the Debtor for the ſaid " Debt, or ſhall have brought or purſued againſt the ſaid Debtor, his Exe- " cutors or Adminiſtrators, ſome Action for the ſaid Debt, Wares, or Work " done, within one Year next after the ſame Wares delivered, Money due " for Wares delivered, or Work done."

proved to be, that the Draymen came every Night to the Clerk of the Brewhouſe, and gave him an Account of the Beer they had delivered out, which he ſet down in a Book kept for that Purpoſe, to which the Draymen ſet their Hands, and that the Drayman was dead; but that this was his Hand which was ſet to the Book; and this was held good Evidence of a Delivery; otherwiſe of the Shop-Book itſelf ſingly, without more. Salk. 285. pl. 18. 2 Ld Raym. 873. 6 Mod. 264. *Price* verſus *The Earl of Torrington.*——So in an *Indebitatus Aſſumpſit* on a Taylor's Bill, a Shop-Book was allowed for Evidence, it being proved that the Servant who wrote the Book was dead, and that this was his Hand, and he accuſtomed to make the Entries therein. 2 Salk. 690. *Pitman* and *Madox*, ruled by *Holt* Ch. Juſt. (*b*) Though the Statute ſays, a Shop-Book ſhall not be Evidence after the Year; yet this does not make it Evidence of itſelf, within the Year. 2 Salk. 690. pl. 2.

" Provided that this Act ſhall not extend to any Intercourſe of Traffick, " Merchandizing, Buying, Selling, or other Trading or Dealing for Wares " delivered, or to be delivered, Money due, or Work done, or to be done, " between Merchant and Merchant, Merchant and Tradeſman, or between " Tradeſman and Tradeſman, for any Thing directly falling within the " Circuit or Compaſs of their *mutual* Trades and Merchandize; but that " for ſuch Things only they and every of them ſhall be in Caſe as if this " Act had never been made; any Thing herein contained to the contrary " thereof notwithſtanding."

Hob. 213. Lord *Abigney* ver. *Clifton.* Godb. 199. S. P. but 2 Rol. Abr. 686. ſeems contrary.

On a Conteſt in Chancery concerning a Promiſe made by the Lord *Abigney*, to ſettle Lands on the Lord *Clifton* and his Lady, who was the Daughter of the Lord *Abigney*; the King's Certificate under his Sign Manual, ſignifying the Purport of the ſaid Promiſe, was held ſufficient Evidence of it.

10 Co. 92. a. b.

Regularly he who pleads a Deed, or would take any Benefit by it, muſt produce the Deed itſelf; and this, my Lord *Coke* ſays, is for two Purpoſes: 1*ſt*, That it may appear to the Court, what the Operation of the Deed is, and that it be not on Condition, Limitation, or containing a Power of Revocation, and of this the Judges are to judge. 2. That it may appear to have been legally executed, and (*c*) without any Raſures, Interlineation, or other Imperfections; and of this the Jury are to determine.

(*c*) Anciently the Court on View judged the Deed void, if raſed or interlined in Places material; but now it is left to be tried by a Jury, whether it were done before Delivery. Co. Lit. 225. a.

10 Co. 92. * Page 308

But though it be regularly true, that the Deed itſelf muſt be produced, yet in Caſes of extreme Neceſſity, as where the Deed is (*d*) burnt, *&c.* * the Court will admit a (*e*) Copy of it to be given in Evidence, (*f*) or will admit it to be proved by Witneſſes.

(*d*) As where a Deed was burnt by a Fire in the *Temple*, and a Copy taken by one *Gardner* of the *Temple* was allowed to be read as Evidence, although he ſaid he did not examine it by the Original; but that he writ it, and that it always lay by him as a true Copy. Mod. 4. 2 Keb. 546. 3 Keb. 1, 2, 477. 5 Mod. 211, 386. 2 Vern. 471, 591, 603. Eq. Ca. Abr. 228. Stra. 401, 526. *& vide* Hard. 323. (*e*) But a Copy or Counterpart of a Deed is not ſufficient without other Circumſtances, unleſs in caſe of a Fire, in which Caſe a Counterpart is good Evidence of itſelf. Salk. 287. 6 Mod. 225. See Ld. Raym. 154, 746, 1292, 1371. 2 Vern. 471, 591, 603. Pre. Ch. 59, 64, 116. 10 Mod. 8. 2 Stra. 1122. (*f*) Where the Deed was cancelled by Fraud, by the Perſon in whoſe Cuſtody it was; and this being proved, it was allowed as Evidence. Hetl. 138.—Where the Seals were torn off by a little Boy, and admitted in Evidence. Palm. 402

Alſo

Alſo a Copy of a Record, ſworn to be a true one, may be given in Evidence to a Jury, for theſe are Matters of ſo high a Nature, that they can be no otherwiſe proved but by themſelves; and no Razure or Interlineation ſhall be preſumed to be in them; but my Lord *Coke* ſays, that the ſureſt Way is to have them (*a*) exemplified under the Great Seal, or at leaſt under the Seal of the Court. ‡ 10 Co. 92-3.

(*a*) That by the Statutes of 3 E. 6. c. 4. and 13 Eliz. c. 6. Letters Patent may be exemplified as well as Records of a public Nature; but for this *vide* 5 Co. 52. *Page*'s Caſe. Co. Lit. 225. 2 Inſt. 282. 8 Co. 8. a. Hard. 118.

‡ An Office Copy on Stamps duly examined in Evidence. The Witneſs ſhould read the Copy whilſt the Original is read to him, and then the Original, whilſt the Copy is read to him.

If one pleaded to be diſcharged of Tithes by the Pope's Bull or Compoſition, a Copy of ſuch Bull or Compoſition was not allowed as Evidence, without ſhewing the Bull or Compoſition itſelf. Winch 70. *Bret* and *Ward*.

It was formerly (*b*) doubted, whether a Copy from an Inrolment of a Deed, which was inrolled for ſafe Cuſtody, was ſufficient Evidence of ſuch a Deed, for being recorded for ſafe Cuſtody only, it could not be ſaid to be of ſo authentic a Nature, as a Bargain and Sale inrolled purſuant to the Statute, which makes ſuch Inrolment a Record; ſo that a Copy of it is good Evidence, without Witneſſes, of the Sealing and Delivery; but it ſeems now (*c*) agreed, that the Inrolment of every ſuch Deed is good Evidence, without particular Circumſtances to ſupport it, as proving that the original Deed was in the Defendant's Cuſtody or Power, or accidentally loſt, &c. for the Acknowledgment of the Party in a Court of Record eſtops him from ſaying, that it was not his Deed, or that it was not duly ſealed and delivered.

(*b*) 2 Vern. 471, 591.

(*c*) 1 Vent. 296-7. Where the Inrolment was of a Grant of an Office, and a Copy allowed to be given in Evidence. Salk. 280. pl. 7. Where a Bargain and Sale inrolled of a Term for Years, a Copy of it was given in Evidence. 3 Lev. 387. S. P.

Hence it follows, that a Copy of a Record, or other authentic Writing ſworn to be true, may be good Evidence, but a Copy of a Copy can in no Caſe be admitted as Evidence, becauſe ſtill more liable to the Errors and Miſtakes of the Tranſcriber; alſo if the Copy of a Copy were to be admitted, ſo a Copy of ſuch Copy, &c. which in the End muſt occaſion the utmoſt Uncertainty. Skin. 174. pl. 3. & *vide* Skin. 584. *per Holt* Ch. Juſt. in all Caſes where the Original is Evidence, the Copy is Evidence; but if the Original is but a Copy, there a Copy of ſuch Original cannot be read.

402.—That a Copy of a Deed ſhewn to a Counſel for Opinion, is not ſufficient Evidence of the Deed. Mod. 94. Skin. 205. pl. 2. S. P. See 10 Mod. 42, 74, 108, 126. 292, 518. Ld. Raym. 735. 2 Vern. 471, 591, 603.—Where one of the Parties has a Deed in his Cuſtody, and refuſes to produce it, the Counterpart may be given in Evidence, Keb. 12. Mod. 266. Vern. 408, 452. 2 Vern. 380. How far the Recital of a Deed is Evidence thereof, *vide* 6 Mod. 44. Keb. 12.—An ancient † Deed is good Evidence, without Proving, or Seal on it. Keb. 877.—An original Leaſe could not be produced, being an ancient Leaſe; but the Grandſon of the Leſſor produced a Counterpart found among the Evidences of his Grandfather; this was allowed for Evidence, though there were no ſubſcribing Witneſſes to it; and Juſtice *Wyndham* ſaid, he had ſeen many Deeds in Queen *Elizabeth*'s Time, without any. Lev. 25.—Where, on Motion, a Rule of Court was made by Conſent, that a Deed ſhould be given in Evidence, without proving the Execution of it. Sid. 269. ‖

† Forty Years old. Com. Dig. 3 V. 282. (B. 2.)

‖ Modern Deeds are often given in Evidence by Conſent, without Rule of Court, to ſave the Expence of Witneſſes.———See farther with reſpect to Deeds, and the Recital of them, &c. Com. Dig. 2 V. 282, 283.

Skin. 431. ſo ruled in a Trial at Bar in *Andrew Newport*'s Caſe.

On this Rule it was objected to a Copy of the Book at *Doctors Commons*, which was produced in Evidence to prove ſuch a one to be Executor, that it was no Evidence, becauſe it was but a Copy of a Copy, and the Book itſelf ought to be produced, or the Will with the Probate, or a Copy of the Probate; but it was held, that it being a Will of Goods, * the Act of the Court is the Original, and the Will is proved (*a*) by the Act of the Court, before that it is under the Seal, with the Probate; and ſo a Copy of the Act of the Court is ſufficient; but (*b*) if it was a Will for Lands, there a Copy would not be ſufficient, but they ought to have the Entry and Book itſelf.

* Page 309

(*a*) So where the Book of Entring the Acts of the Court of Prerogative was produced and held good Evidence of Adminiſtration granted to the Party; for the Court held, that it is the Act of the Court that makes a Man Adminiſtrator, and not the Letters of Adminiſtration with the Seal of the Court. Lev. 101. Keb. 509. S. C. (*b*) That a Will exemplified under the Great Seal is not Evidence to a Jury in Ejectment. Comb. 46.—[The original Will ought always to be produced, in Queſtions relative to *Lands* deviſed.]

(G) Whether Parol Evidence is to be admitted to explain what appears on the Face of a Deed or Will.

5 Co. 68. a b. 8 Co. 155. a. Keilw. 49.

IT ſeems to have been agreed as a General Rule, even before (*c*) the Statute of Frauds and Perjuries, that no Parol Evidence could be admitted to controul what appeared on the Face of (*d*) a Deed or Will, not only from the Danger of Perjury, but from a (*e*) Preſumption, that whatever the Parties at that Time had in Contemplation, was all reduced into Writing.

(*c*) For this *vide* Tit. *Agreements*.

(*d*) As to Records it ſeems a general Rule, that nothing can be admitted, though ſworn by Witneſſes of the beſt Credit, that contradicts them; for being Things of the greateſt Credit, they can only be queſtioned by Matters of equal Notoriety with themſelves. Rol. Abr. 757. (*e*) *Vide* Vern. 369.

2 Vern. 98, 337, 625.

But this Rule has received a Relaxation, eſpecially in the Courts of Equity, where a Diſtinction has been taken between Evidence, that may be offered to a Jury, and to inform the Conſcience of the Court, *viz.* that in the firſt Caſe no ſuch Evidence ſhould be admitted, becauſe the Jury might be inveigled thereby; but that in the ſecond it could do no Hurt, becauſe the Court were Judges of the whole Matter, and could diſtinguiſh what Weight and Streſs ought to be laid on ſuch Evidence.

5 Co. 68. Lord *Cheyney*'s Caſe.

Alſo to aſcertain a Fact, Parol Evidence hath been admitted to explain the Intent of the Teſtator; as where the Teſtator had two Sons both named *John*, and he deviſed Lands to his Son *John*; here Parol Evidence was admitted, to ſhew which of his Sons he meant; and it being proved, that one of his Sons of that Name had been abſent ſeveral Years beyond Sea, and that the Teſtator apprehended that he was dead, the Deviſe was held good, and that the other ſhould take; for without ſuch Evidence the Will muſt be void

Vern. 366.

It has been held, that if *A.* purchaſes Lands in the Name of *B.* that *A.* may be admittd to prove, that he paid the Purchaſe Money, and ſo make it a reſulting Truſt, or Truſt by Implication of Law for himſelf.

2 Vern. 547. *Hill* and *Wiget*.

An Entry in the Steward's Book, and Parol Proof by the Foreman of a Jury was admitted as good Evidence, to ſhew that a Feme Covert ſurrendered

dered her whole Eſtate, altho' the Surrender upon the Roll, and the Admiſſion thereon was but of a Moiety.

Alſo to ouſt an Implication, and rebut an Equity, Parol Evidence has been admitted to explain the Intention of the Teſtator; as where a Man deviſes particular Legacies to his Executors, and makes no Diſpoſition of the Surplus of his Eſtate; in this Caſe, according to the Notions of the Courts of Equity, the Executors ſhall be only Truſtees for the next of * Kin; but to rebut this Equity which ariſes by Implication only, the Executors have been allowed to prove by Parol Evidence, that the Teſtator deſigned them the Surplus.

To this Purpoſe are the Caſes in Vern. 473. *Foſter* and *Munt*. * Page 310 Chan Ca. 19. b. *Crompton* and *North*. 2 Vern. 99. *Batchelor* and *Pring* and *Pring*. 2 Vern. 648. Lady *Granville* and Dutcheſs of *Beaufort*. 2 Vern. 736. *Searl*, and ſeveral other Caſes, which *vide* in Abr. Eq. 230. and 243.

So where the Earl of *Gainſborough* made his Will, and thereby deviſed ſeveral Legacies, and charged his Real Eſtate with the Payment of them and his Debts, and deviſed his Eſtate, ſo charged, to the Defendant, his Nephew, and made the Plaintiff, his Wife, Executrix; and the Bill was brought to have the Perſonal Eſtate diſcharged from the Debts and Legacies, ſuggeſting that the Creditors threatened to come upon and exhauſt the Perſonal Eſtate; and that it was the Intent of the Teſtator, that ſhe ſhould have the Perſonal Eſtate clear to herſelf, and that the Directions for making the Will were ſo; but that, either by the Miſtake or Contrivance of the Perſon who drew the Will, it was not ſo expreſſed; and on Demurrer, becauſe no ſuch Averment could be admitted againſt a Will in Writing, the Demurrer was over-ruled; and it was held by *Rawlinſon* and *Hutchins*, that though ſuch an Averment could not be admitted where it was to make the Party a Title; yet where it was only to rebut an Equity, as in this Caſe, it might.

2 Vern. 252. Counteſs and Earl of *Gainsborough*. Abr. Eq. 230. S. C. and affirmed in the Houſe of Lords.

So where *J. S.* deviſed all his Houſhold Goods, as Woollen, Linen, Pewter and Braſs whatſoever, except a Trunk under the Chamber-Window; and the Queſtion was, Whether the Parol Proof of the Perſon who drew the Will ſhould be admitted to explain theſe Words; and my Lord Keeper thought it might, notwithſtanding the Statute of Frauds and Perjuries; for here it neither adds to nor alters the Will, but only explains which of the Meanings ſhall be taken; as in Caſe of a Deviſe to Son *John*, when the Teſtator had two of the ſame Name; and here the Word *as* may be a Reſtriction, or if the following be as particular Inſtances, it may not reſtrain the Word *whatſoever*, and he thought the Words imported to carry all the Houſhold Goods; and of that Opinion was the Maſter of the Rolls; and the Proof was read accordingly.

Abr. Eq. 230, 231. Mich. 1705. *Pendleton* and *Grant*. 2 Vern. 517,

So where one not of Kin, but a Stranger, was made Executor, and had conſiderable Legacies given him, although it was decreed by Sir *Peter King*, in the Mayor's Court, in Favour of the Teſtator's Brothers, that the Surplus ſhould be diſtributed; yet, upon Appeal to the Houſe of Peers, that Decree was reverſed, not barely as it ſtood upon the Will, but that Parol Proof ought to be received in Favour of the Executor's Title, conſiſtent with the Will; and the Proof being full as to the Teſtator's frequent Declarations, that his Executor, though a Stranger, ſhould have the Surplus, it was decreed accordingly.

Abr. Eq. 245. *Littlebury* and *Buckley*, affirmed in the Houſe of Lords.

But notwithſtanding theſe Caſes, the Courts have been very unwilling to admit of Parol Evidence in Relation to any Thing that appears on the Face of a Will; and it is certain that too much Caution cannot well be uſed in this Particular, eſpecially when it is conſidered that the Statute of Frauds and Perjuries, which was made to prevent Perjury, Contrariety of Evidence and Uncertainty, binds the Courts of Equity as well as the Common Law Courts; as alſo that little Regard ought in many Caſes to be had

Vide 2 Vern. 98, 337, 625, and Salk. 234. pl. 13. 2 Ld. Raym. 831. where in the Caſe of *Cole* and *Rawlinſon*, it is laid

down by my Lord Chief Juſtice *Holt*, That the Teſtator's Intent muſt be collected

to the Expreſſions of the Teſtator, either before or after the making his Will, becauſe poſſibly theſe Expreſſions might be uſed by him, on Purpoſe to controul or diſguiſe what he was doing, or to keep the Family quiet, or for other ſecret Motives and Inducements which cannot after his Death be found out.

from the Words of the Will, and not from his Circumſtances, or any Matters *debors*, and that to ravel into the Affairs of the Teſtator, would render Property precarious, and introduce Uncertainty and Confuſion in the Law itſelf.

* Page 311

Caſ. *Temp.* Talb. 240. See 2 Stra. 1261. *Selwin* and *Brown*, 21 *March* 1734, *in Domo Procerum*. *Note*, This Cauſe was firſt heard before his Honour, the Maſter of the Rolls, who admitted the Parol Evidence, and on the Strength thereof decreed, that the 3000*l.* ſhould not be taken as Part of the Surplus of the Teſtator's Perſonal Eſtate; but that it was extinguiſhed for the Benefit

* Hence in a late Caſe in the Houſe of Lords, where the Teſtator deviſed ſeveral Legacies, and amongſt the Reſt gave conſiderable Legacies to his two Executors, to whom alſo he deviſed the Surplus of his Eſtate; and there being a Debt of 3000*l.* due by Bond to the Teſtator from one of the Executors, he inſiſted, that, there being ſufficient Aſſets to ſatisfy all the Legacies, this 3000*l.* ſhould not be brought into the Surplus of the Teſtator's Eſtate, but that the ſame was extinguiſhed for his Benefit, by his being made Co-Executor; and that though the Surplus of the Eſtate was deviſed to them both, yet that this Debt could not be taken to be Part of that Surplus, being before extinguiſhed; and, by the Evidence of the Perſon who drew the Will, fully proved, that this was the Teſtator's Intention; which Evidence, it was urged, ought to be admitted, being only to rebut an Equity, and ouſt an Implication of Law ariſing from the Notions of the Courts of Equity, which revives the Debt in theſe Caſes, and gives equal Benefit to both the Executors; but the Lords refuſed going into this Parol Evidence, and decreed that the 3000*l.* ſhould be taken as Part of the Surplus of the Teſtator's Perſonal Eſtate, which both the Executors were equally intitled unto; for though in ſome Books the Teſtator's making a Debtor Executor is ſaid to be an Extinguiſhment of the Debt, becauſe an Executor cannot ſue himſelf; yet it was never doubted, but that ſuch a Debt remained Aſſets to ſatisfy other Creditors; alſo it has been (*a*) reſolved to be Aſſets to ſatisfy Legacies; and this Deviſe of the Surplus and Reſidue of the Teſtator's Eſtate being as much a Legacy, and as well recoverable in the Spiritual Court as any particular Legacy, it was but fitting, that ſince the Courts of Equity claim now a concurrent Juriſdiction with the Eccleſiaſtical Courts in Matters of this Nature, that there ſhould be the ſame Meaſure of Juſtice in both theſe Courts.

of the Obligee, and accordingly ordered the Bond to be cancelled; but this Decree was reverſed by my Lord Chancellor, though he admitted the Parol Proof to be read, as not thinking the Teſtimony of a ſingle Witneſs, according to the Circumſtances of this Caſe, ſufficient to controul what appeared on the Face of the Will. (*a*) For this *vide* Yelv. 160. Plow. 186. a. Co. Lit. 264. 8 Co. 136. a. Cro. Eliz. 373. Hob. 10. Leon. 320.

(H) Of Preſumptive Proof.

Co. Lit. 6.

MY Lord *Coke* diſtinguiſhes Preſumptive Proof, by which he ſays Juries are often induced into, 1. Violent Preſumption, which amounts to *plena Probatio*; as if one be ſtabbed in a Houſe, and a Man is ſeen running out of it with a Knife bloody, and none elſe in the Houſe. 2. *Præſumptio Probabilis*, which moves a little. 3. *Præſumptio Levis*, which moves not at all.

Co. Lit. 6. (*b*) Where from their

Alſo in caſe of a Feoffment, if all the Witneſſes to the Deed are dead, then a continual and quiet Poſſeſſion for any (*b*) Length of Time will make a ſtrong

a ſtrong or violent Preſumption, which ſtands for Proof; and here the Rule is, that *ex diuturnitate Temporis omnia præſumuntur ſolemniter eſſe acta*; alſo the Deed may receive Credit by comparing the Seals, the Hand-writing, and other Circumſtances, all which muſt be left to the Jury.

Antiquity Things receive a Credit. Mod. 117. Lev. 25. & *vide* Palm. 427.

Perſons once in Being ſhall be intended ſtill living, if the contrary is not proved.†

2 Rol. Rep. 461.

† Therefore in Ejectments, &c. great Caution is required in making out a Pedigree, &c. not to prove the Birth of any Perſon, through whom the Title is not deduced, and who might be Heir, &c. if living; and to be prepared with Proof of the Death of ſuch Perſon, if ſet up by the adverſe Party.

But now by the 19 *Car.* 2. *cap.* 6. it is enacted, "That if any Perſon "or Perſons, for whoſe Life or Lives, Eſtates have been, or ſhall be "granted, ſhall remain beyond the Seas, or elſewhere abſent themſelves in "this Realm, by the Space of ſeven Years together, and no ſufficient and "evident Proof made of the Life or Lives of ſuch Perſon or Perſons re-"ſpectively, in any Action commenced for the Recovery of ſuch Tene-"ments by the Leſſors or Reverſioners; in every ſuch Caſe the Perſon or "Perſons, upon whoſe Life or Lives ſuch Eſtate depended, ſhall be ac-"counted as naturally dead; and in every Action brought for the Reco-"very of the ſaid Tenements by the Leſſors or Reverſioners, their Heirs "or Aſſigns, the Judges, before whom ſuch Action ſhall be brought, ſhall "direct the Jury to give their Verdict, as if the Perſon ſo remaining be-"yond the Seas, or otherwiſe abſenting himſelf, were dead."

* Page 312 For the Conſtruction hereof *vide* Carth. 246. & *vide* alſo the 6 *Ann.* c. 18.

By the 21 *Jac.* 1. *cap.* 27. it is enacted, "That if any Woman be de-"livered of any Iſſue, which being born alive ſhould, by the Laws of this "Realm, be a Baſtard, and endeavour privately, either by Drowning or "ſecret Burying, or any other Way, either by herſelf or the Procuring of "others, ſo to (*a*) conceal the Death thereof, as that it may not come to "Light, whether it were born alive, or not, but be concealed; in every "(*b*) ſuch Caſe the Mother ſo offending ſhall ſuffer Death, as in caſe of "Murther, unleſs ſhe can prove, by one Witneſs at leaſt, that ſuch Child "was born dead."

Gilb. Evid. 271. H. P C. 266. 2 H. H. P. C. 288. Law of Evid. 278. pl. 41.

(*a*) If the Woman appear to have endeavoured to conceal the Death of ſuch Child, there is no Need of any Proof, that it was born alive, or that there were any Signs of Hurt, for it ſhall be taken undeniably, that the Child was born alive, and murdered. Kelynge 32. ——But where a Woman lay in a Chamber by herſelf, and went to Bed without Pain, and waked in the Night, and knocked for Help, but could get none, and was delivered of a Child, and put it in a Trunk, and did not diſcover it till the Night following, ſhe was adjudged not to be within the Statute, becauſe ſhe knocked for Help. Kelynge 32. Neither is a Woman within the Statute, who, having confeſſed herſelf with Child before-hand, is afterwards ſurprized and delivered, no Body being with her; and therefore in theſe Caſes it muſt appear by Signs of Hurt, or ſome other Way, that the Child was born alive. Kelynge 33. 2 Hawk. P. C. 438. (*b*) But there is no Need, in order to convict a Woman by Force of this Statute, to draw the Indictment ſpecially, or to conclude it *contra formam Statuti*; but it is the better Way to ſet forth, that the Defendant *Infantem Maſculum Vivum parturiit, qui quidem infans Maſculus adtunc & ibidem Vivus exiſtens natus per leges hujus Regni Angliæ ſpurius fuit, Anglice* a Baſtard, and then to go on in the ordinary Form, to ſhew that ſhe murdered him, &c. *contra pacem*, &c. for the Statute doth not make a new Offence, but only makes ſuch a Concealment an undeniable Evidence of Murder. Kelynge 32. 2 Hawk. P. C. 438. The Editor recommends to the Reader the humane and judicious Obſervations of a modern elegant Writer on this Law. See *Obſerv. on the Statutes* 424, 425. 2d. Edit.

Evidence.

(I) Where the Law requires the higheſt Proof the Nature of the Thing is capable of.

Show. Rep. 397. Carth. 220. Holt. 284. pl. 4.

IT ſeems in regard to Evidence to be an inconteſtible Rule, that the Party, who is to prove any Fact, muſt do it by the higheſt Evidence the Nature of the Thing is capable of.

Salk. 281. pl. 9.

As where the Queſtion was, whether the Abbey *de Sentibus* was an inferior Abbey, or not, *Dugdale's Monaſticon Anglicanum* being produced for Evidence was refuſed, becauſe the original Records might be had in the Augmentation-Office.

2 Show. Rep. 163. pl. 152.

So if a Witneſs be to teſtify what another ſwore on a former Trial, the Record † of ſuch Trial muſt be produced, or his Evidence is not to be admitted, *&c.*

† *i. e.* An Office-Copy, as Records ought not to be removed, that every one may know where to find them when wanting, and Proof of a Record may be wanting at ſeveral far diſtant Places, at the ſame Time.

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* Page 313

* (K) Of hearſay Evidence.

Mod. 383. Skin. 402. pl. 37.

IT ſeems agreed, that what another has been heard to ſay is no Evidence, becauſe the Party was not on Oath; alſo, becauſe the Party, who is affected thereby, had not an Opportunity of croſs-examining; but ſuch Speeches or Diſcourſes may be made uſe of by way of Inducement or Illuſtration of what is properly Evidence.

2 Hawk. P. C. 431.

Alſo what a Witneſs hath been heard to ſay at another Time, may be given in Evidence, in order either to invalidate or confirm the Teſtimony he gives in Court.

2 Hawk. P. C. 431.

So what a Perſon accuſed of a Crime hath been heard to ſay at another Time, may be given in Evidence at his Trial, either for him or againſt him.

(L) Of the Patry's Confeſſion.

But for this *vide* 2 Hawk. P. C. 429.

THE Confeſſion of the Defendant himſelf, whether taken on an Examination before Juſtices of the Peace, in Purſuance of 1 & 2 *P. & M. cap.* 13. or of 2 & 3 *P. & M. cap.* 10. upon a Bailment or Commitment for Felony, or taken by the Common Law on an Examination before a Magiſtrate for Treaſon or other Crime, or ſpoken in private Diſcourſe, has always been allowed to be given in Evidence againſt the Party, but not againſt others.

But wherever a Man's Confeſſion is made uſe of againſt him, it muſt be taken all together, and not by Parcels. *

* Qu. If ſuch Confeſſion can be uſed, if extorted by Threats, or obtained by Promiſe of Favor?

(M) Of Similitude of Hands.

IT is obſervable (a) that this, with other Circumſtances in (b) *Algernon Sidney*'s Caſe, was ruled to be good Evidence of his having written a Paper charged againſt him as an Overt-act of High Treaſon: Yet in the Trial of the (c) ſeven Biſhops, the Court was divided in Opinion, whether Similitude of Hands was Evidence of the Defendants having ſigned the Paper charged againſt them as a Libel, and the Parliament having declared an Opinion in the (d) Reverſal of *Algernon Sidney's* Attainder, that Compariſon of Hands is no Evidence of a Man's Hand-writing in criminal Caſes: It ſeems to have been generally holden (e) ſince that Time, that it is not Evidence in any criminal Caſe, whether capital or not capital.

(a) 2 Hawk. P. C. 431. ſect. 15.
(b) 3 Stat. Tri. 213, 216, 217, 226, 230.
(c) 3 Stat. Tri. 762 to 767.
(d) 1 W. & M. *cap.* 7. of private Acts.
(e) See 3 Stat. Tri. 892, 893. 4 Vol. 271, 272. and *Francia*'s Trial. Compariſon of Hands was held not to be good Evidence in Treaſon, unleſs the Papers were found in the Cuſtody of the Perſon himſelf, and not of another. Skin. 579. 12 Mod. 72. Ld. Raym. 40. S. C. and *per Curiam*, it is not ſufficient for the original Foundation of an Attainder, but may be well uſed as circumſtantial Evidence, if the Fact be otherwiſe proved, as in my Lord *Preſton*'s Caſe, his attempting to go with ſeveral treaſonable Papers into *France*, and principally where they were found on his Perſon; but here, ſince they were found elſewhere, to convict on a Similitude of Hands, was to run into the Error of Colonel *Sidney*'s Caſe. 12 Mod. 72.

* (N) Whether the Depoſitions of Witneſſes in another Cauſe may be given in Evidence.

* Page 314

DEpoſitions cannot be given in Evidence againſt any Perſon who was not Party to the Suit; (f) and the Reaſon is, becauſe he had not Liberty to croſs-examine the Witneſſes; and it is againſt natural Juſtice that a Man ſhould be concluded in a Cauſe to which he never was a Party.

Hardr. 22, 472. Bunb. 50. pl. 84. 91. pl. 148, 321. pl. 403.

9 Mod. 229. Carth. 181. Gilb. Evid. 62. Prec. Ch. 212. Theo. Evid. 30. 12 Vin. Abr. 113. pl. 45, 47. Vern. 413. pl. 390. Eq. Caſ. Abr. 227. pl. 3. Atk. Rep. 204. (f) But if a Witneſs is examined in Chancery, you may read, without an Order, any other Depoſitions of the ſame Perſon, in the Spiritual Court, or elſewhere, in any other Cauſe, ſo as you make uſe of them only to confront the Evidence he then gives. Anon. Moſely 118, 188.

Excommunication.

Co. Lit. 133. Godolp. Repert. 624.

EXcommunication is the higheſt Eccleſiaſtical Cenſure which can be pronounced by a Spiritual Judge againſt a Chriſtian, for thereby he is (*a*) excluded from the Body of the Church, and diſabled to bring any Action, or ſue any Perſon in the Common Law Courts.

(*a*) By the 31ſt of the Articles of the Church of *England*, that Perſon, which by open Denunciation of the Church is rightly cut off from the Unity of the Church, and excommunicated, ought to be taken by the whole Multitude of the Faithful as an Heathen and Publican, until he be openly reconciled by Penance, and received into the Church by a Judge that hath Authority thereunto. Gib. Cod. 1095-6.——It was uſed by way of Puniſhment only for greatand heinous Crimes, according to the Rule in the *Reformatio Legum*, *fol.* 80. *Non debet excommunicatio Minutis in delictis verſari, ſed ad horribilium Criminum atrocitatem admovenda eſt, in quibus Eccleſia graviſſimam infamiam ſuſtinet, vel quod illis evertatur Religio, vel quod boni mores pervertuntur.* But now the frequent Uſe of Excommunication is in Caſes of Contumacy, for not appearing or diſobeying of Sentences, though in the ſmalleſt Matters, and thoſe oft-times of a Civil Nature, which is one of the principal Means of bringing a Contempt upon it, and yet is the only Way which the Spiritual Court hath to enforce Obedience. Gib. Cod. 1095.

Co. Lit. 134.

Excommunication is divided into the Greater and Leſſer; the Greater excludes a Man from the Communion of the Faithful as well as of the Sacraments; the Leſſer excludes a Man from the Communion of the Sacraments only; but they both equally diſable the Perſon from bringing any Action, *&c.*

Under this Head we ſhall conſider,

(A) In what Caſes the Spiritual Court may properly excommunicate. 315.

(B) In what Caſes a Perſon ſhall be ſaid to be ipſo facto excommunicated. 316.

(C) By whom Excommunication is to be pronounced and certified. 318.

(D) What Inconveniencies and Diſabilities it lays the Party excommunicated under; and herein of his Diſability to bring any Action. 319.

(E) Of the Proceedings on the Writ of Excommunicato capiendo, both at Common Law, and by Virtue of the Statute 5 Eliz. c. 23. 320.

(F) Of Abſolving and Abſolling a Perſon excommunicate. 325.

(A) In

Excommunication.

* (A) In what Cases the Spiritual Court may properly excommunicate.

* Page 315

IT ſeems agreed, that wherever the Spiritual Court hath Juriſdiction in any (*a*) Cauſe, and the Party refuſes to appear to their Citation, or after Sentence, being admoniſhed, refuſes to obey their Decree, that he may be excommunicated.

Rol.Abr.883. 12 Co. 76.

(*a*) That anciently the King's Tenants who held *in Capite*, and whoſe Attendance was neceſſary on the Perſon of the King, could not be excommunicated. 2 Inſt. 631. Gibſ. Cod. 1102.——That a Biſhop, or other Peer of Parliament, may be excommunicated. 7 Mod. 56, *&c.* The Biſhop of *St. David*'s Caſe.

Alſo it ſeems, that at Common Law, the *Significavit* of an Excommunication might be upon a general Cauſe, as *Propter Contumaciam*, or *De non parendis Mandatis Eccleſiæ*; but now by the 5 *Eliz. c.* 23. the Cauſe muſt be ſet forth in the Writ *De excommunicato capiendo* itſelf, becauſe by that Statute the Writ is made returnable in *B. R.* which would be to no Purpoſe, if the Cauſe were not ſet forth in the Writ, ſo as to enable the Court to judge thereof.

Salk. 293. pl. 1. 350. pl. 7. Ld. Raym. 586, 618. Gibſ. Cod. 1097.

But it was always holden, that the Biſhop's Certificate ſignifying the Excommunication into Chancery, on which the Writ of *Excommunicato capiendo* iſſued, ought to compriſe the particular Cauſe of the Excommunication; ſo that the Court might (*b*) judge whether it were a Matter within their Juriſdiction, or not.

14H. 4. 14. b. Rol.Abr.883.

(*b*) And therefore the Court of Chancery, for any Defect in the Certificate, uſed to grant a *Superſedeas*; but before the 5 Eliz. c. 23. there were no Diſcharges in *B. R.* on *Excommunicato capiendo*, but where a Man was excommunicated pending a Prohibition. Salk. 293. pl. 1.

If the Excommunication appears to have been by an Archdeacon of a peculiar or limited Juriſdiction, it ought to appear by the Certificate, either expreſsly or by Implication, that the Matter thereof aroſe (*c*) within his (*d*) Juriſdiction; otherwiſe it is void.

Rol Abr.884. *Sterling*'s Caſe. Rol. Rep. 174. S. C.

(*c*) The Defendant was taken upon a *Capias Excommunicatum*, and becauſe it was not mentioned in the *Significavit*, that he lived in that Dioceſe at the Time of the Excommunication, it was adjudged to be uncertain, and the Party was diſcharged. Moor 467. *Beaumont*'s Caſe. Show. Rep. 17. S. C. cited. Godb. 191. S. P. (*d*) The Defendant was taken upon a *Capias Excom'*, and the *Significavit* was, that he was excommunicated for not anſwering Articles; but it was not ſhewn what theſe Articles were; and it was adjudged ill. Roll. Rep. 136. *Fox*'s Caſe.——If a Man is excommunicated for an Offence, which is pardoned by a general Pardon, and this being ſhewn to the Biſhop, he notwithſtanding refuſes to abſolve him, an Action on the Caſe lieth againſt him. 12 Co. 76.

If the Excommunication in a Writ of *Excommunicato capiendo* is recited to be *pro quibuſdam cauſis Subſtractionis decimarum ſive aliorum jurium Eccleſiaſticorum*; this is too uncertain, for the *Alia Jur'* might be ſuch Matters as were out of their Juriſdiction, and they ought to ſhew the Matter was within their Juriſdiction; for of that the King's Courts are to be Judges, and not they themſelves.

Salk. 293. pl. 1. *The King* and *Fowler*, adadjudged upon ſuch a Return to a *Habeas Corpus*.

So where in a Writ of *Excommunicato capiendo*, the Recital of the *Significavit* was, that he was excommunicated for not paying the Coſts *in quodam negotio puerorum educationis ſive inſtructionis ſine aliqua licentia in ea parte prius obtenta*; and the Writ was quaſhed for Incertainty, becauſe it might be a Teaching to fence or dance, and not Letters.

Salk. 294. pl. 2. *The Queen* v. *Hill*. 2 Ld. Raym. 818, 1415.

There

Paſch. 6 Ann. *The Queen and Bentley.*

There was a Preſentment in the Spiritual Court of the Biſhop of *Ely* againſt the Defendant for teaching School ‡ in *Cambridge* without a Licence, by the Churchwardens of the Pariſh; whereupon, as the Way was there, a Citation was fixed up at the Church-Door, for the Defendant to come in * Page 316 * and anſwer the Charge of the Preſentment; but he, being a Diſſenter, and not coming to Church, had no Notice of the Citation; and for his Contempt in not coming, he was excommunicated; whereupon he applied to the Biſhop to get himſelf aſſoiled, for that it was a Writing-School he taught, and ſo not within the Biſhop's Juriſdiction; but the Court refuſed to aſſoil him, unleſs he would put in Caution to anſwer ſuch Articles, and abide by ſuch Sentence, as they ſhould make thereupon; which he was adviſed not to do, becauſe that would be owning their Juriſdiction, and concluding himſelf to abide by their Sentence, and thereupon he moved for a Prohibition, and had it, with a ſpecial Clauſe to aſſoil him. Mr. *Page* moved for the Prohibition, and inſiſted, that they could not excommunicate any one for a Contempt, without ſhewing that the Matter itſelf was within their Juriſdiction; and as they could not excommunicate for the original Matter, if it were not within their Juriſdiction, ſo neither could they for a Contempt to a Citation upon that Matter; and cited 8 *Co.* 68. *Trollop's* Caſe, *Doctor and Student.* 12 *Co.* 77. 14 *H.* 4. 14. 5 *Co.* 23. And he ſaid, by theſe Books it appears, that, if the Biſhop refuſed to aſſoil him, an Action on the Caſe would lie againſt him; but now a-Days, a Prohibition was thought the better Way; and he ſaid, this Preſentment being only for teaching School, they could not come after with Articles, and charge him with any other Matter, as a Writing-School, Latin-School, or other particular School; which the Court agreed, and ſaid it was like a Preſentment by a Grand Jury here, which cannot be altered or changed by Articles after; and as the Grand Jury are upon their Oath, ſo are the Churchwardens there; and ſaid, that when Articles are given in againſt any one, the Citation ought to be founded upon that; but when it was by Preſentment, that was a Charge and a Citation itſelf, and cannot be after altered by Articles; though Serjeant *Parker* ſaid, he thought this Preſentment to be only in the Nature of a Summons, and that it was neceſſary Articles ſhould be drawn up againſt him after, to charge upon the Particulars; but the Prohibition with the ſaid Clauſe was granted.†

‡ None ſhall keep a School-Maſter, or teach School, without the Biſhop's Licence, 23 El. c. 1. ſ. 6 & 7. 1 Jac. 1. c. 4. ſ. 9. 13 & 14 Car. 2. c. 4. ſ. 11.

† For the Cauſes in which an *Excommunicato capiendo* may be awarded on the Statute, *vide* Stat. 5 Eliz. c. 23. ſ. 13. *poſt* 325.

(B) In what Caſes a Perſon ſhall be ſaid to be ipſo facto excommunicated.

(*a*) For the Cauſes of Excommunication *ipſo facto*, according to the Conſtitutions and Canons Eccleſiaſtical of the Church of *England*, *vide* Godolp. Repert. 629, 630.

BY ſeveral (*a*) Acts of Parliament, Offenders of ſeveral Kinds are made to incur the Puniſhment of Excommunication *ipſo facto*.

And to this Purpoſe it is enacted by 6 *E.* 6. *cap.* 4. "That if any Perſon whatſoever ſhall, by Words only, quarrel, chide or brawl, in any

" Church or Church-Yard, that then it ſhall be lawful unto the Ordinary of " the Place where the ſame Offence ſhall be done, and proved by two " lawful Witneſſes, to ſuſpend every Perſon ſo offending, that is to ſay, " if he be a Layman *ab ingreſſu Eccleſiæ*; and if he be a Clerk, from the " Miniſtration of his Office for ſo long Time as the ſame Ordinary ſhall by " his Diſcretion think meet and convenient, according to the Fault."

And it is further enacted by the ſaid Statute, " That if any Perſon ſhall " ſmite or lay any violent Hands upon any other, either in any Church or " Church-yard, that then *ipſo facto* every Perſon ſo offending ſhall be " deemed excommunicate, and be excluded from the Fellowſhip and Com- " pany of Chriſt's Congregation."

* And it is further enacted by the ſaid Statute, " That if any Perſon ſhall * Page 317
" maliciouſly ſtrike any Perſon with any Weapon, in any Church or Church- " yard, or ſhall draw any Weapon in any Church or Church-yard, to the " Intent to ſtrike another with the ſame Weapon, that then every Perſon " ſo offending, and thereof being convicted by Verdict of twelve Men, " or by his own Confeſſion, or by two lawful Witneſſes before Juſtices of " Aſſize, Juſtices of *Oyer* and *Terminer*, or Juſtices of Peace in their Seſ- " ſions, by Force of this Act, ſhall be adjudged by the ſame Juſtices, be- " fore whom ſuch Perſon ſhall be convicted, to have one of his Ears cut " off, *&c.* and beſides that, every ſuch Perſon to be and ſtand *ipſo facto* " excommunicated, as aforeſaid."

In the Conſtruction hereof the following Opinions have been holden:

1. That the Statute extends as well to Cathedral as Parochial Churches and Church-yards. Cro. Eliz 224.

That notwithſtanding the Words of the Statute be expreſſed, That he who ſmites another in the Church, *&c.* ſhall *ipſo facto* be deemed excommunicate; yet there ought either to be a precedent Conviction at Law, which muſt be tranſmitted to the Ordinary, or elſe the Excommunication muſt be declared in the Spiritual Court, upon a proper Proof of the Offence there; for it is implied in every Penal Law, that no one ſhall incur the Penalty thereof, till he be found guilty upon a lawful Trial; alſo it muſt be intended, in the Conſtruction of this Statute, that the Excommunication ought to appear judicially; for otherwiſe there could be no Abſolution. Dyer 275. pl. 48. Cro. Jac. 461. Lit. Rep. 149. Hetl. 86. Cro. Eliz. 919. Vent. 146.

That when the Proceedings for the Offences againſt this Statute are in the Spiritual Court, Coſts may be given *pro expenſis litis*, but not *pro damnis*. Cro. Jac. 464. Hetl. 86. S.P.

That he who ſtrikes another in a Church, *&c.* can no way excuſe himſelf, by ſhewing that the other aſſaulted him.* Cro. Jac. 367.

* *Sed qu.* If Self-defence is not lawful, in every Place, againſt a groundleſs Aſſault? See what *Cicero* ſays in his Oration *pro Milo, ſ.* 4. *Eſt enim hæc, judices, non ſcripta, ſed nata lex: quam non didicimus accepimus, legimus, verum ex natura ipſa arripuimus, hauſimus expreſſimus; ad quam non docti, ſed facti; non inſtituti, ſed imbuti ſumus: ut ſi vita noſtra in aliquas inſidias, ſi in vim, ſi in tela aut latronum, aut inimicorum incidiſſet; omnis honeſta ratio eſſet expediendæ ſalutis. Silent enim leges inter arma, nec ſe exſpectari jubent, cum ei qui exſpectare velit, ante injuſta pœna luenda ſit, quam juſta repetenda. Etſi perſapientor, et quodammodo tacite, dat ipſa lex poteſtatem defendi;* &c.

That (*a*) Churchwardens who whip Boys for playing in the Church, or pull off the Hats of thoſe who obſtinately refuſe to take them off themſelves, or gently lay their Hands on thoſe who diſturb the Performance of any Part of Divine Service, and turn them out of the Church, are not within the Meaning of the Statute. Saund. 13. *Hawe* ver. *Planner.* 2 Keb. 124. Lev. 196. Sid. 301. Mod. 168.

S. C. (*a*) Or perhaps private Perſons. 2 Hawk. P. C. 139.

Cro.Eliz.231. *Penhallo's* Caſe. 4 Leon. 49. Noy 171. S. C.

That if the Proceeding be in the Temporal Courts, by Way of Indictment, for drawing a Weapon in the Church, *&c.* and it conclude *contra formam Statuti*, it muſt be laid to be, with an Intent to ſtrike ſuch a Perſon; for being laid to be *contra formam Statuti*, the Jury cannot inquire of any other Offence, than that which comes within the Deſcription of the Act.

Cro.Eliz.464. That in an Indictment upon this Statute, for ſtriking in the Church, in order to bring the Offender within the latter Clauſe of the Statute, which ſubjects him to the Loſs of an Ear, *&c.* it muſt be ſhewn that the Striking was with a Weapon.

Dalton's Juſtice, *cap.* 23. *fol.* 49. ſaid to have been ſo holden by two Juſtices. Comp. Incumb. 347. cited.

So it hath been holden that if a Man takes up a Stone in the Churchyard and offer to throw it at another, or having a Hatchet or Ax in his Hand offer to ſtrike another therewith, that this is not an Offence within this Part of the Statute; for theſe are not ſuch Weapons as may properly be ſaid to be drawn, as a Sword, Dagger, *&c.*

3 Keb. 803. *Rex* ver. *Nicols* and *Robins.* Comp. Incumb 347. S. C. cited. * Page 318

Alſo two Perſons committed to Priſon by certain Juſtices of the Peace for diſturbing a Miniſter in his Office, were diſcharged upon a *Habeas Corpus*, by the Court of *King's Bench*, for that their Commitment was too general, not ſhewing wherein they diſturbed, but only that they *per* * *apertum factum* diſturbed, *&c.* not ſhewing the particular Fact whereby they did diſturb, *viz.* by Brawling, Fighting, or otherwiſe, there being ſeveral Puniſhments to each; but the Court bound them to their good Behaviour for a Year.

By the 3 *Jac.* 1 *cap.* 5. *par.* 11 and 12, it is enacted, "That every Po-
" piſh Recuſant convict ſhall ſtand to all Intents and Purpoſes diſabled,
" as a Perſon lawfully excommunicated, and as if ſuch Perſon had been ſo
" denounced and excommunicated according to the Laws of this Realm,
" until he or ſhe ſhall conform, *&c.* and that every Perſon ſued by ſuch Per-
" ſon ſo diſabled, may plead the ſame in diſabling of ſuch Plaintiff, as if
" he or ſhe were excommunicated by Sentence in the Eccleſiaſtical Court,
" except the Action of ſuch Recuſant do concern ſome Hereditament or
" Leaſe, which is not to be ſeiſed into the King's Hands, by Force of
" ſome Law concerning Recuſancy."

In the Expoſition hereof it hath been holden,

Noy 89. Latch. 176. 3 Lev. 333-4.

1. That a Plea in Diſability, purſuant to this Statute, ought to ſhew before what Juſtices the Conviction was, that the Court may know where to ſend for a Certificate thereof, if it be denied; and that the Record itſelf, or at leaſt a Certificate thereof, ought immediately to be produced.

Hetl. 176.

2. That if after ſuch a Plea it be certified, that the Plaintiff hath conformed, and thereupon the Defendant be ordered to plead in Chief, and then the Plaintiff relapſe and be convict again, the Defendant cannot plead the ſame in Diſability a ſecond Time. †

† Why not in the Nature of a Plea, after the laſt Continuance, if the Plaintiff hath by his own Act rendered himſelf incapable?

3 Lev. 333, *&c.*

3. That it muſt appear, either from the Conviction itſelf or by proper Averments, that the Plaintiff is convicted of Popiſh Recuſancy, becauſe no Recuſants, except Popiſh ones, are within the ſaid Clauſe; but this is ſufficiently ſet forth, by alledging, that the Plaintiff being *Papalis Recuſans* was indicted and convicted *ſecundum formam Statuti*, *&c.*

Alſo

Alſo it is holden by (a) ſome, that all Popiſh Recuſants convict may be taken up by the Writ *De Excommunicato capiendo*, and that they are not to be admitted as competent Witneſſes in any Cauſe; but by (b) *Hawkins*, this ſeems to be a Conſtruction over ſevere; for in as much as this, like all other Penal Statutes, ought to be conſtrued ſtrictly, and the Words thereof are no more than that ſuch Perſons ſhall ſtand diſabled, &c. as Perſons lawfully excommunicate, &c. and the Purport thereof may be fully ſatisfied by the Diſability to bring any Action; it ſeems to be too rigorous to carry them farther.

(a) 2 Bulſt. 155.

(b) Hawk. P. C. 23.

By the 25 *E.* 1. *cap.* 4. it is enacted, "That all Archbiſhops and "Biſhops ſhall pronounce the Sentence of Excommunication againſt all "thoſe that by Word, Deed or Counſel, do contrary to the Charters of "*Magna Charta*, or that in any Point break or undo them; and that the "ſaid Curſes be twice a Year denounced and publiſhed by the Prelates "aforeſaid.

But for this *vide* Gibſ. Cod. 1098.

(C) By whom Excommunication is to be pronounced and certified.

THE Sentence of Excommunication can only be pronounced by the Biſhop, or other Perſon in Holy Orders, being a Maſter of Arts at leaſt; alſo the Prieſt's Name pronouncing ſuch Sentence is to be expreſſed in the Inſtrument iſſuing under Seal out of the Court.

Gibſ. Cod. 1095.

*Excommunication muſt be certified by the Biſhop of the Dioceſe, whoſe proper Subject the Party is, and cannot be certified by his Commiſſary or Official; the Reaſon whereof, according to the (c) Civilians, is, becauſe no Perſon inferior to a Biſhop can call in the Secular Arm, by the Laws of the Church; but my Lord (d) *Coke* aſſigns the Reaſon of it to be, becauſe no Certificate of Excommunication by any ſhall diſable one, but the Certificate of him to whom the Court may write to abſolve the Party excommunicated.

* Page 319 Co. Lit. 133. Rol. Abr. 884.

(c) Lyndw. *de Sent. Ex* Gibſ. Cod. 1097.

(d) 8 Co. 68.

But the Vicar General, *Epiſcopo in remotis agente*, or the Guardian of the Spiritualities, *vacante ſede*, may do it, (e) either by direct Certificate, that the Perſon is excommunicate, or by Letters Teſtimonial, reciting the Entry thereof in the Regiſter, and atteſting that ſuch Entry is there found.

Co. Lit. 133. F. N. B. 1.

(e) Vern. 222. 3 Keb. 60, 69.

So a Parſon excommunicated by a Commiſſary, Official or Archdeacon, who derive their Juriſdiction from the Biſhop, may be certified excommunicated by the Biſhop himſelf.

8 Co. 63. Rol. Abr. 434. Reg. 65.

Alſo the Biſhop, after Election, though before Conſecration, may certify Excommunication.

F. N. B. 140.

In Times of Popery, Excommengement certified by the Pope, or Delegates commiſſioned by him, did not diſable the Plaintiff to ſue, &c. becauſe the Courts had no Perſon to whom they could write to have him aſſoiled.

16 E. 3. 31. 14 H. 4. 14. Rol. Abr. 883.

The Court will not receive the Certificate of Excommunication of one Biſhop from another, becauſe they muſt have the Certificate from the Biſhop whoſe proper Subject he was; and he might have him aſſoiled by his own Ordinary, after the firſt Certificate to the Biſhop.

8 Co. 63.

Bro. *Excom.* 21. Co. Lit. 134. (*d*) Rol. Abr. 883. 8 Co. 63. (*e*) Rol. Abr. 883.

Nor will they receive a Certificate of a Biſhop deceaſed, becauſe he may ſtand aſſoiled by the preſent Ordinary that now is, after the Deceaſe of the Biſhop who has certified; and the Court will not (*d*) receive any Certificate but from ſuch Perſon to whom they can write to aſſoil.

The Certificate ought to be directed, either to the Court, or at leaſt *Univerſis S. Matris Eccleſiæ filiis*, and (*e*) ought to contain the Day of the Excommunication.

(D) What Inconveniences and Diſabilities it lays the Party excommunicated under; and herein of his Diſability to bring any Action.

Gibſ. Cod. 435. 1096-7. (*f*) But ſuch a Perſon is intitled to the Benefit of Clergy.

A Perſon excommunicated is thereby diſabled to (*f*) be a Witneſs in any Cauſe, cannot be Attorney or Procurator for another, is to be turned out of Church by the Church-Wardens, and not to be allowed Chriſtian Burial.

Bro. *Clergy* 20.—And may contract Marriage. Godolph. Repert. 626.

9 E. 4. 36. Co. Lit. 133. 8 Co. 63. Rol. Abr. 883.

Alſo an excommunicate Perſon is diſabled to ſue or commence any Action; but ſuch Diſability cannot be pleaded (*g*) after a general Imparlance, for thereby the Defendant admits him a good Plaintiff.

(*g*) *Placita Gen.* 10. Latch. 179. Lutw. 19.

* Page 320 Lit. Sect. 207. 8 Co. 69. Co. Lit. 134. 3 Lev. 208, 240.

* Alſo when Excommunication is pleaded, the Biſhop's Letter under his Seal, witneſſing the Excommunication, muſt be ſhewn; and though the Plaintiff cannot deny the Plea, yet the Writ ſhall not abate, but the Defendant *eat inde ſine die*, becauſe the Plaintiff, upon producing his Letters of Abſolution, ſhall have a Reſummons or Re-attachment.

3 Aſſiſe, pl. 12. 2 Hawk. P. C. 114.

If in an Appeal of Murder, *&c.* the Defendant pleads Excommunication in the Plaintiff in Diſability, the Appellee ſhall be bailed until the Plaintiff purchaſes Letters of Abſolution, and then he muſt plead in Chief; for if the Defendant ſhould be kept in Priſon till the Plaintiff be abſolved, he might be a Priſoner for Life.

43 E. 3. 13. Co. Lit. 134. Theol. 11.

Excommunication is a good Plea to an Executor or Adminiſtrator, tho' they ſue *in auter droit*, for an excommunicate Perſon is excluded from the Body of the Church, and incapable to lay out the Goods of the Deceaſed to pious Uſes; alſo it is one of the Effects of Excommunication, that he cannot be a Procurator or Attorney for any other Perſon, and therefore cannot repreſent the Deceaſed.

12 Co. 61.

Excommunication is no Plea on a *Qui tam*, becauſe it is for Example; and the Statute having given the Informer an Ability to ſue, and not excepted excommunicated Perſons from the Liberty of informing, he is enabled to ſue by the Statute, notwithſtanding the Cenſures of the Church.

28 E. 3. 97.

When a Prohibition is brought againſt the Biſhop, and he pleads Excommunication againſt the Plaintiff, and in the Excommunication there is no Cauſe of ſuch Excommunication ſhewn; this is no good Plea, for in ſuch Caſe it will be intended, that the Excommunication was for endeavouring to hinder the Biſhop's Proceeding, by Application to the Temporal Court; and

and if ſuch Excommunication were allowed, it would deſtroy all Prohibitions, and the Plea of Excommunication in this Caſe is *Exceptio ejuſdem rei cujus petitur diſſolutio.*

If an Action be brought by the Bailiffs and Commonalty of a Corporation, the Defendant ſhall not plead Excommunication in the Bailiffs, becauſe they ſue as a Corporation, and a Corporation cannot be excluded from the Communion of the viſible Church. 30 E. 3. 15. Co. Lit. 134.

When Excommunication is pleaded in the Plaintiff, he ſhall not reply, that he has appealed from the Sentence, for the Sentence is in Force until it is repealed; and whilſt it is in Force, he cannot appear in any of the Courts of Juſtice, but he may reply, he is abſolved; for then his Diſability is taken away. Bro. *Excommunication* 3. 3 Bulſt. 72. 20 H. 6 25. *Placita Gen'* 10, 72.

(E) Of the Proceedings on the Writ of Excommunicato capiendo, both at Common Law and by Virtue of the Statute 5 Eliz. c. 23.

IT is ſaid, that the Writ *De excommunicato capiendo* is a Liberty or Privilege peculiar to the Church of *England*, above all the Realms in Chriſtendom; for though the Aſſiſtance of the Secular Arm hath ever been afforded to the Church in moſt other Chriſtian Countries as well as this, yet in no Inſtance is it perhaps ſo ſurely and ſo effectually reached out, as the Execution of this Writ, which is (*a*) *Debitum Juſtitiæ*, and not made to depend upon the Pleaſure of the Prince. Gibſ. Cod. 1102. cited from Dr. *Coſin's Apol.* fol. 8.

(*a*) But in 2 Inſt. 623. 631. It is expreſly ſaid, that *Brevæ Regis de excommunicato capiendo de gratia Regis procedit.*

* The Writ of *Excommunicato capiendo* iſſues out of Chancery, and is founded on the Biſhop's Certificate, ſignifying the Excommunication, and at Common Law was only returnable into that Court; ſo that for any Uncertainty or Defect in the Writ, the Party could only be diſcharged in Chancery. * Page 321 Fitz. N. B. 140. Salk. 293. pl. 1.

But now by the 5 *Eliz. cap.* 23. intituled, *An Act for the due Execution of the Writ* De excommunicato capiendo, reciting, "For as much as divers "Perſons offending in many great Crimes and Offences, appertaining merely "to the Juriſdiction and Determination of the Eccleſiaſtical Courts and "Judges of this Realm, are many Times unpuniſhed for Lack and Want "of the good and due Execution of the Writ *De excommunicato capiendo*, "directed to the Sheriff of any County, for the Taking and Apprehending of any ſuch Offenders, the great Abuſe whereof, as it ſhould "ſeem, hath grown, for that the ſaid Writ is not returnable in any Court "that might have the Judgment of the well executing and ſerving the "ſaid Writ, according to the Contents thereof; but hitherto hath been "left only to the Diſcretion of the Sheriffs and their Deputies, by whoſe "Negligence and Defaults for the moſt part the ſaid Writ is not executed "upon the Offenders as it ought to be, by Reaſon whereof ſuch Offenders "be greatly incouraged to continue their ſinful and criminous Life, much "to the Diſpleaſure of Almighty God, and to the great Contempt of the "Eccleſiaſtical Laws of this Realm.

"2. Wherefore, it is enacted, That every Writ of *Excommunicato capiendo*, that ſhall be granted and awarded out of the High Court of "Chancery

" Chancery againſt any Perſon or Perſons within the Realm of *England*,
" ſhall be made in the Time of Term, and returnable before the Queen's
" Highneſs, her Heirs and Succeſſors, in the Court commonly called the
" King's Bench, in the Term next after the *Teſte* of the ſame Writ, and
" the ſame Writ ſhall be made to contain, at the leaſt, twenty Days
" between the *Teſte* and the Return thereof; and after the ſame Writ
" ſhall be ſo made and ſealed, that then the ſaid Writ ſhall be forthwith
" brought into the ſaid Court of King's Bench, and there, in the Pre-
" ſence of the Juſtices, ſhall be opened and (*a*) delivered of (*b*) Record to
" the Sheriff or other Officer, to whom the Serving and Execution thereof
" ſhall appertain, or to his or their Deputy or Deputies; and if afterwards
" it ſhall or may appear to the Juſtices of the ſame Court for the Time
" being, that the ſame Writ ſo delivered of Record be not duly returned
" before them at the Day of the Return thereof, or that any other Default
" or Negligence hath been uſed or had in the not well ſerving and execut-
" ing of the ſaid Writ, that then the Juſtices of the ſaid Court ſhall and
" may, by Authority of this Act, aſſeſs ſuch Amercement upon the ſaid
" Sheriff or other Officer, in whom ſuch Default ſhall appear, as to the
" * Diſcretion of the ſaid Juſtices ſhall be thought meet and convenient;
" which Amercement ſo aſſeſſed ſhall be eſtreated into the Court of Ex-
" chequer as other Amercements have been uſed.

(*a*) That the preciſe Form of the Statute muſt herein be obſerved, and that the Writ muſt be brought and openly delivered in Court. Cro. Jac. 567.

* Page 322

(*b*) That the Writ muſt be inrolled and delivered to the Sheriff in convenient Time. Cro. Car. 583. *Packer*'s Caſe. Vent. 338. S. P. and the Priſoner may be diſcharged on Motion as well as by Pleading this Matter at the Return of the *Habeas Corpus*, & *vide Sid.* 285.——But where for ſuch a Fault the Court refuſed to diſcharge the Priſoners, or to bail them, becauſe they were dangerous Perſons, and refuſed to take the Oath of Allegiance, *vide* Sid. 165.——Alſo upon the Conſtruction of this Clauſe of the Statute, it hath been holden, 1. That one taken on a Writ of *Excommunicato capiendo* cannot come into *B. R.* but by *Habeas Corpus*; and if he be brought in before the Writ is returnable, he ſhall not be allowed to plead, or move to quaſh the Writ. 2 The Writ of *Excommunicato capiendo* recites the *Significavit* which is in Chancery, but the Writ is brought into *B. R.* and is inrolled there before it goes to the Sheriff, which Inrolment is to inform the Court, that at the Return of the *Excommunicato capiendo* they may award farther Proceſs, as the Caſe requires. 3. If by the Recital of the *Significavit* it appears, that there was no Cauſe for the Writ, the Court of King's Bench may quaſh it, and the Court of Chancery cannot, though the *Significavit* be there. Salk. 294. pl. 3.

" 3. It is further enacted, That the Sheriff, or other Officer, to whom
" ſuch Writ of *Excommunicato capiendo*, or other Proceſs by Virtue of this
" Act, ſhall be directed ſhall not in any wiſe be compelled to bring the
" Body of ſuch Perſon or Perſons as ſhall be named in the ſaid Writ or
" Proceſs into the ſaid Court of King's Bench, at the Day of the Return
" thereof, but ſhall only return the ſame Writ and Proceſs thither,
" with Declaration briefly, how and in what Manner he hath ſerved
" and executed the ſame, to the Intent that thereupon the ſaid Juſtices
" may then further proceed, according to the Tenor and Effect of this
" preſent Act.

" 4 And if the Sheriff or other Officer, to whom the Execution of the
" ſaid Writ ſhall ſo appertain, do or ſhall return, that the Party or Parties
" named in the ſaid Writ cannot be found within his Bailiwick, that then
" the ſaid Juſtices of the King's Bench for the Time being, upon every
" ſuch Return, ſhall award one Writ of *Capias* againſt the ſaid Perſon or
" Perſons named in the ſaid Writ of *Excommunicato capiendo*, returnable in
" the ſame Court in the Term-time, two Months at leaſt next after the *Teſte*
" thereof, with a Proclamation to be contained within the ſaid Writ of *Ca-*
" *pias*, that the Sheriff, or other Officers, to whom the ſaid Writ ſhall be
" directed in the full County-Court, or elſe at the General Aſſiſes or Gaol-
" Delivery to be holden within the ſaid County, or at a Quarter-Seſſions to
" be holden before the Juſtices of the Peace within the ſaid County, ſhall
" make open Proclamation, ten Days at leaſt before the Return, that

" the Party or Parties named in the ſaid Writ ſhall, within ſix Days next " after ſuch Proclamation, yield his or their Body or Bodies to the Priſon " of the ſaid Sheriff, or other ſuch Officer, there to remain as a Priſoner, " according to the Tenor or Effect of the firſt Writ of *Excommunicato capiendo*, upon Pain of Forfeiture of ten Pounds; and thereupon after ſuch " Proclamation had, and the ſaid ſix Days paſt and expired, then the ſaid " Sheriff or other Officer, to whom the ſaid *Capias* ſhall be directed, ſhall " make return of the ſame Writ of *Capias* into the ſaid Court of the " King's Bench of all that he hath done in the Execution thereof, and " whether the Party named in the ſaid Writ have yielded his Body to " Priſon, or not.

" 5. And if upon the Return of the ſaid Sheriff it ſhall appear, that the " Party or Parties named in the ſaid Writ of *Capias*, or any of them, have " not yielded their Bodies to the Gaol and Priſon of the ſaid Sheriff, or " other Officer, according to the Effect of the ſame Proclamation, that " then every ſuch Perſon, that ſo ſhall make Default, ſhall, for every ſuch " Default, (*a*) forfeit to the Queen's Highneſs, her Heirs and Succeſſors, " ten Pounds, which ſhall likewiſe be eſtreated by the ſaid Juſtices into " the ſaid Court of Exchequer, in ſuch Manner and Form as Fines and " Amercements there taxed and aſſeſſed are uſed to be.

(*a*) This Statute doth not take away or affect the *Excommunicato capiendo* at Common Law but in the particular Caſes therein mentioned gives a greater Penalty to enforce it; and therefore the Writ doth, not only iſſue upon Excommunication in any other Caſes, but (as hath been often adjudged) though a *Capias* with Proclamations and Penalties go forth in a Matter not within this Statute, and the Perſon is thereupon impriſoned, and prays to be diſcharged, becauſe the Matter for which he was excommunicated (though of a Spiritual Nature) is not within this Statute, yet nothing ſhall be diſcharged but the Penalties, and (without any new Writ obtained) the Excommunication and Impriſonment may remain as at Common Law, and not be diſcharged but by Abſolution in due Form. Gibſ. Cod. 1106. but for this *vide* Cro. Car. 197, 199. Rol. Abr. 175. Jon. 226. Latch. 174, 204. 2 Jon. 89. Show. 17. 3 Mod. 42-3. Skin. 176. pl. 6. Vern. 24. Salk. 294. pl. 4. 7 Mod. 56, 117. Ld. Raym. 619. 2 Ld. Raym. 790, 817. Will. Rep. 435. pl. 123. 3 Will Rep. 55. Stra. 43. Salk. 134, 136, 294. pl. 3. 8 Mod. 58. Stra. 76 265, 413. 2 Stra 946, 1067, 1189.

" 6. And thereupon the ſaid Juſtices of the King's Bench ſhall alſo " award forth one other Writ of *Capias* againſt the ſaid Perſon or Per- * " ſons, that ſo ſhall be returned to have made Default, with ſuch like * Page 323 " Proclamation as was contained in the firſt *Capias*, and a Pain of 20*l.* to be " mentioned in the ſaid ſecond Writ and Proclamation; and the Sheriff or " other Officer, to whom the ſaid ſecond Writ of *Capias* ſhall be ſo directed, " ſhall ſerve and execute the ſaid Writ in ſuch like Manner and Form, as " before is expreſſed, for the ſerving and executing of the ſaid firſt Writ " of *Capias*; and if the Sheriff or other Officer ſhall return upon the ſaid " ſecond *Capias*, that he hath made the Proclamation according to the Tenor and Effect of the ſame Writ, and that the Party hath not yielded his " Body to Priſon, according to the Tenor of the ſaid Proclamation, that " then the ſaid Party that ſo ſhall make Default, ſhall, for ſuch his Contempt and Default, forfeit to the Queen's Highneſs, her Heirs and Succeſſors, the Sum of twenty Pounds, which ſaid Sum of twenty Pounds, " the ſaid Juſtices of the King's Bench for the Time being ſhall likewiſe " cauſe to be eſtreated into the ſaid Court of Exchequer, in Manner and " Form aforeſaid.

" 7. And then the ſaid Juſtices ſhall likewiſe award one other Writ of *Capias* againſt the ſaid Party, with ſuch like Proclamation and Pain of Forfeiture, as was contained in the ſaid ſecond Writ of *Capias*, and the Sheriff or other Officer, to whom the ſaid third Writ of *Capias* ſhall be ſo directed, ſhall ſerve and execute the ſaid third Writ of *Capias*, in ſuch like Manner and Form as before in this Act is expreſſed and declared, for the ſerving and executing of the ſaid firſt and ſecond Writs of *Capias*; and if the

" Sheriff

" Sheriff or other Officer, to whom the Execution of the ſaid third Writ " ſhall appertain, do make return of the ſaid third Writ of *Capias*, that the " Party upon ſuch Proclamation hath not yielded his Body to Priſon, accord- " ing to the Tenor thereof, that then every ſuch Party, for every ſuch Con- " tempt and Default, ſhall likewiſe forfeit to the Queen's Majeſty, her Heirs " and Succeſſors, other 20*l.* which Sum of 20*l.* ſhall likewiſe be eſtreated into " the ſaid Court of Exchequer, in Manner and Form aforeſaid; and thereupon " the ſaid Juſtices of the King's Bench ſhall likewiſe award forth one other " Writ of *Capias* againſt the ſaid Party, with like Proclamation and like Pain " of Forfeiture of 20*l.* and that alſo the ſaid Juſtices ſhall have Authority by " this Act infinitely to award ſuch Proceſs, with ſuch like Proclamation and " Pain of Forfeiture of 20*l.* as is before limited againſt the ſaid Party that " ſo ſhall make Default in yielding his Body to the Priſon of the Sheriff, " until ſuch Time as by the Return of ſome of the ſaid Writs before the ſaid " Juſtices it ſhall and may appear, that the ſaid Party hath yielded himſelf " to the Cuſtody of the ſaid Sheriff or other Officer, according to the Tenor " of the ſaid Proclamation, and that the Party, upon every Default and " Contempt by him made againſt the Proclamation of any of the ſaid Writs " ſo infinitely to be awarded againſt him, ſhall incur like Pain and For- " feiture of 20*l.* which ſhall likewiſe be eſtreated in Manner and Form " aforeſaid.

" 8. And be it further enacted, by the Authority aforeſaid, That when " any Perſon or Perſons ſhall yield his or their Body or Bodies to the Hands " of the Sheriff or other Officer, upon any of the ſaid Writs of *Capias*, " that then the ſame Party or Parties, that ſhall ſo yield themſelves, ſhall " remain in the Priſon and Cuſtody of the ſaid Sheriff, or other Officer, " without *(a)* Bail, Baſton, or Mainprize, in ſuch like Manner and Form " to all Intents and Purpoſes, as he or they ſhould or ought to have done, " if he or they had been apprehended and taken upon the ſaid Writ of *Ex-* " *communicato Capiendo.*"

(*a*) By the 1 E. 3. c. 8. Perſons excommunicate, taken at the Requeſt of the Biſhop, are expreſly held to be irreplevifable; but it hath been held, that the Court of King's Bench may, as well before as ſince this Statute, bail a Perſon taken upon *Excommunicato capiendo.* Bulſt. 122. ——But where the Court refuſed in ſuch a Caſe to bail the Biſhop of *St. David's, vide* 7 Mod. 61.

*Page 324 " 9. And that if any Sheriff, or other Officer, by whom the ſaid Writ " of *Capias*, or any of them, ſhall be returned, as is aforeſaid, do make " an untrue Return upon any of the ſaid Writs, that the Party named in " the ſaid Writ hath not yielded his Body upon the ſaid Proclamations, or " any of them, where indeed the Party did yield himſelf, according to " the Effect of the ſame, that then every ſuch Sheriff, or other Officer, " for every ſuch falſe and untrue Return, ſhall forfeit to the Party grieved " and damnified by ſuch falſe Return, the Sum of 40*l.* for the which Sum " of 40*l.* the ſaid Party grieved ſhall have his Recovery and due Remedy " by Action of Debt, Bill, Plaint or Information, in any of the Queen's " Courts of Record, in which Action, Bill, Plaint or Information, no Eſ- " ſoign, Protection, or Wager of Law, ſhall be admitted or allowed for " the Party Defendant.

" 10. Saving and reſerving to all Archbiſhops and Biſhops, and all " others, having Authority to certify any Perſon excommunicated, and " like Authority to accept and receive the Submiſſion and Satisfaction of " the ſaid Perſon ſo excommunicated in Manner and Form heretofore uſed, " and him to abſolve and releaſe, and the ſame to ſignify, as heretofore " it hath been accuſtomed, to the Queen's Majeſty, her Heirs and Suc- " ceſſors, into the High Court of Chancery, and thereupon to have ſuch " Writs for the Deliverance of the ſaid Perſon ſo abſolved and releaſed " from the Sheriff's Cuſtody or Priſon, as heretofore they or any of them

" had,

" had, or of Right ought or might have had; any Thing in this preſent " Statute ſpecified or contained to the contrary hereof in any wiſe notwith- " ſtanding.

" 11. Provided always, that in *Wales*, the Counties Palatine of *Lancaſter*, " *Cheſter*, *Durham*, and *Ely*, and in the *Cinque Ports*, being Juriſdictions " and Places exempt, where the Queen's Majeſty's Writ doth not run, and " Proceſs of *Capias* from thence not returnable into the ſaid Court of the " King's Bench, after any *Significavit*, being of Record in the ſaid Court of " Chancery, the Tenor of ſuch *Significavit* by *Mittimus* ſhall be ſent to ſuch " of the ſaid Head Officers of the ſaid Country of *Wales*, Counties Palatine " and Places exempt, within whoſe Offices, Charge or Juriſdiction, the Of- " fenders ſhall be reſiant, that is to ſay, to the Chancellor or Chamberlain " for the ſaid Counties Palatine of *Lancaſter* and *Cheſter*, and for the *Cinque* " *Ports* to the Lord Warden of the ſame, and for *Wales* and *Ely*, and the " County Palatine of *Durham*, to the Chief Juſtice or Juſtices there; and " thereupon every of the ſaid Juſtices and Officers, to whom ſuch Tenor " of *Significavit* with *Mittimus* ſhall be directed and delivered, ſhall, by " virtue of this Eſtatute, have Power and Authority to make like Proceſs " to the inferior Officer and Officers to whom the Execution of Proceſs " there doth appertain, returnable before the Juſtices there, at their next " Seſſions or Court, two Months at the leaſt after the *Teſte* of every ſuch Pro- " ceſs; ſo always as in every Degree they ſhall proceed in their Seſſions " and Courts againſt the Offenders, as the Juſtices of the ſaid Court of " King's Bench are limited, by the Tenor of this Act, in Term-times to " do and execute.

" 12. Provided alſo, and be it enacted, that any Perſon, at the Time of " any Proceſs of *Capias* aforementioned awarded, being in Priſon, or out " of this Realm, in the Parts beyond the Sea, or within Age, or of *non ſane* " *Memorie*, or Woman covert, ſhall not incur any of the Pains or Forfeitures " afore mentioned, which ſhall grow by any Return or Default happening " during ſuch Time of Nonage, Impriſonment being beyond Sea, or *Non* " *ſane Memorie*; and that by virtue of this Statute, the Party grieved may " plead every ſuch Cauſe or Matter in Bar of and upon the Diſtreſs or " other Proceſs, that ſhall be made for Levying of any of the ſaid Pains or " Forfeitures.

" * 13. And that if the Offender, againſt whom any ſuch Writ of *Excom-* * Page 325 *
" *municato capiendo* ſhall be awarded, ſhall not in the ſame Writ of *Ex-* " *communicato capiendo* have a ſufficient and lawful (*a*) Addition, accord- " ing to the Form of the Eſtatute of (*b*) *Primo* of *Henry* the Fifth, in Caſes " of certain Suits, whereupon Proceſs of Exigent are to be awarded, or if " in the *Significavit* it be not contained, that the Excommunication doth " proceed upon ſome Cauſe or Contempt of ſome original Matter of Here- " ſy, or refuſing to have his or their Child baptized, or to receive the Ho- " ly Communion, as it is now commonly uſed to be received in the Church " of *England*, or to come to Divine Service now commonly uſed in the " ſaid Church of *England*, or Error in Matters of Religion, or Doctrine " now received and allowed in the ſaid Church of *England*, Incontinency, " Uſury, Simony, Perjury in the Eccleſiaſtical Court, or Idolatry, that " then all and every Pains and Forfeitures limited againſt ſuch Perſons ex- " communicate by this Statute, by Reaſon of ſuch Writ of *Excommunicato* " *capiendo*, wanting ſufficient Addition, or of ſuch *Significavit* wanting all " the Cauſes afore-mentioned, ſhall be utterly void in Law, and by Way " of Plea to be allowed to the Party grieved."

(*a*) That if the Party excommunicated has no Addition in the Writ, he may be diſcharged on Motion. Salk. 294. pl. 4. Show. Rep. 16—But where the Parties were named *A. B.* Merchant, *C. D.* Gent. *E. F.* Yeoman, *de Parech. de D.* this was held well, though it was objected, that the Addition of the Pa.iſh ſhould refer to him only who was laſt mentioned. 3 Mod. 42, 43. *The King* and *Barns*, Skin. 176. pl. 6. S. C. adjudged.

(*b*) This Statute (1 H. 5. c. 5.) enacts,

" 14. And if the Addition ſhall be with a *Nuper* of the Place, then in " every ſuch Caſe, at the Awarding of the firſt *Capias* with Proclamation, " according to the Form mentioned, one Writ of Proclamation without " any Pain expreſſed ſhall be awarded into the County, where the Offender " ſhall be moſt commonly reſiant at the Time of the Awarding the ſaid " firſt *Capias*, with Pain, in the ſame Writ of Proclamation, to be return- " able the Day of the Return of the ſaid firſt *Capias*, with Pain; and Pro- " clamation thereupon, at ſome one ſuch Time and Court as is preſcribed " for the Proclamation, upon the ſaid firſt *Capias*, with Pain; and if ſuch " Proclamation be not made in the County where the Offender ſhall be " moſt commonly reſiant, in ſuch Caſes of Additions of *Nuper*, that then " ſuch Offender ſhall ſuſtain no Pain or Forfeiture by Virtue of this Sta- " tute, for not yielding his or her Body according to the Tenor afore- " mentioned; any Thing before ſpecified, and to the contrary hereof in " any wiſe notwithſtanding."

(F) Of abſolving and aſſoiling a Perſon excommunicate.

2 Inſt. 623. 12 Co. 76. & *vide* the 9 *E.* 2. *cap.* 7. (*a*) For this *vide* F. N. B. 141.

IF a Perſon be unjuſtly excommunicated, that is, if he be excommunicated for Matter of which the Spiritual Court hath not Conuſance, and he is taken on a Writ of *Excommunicato capiendo*, the Party grieved ſhall have (*a*) a Writ out of Chancery to the Sheriff, to deliver him out of Priſon.

Sid 232.

So if the Spiritual Court proceeds *inverſo ordine*, as if they refuſe a Copy of the Libel, *&c.* a Prohibition ſhall go, with a Clauſe to abſolve and deliver the Party injured.

* Page 326 2 Inſt. 623.

* Alſo if a Man be excommunicated, and offers to obey and perform the Sentence, and the Biſhop refuſeth to accept it, and to aſſoil him, he ſhall have a Writ to the Biſhop, requiring him, upon Performance of the Sentence, to aſſoil him, *&c.* and the Reaſon thereof is, for that by the Excommunication the Party is diſabled to ſue any Action, or to have any Remedy for any Wrong done unto him, ſo long as he ſhall remain excommunicate; and alſo the Party grieved may have his Action upon his Caſe againſt the Biſhop, in like Manner as he may when the Biſhop doth excommunicate him for a Matter which belongeth not to Eccleſiaſtical Conuſance; alſo the Biſhop, in thoſe Caſes, may be indicted at the Suit of the King.

Gibſ. Codex. 1110.

But if the Excommunication be for a juſt Cauſe, the Party muſt make preſent Satisfaction before he can be abſolved, or he muſt put in Caution, that he will hereafter perform that which the Biſhop ſhall reaſonably and according to Law injoin him; which Caution, in the Civil Law, is of three Sorts.

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enacts that in every original Writ of Actions Perſonal, Appeals and Indictments in which the Exigent ſhall be awarded in the Names of the Defendants in ſuch original Writs, Appeals and Indictments, Additions ſhall be made of their Eſtate or Degree or Myſtery, and the Towns, Hamlets or Places, and the Counties where they were or be converſant, *&c.*

Excommunication.

Sorts. 1. (a) *Fidejuſſoria*, as when a Man bindeth himſelf with Sureties to perform ſomewhat. 2. *Pignoratio* or *realis Cautio*, as when a Man engageth Goods, or mortgageth Lands for the Performance. 3. *Juratoria*, when the Party, who is to perform any Thing, taketh a corporal Oath to do it; which laſt is now the moſt frequent Method.

(a) This Method of taking Caution was held to be againſt Law. Bulſt. 122. — But was afterwards on great Debate held to be good, and that the Biſhop having a diſcretionary Power herein, it was as much in his Option to take Caution by Obligation, as by either of the two other Methods. 2 Lev. 36. Raym. 225.

If after a Perſon is excommunicated, there comes a general Act of Pardon, which pardons all Contempts, &c. it ſeems that this Offence is taken away without any formal Abſolution.*

But for this *vide* Cro. Car. 199. Cro. Jac. 212. 8 Co. 68. Jon. 227. 2 Lev. 36.

* As to the Method of obtaining Relief for a Perſon taken on this Writ, ſee the ſame laid down, and the Subject fully treated of in *Britiſh Libertie*, p. 224.

Execution.

(A) Of the Nature of Execution, and what Things were liable thereto by the Common Law. 328.

(B) Of the Judgment on which Execution is to be taken out; and herein of Recognizances and Statutes which are in the Nature of Judgments. 330.

And herein,

1. Of the Nature of Recognizances at Common Law, and on the 23 *H.* 8. *c.* 6. *&c.* and of the Statute Merchant and Staple. 330.
2. Of the ſeveral Proceſſes on theſe Securities when forfeited, in order to a full Execution. 333.

And therein,

1. *Of the Manner of Execution on the Recognizance at Common Law, and wherein it differs from the Statutes, &c. and they from each other.* 333.

2. *At*

2. *At what Time Execution may be granted on each of them.* 335.

3. *Who ſhall have Execution on them, as the Perſon alters.* 335.

4. *Againſt whom Execution may be granted.* 337.

3. What Things are bound by them, and are liable to be extended for the Satisfaction of them. 339.

4. What Proviſion the Law has made for Tenant by Statute Merchant, &c. in caſe of Eviction. 341.

5. The ſeveral Ways of Vacating and Diſcharging thoſe Statutes, and this either before or after Execution. 342.

(C) Of the ſeveral Kinds of judicial Writs which lie after Judgment. 348.

And herein,

1. Of the Form, Teſte, and Return of ſuch Writs. 348.
2. Of the *Elegit*. 349.
3. Of the *Capias ad Satisfaciendum*. 351.
4. Of the *Fieri facias* and *Levari facias*. 351.
5. Of the *Habere facias ſeiſinam* and *Poſſeſſionem*. 353.

(D) Where the Party ſhall be concluded by the Election of one of them, and what further Remedy he has when he hath not received intire Satisfaction on his firſt Writ; and this either againſt the Party or Sheriff. 353.

(E) Of the Authority and Juriſdiction of the Court out of which the Execution iſſues; and herein of the Manner of Executing a Judgment where the Record has been removed from an Inferior to a Superior Court. 356.

(F) Who are intitled unto, and may ſue out Execution. 356.

(G) Of the Perſons againſt whom Execution may be ſued out. 358.

And herein,

1. Of ſuing Execution where there are ſeveral Parties concerned. 358.
2. Of ſuing out Execution againſt the Heir and Executor. 359.
3. Of ſuing out Execution againſt Infants. 359.

4. Of ſuing out Execution againſt a Feme Covert. 360.
5. Of ſuing out Execution againſt privileged Perſons. 360.
6. Of ſuing out Execution againſt a Clerk in Holy Orders. 360.

(H) At what Time Execution may be ſued out; and herein of the Neceſſity of a Scire facias. 361.
(I) To what Time the Execution ſhall have Relation, ſo as to avoid any Alienation by the Party, and herein of the Statute of Frauds. 363.
(K) Of the King's Precedency in Executions. 365.
* (L) Of the proper Officer to do Execution; and herein of the preceding and ſucceeding Sheriff. 366. * Page 328
(M) Of the Manner of compelling him to do Execution; and herein of the Party's Remedy againſt him for Neglect of his Duty. 366.
(N) Of the Sheriff's Authority in doing Execution; and herein of breaking Doors, &c. 367.
(O) Of the Offence of hindring or obſtructing an Execution. 368.
(P) Of the Party's Remedy when there hath been an irregular Execution, and how the ſame is to be ſet aſide 369.
(Q) To what he ſhall be reſtored when ſuch erroneous Execution is ſet aſide. 370.

(A) Of the Nature of Execution, and what Things were liable thereto by the Common Law.

EXecution is the Obtaining the actual Poſſeſſion of a Thing recovered by Judgment of Law, and *(a)* is called the Life of the Law, and therefore in all Caſes to be favoured. Co.Lit.154.a. Carter 194. (a) *Executio eſt fructus, finis & effectus Legis.* Co. Lit. 289. 5 Co. 87. — It differs from an Action which continues only till Judgment is given, and therefore a Releaſe of all Actions is regularly no Bar of an Execution. Co Lit. 289. 2 Rol. Abr. 404.

And here it will be neceſſary to conſider what Things are liable to Execution at Common Law in Perſonal Actions; and theſe we find were only the Hob. 60. 3 Co. 12. b. Sir *William Herbert's* Caſe.

Cro. Jac. 450. Plow. 440. 2 Inſt. 19. 2 Rol. Abr. 472.

the annual Profits of the Land as they aroſe, and the Goods and Chattels of the Debtor; for neither his Body nor Lands were affected by Recognizances or Judgments for Debt or Damages, except as herein after excepted.

Plow. 440. 3 Co. 11. 2 Inſt. 19.

The Reaſon why the Common Law ſubjected only the Perſonal Eſtate to the Payment of Debts, ſeems to be, for that it was only a Chattel that was lent, and therefore the Chattels of the Debtor were liable only to pay it; and formerly Men truſted one another no further than they had viſible Chattels to anſwer the Debt; the Lands were not liable, becauſe they were obliged to anſwer the Duties to the Feudal Lord; and a new Tenant could not be forced upon him without his Conſent in the Alienation, and the Perſon was not liable, becauſe that was obliged by the Tenure to ſerve the King in the Wars, and at Home the ſeveral Lords, according to the diſtinct Natures of their Tenure; but though this Law was well framed for a Nation bred to Wars, which were to extend their Fame and Power by Arms, yet it was no ways calculated to the Circumſtances and Conſtitution of a trading People, whoſe Power and Credit riſe and fall in Proportion to the Increaſe or Decay of Trade; therefore, in ſuch a Nation, Laws ought to be ſo contrived and framed, as

* Page 329

to invite Foreigners to trade with us, and bring their Commodities to us, and the great Encouragement to this will be to allow them all poſſible Security in their Contracts and Dealings; and the Way to that will be to ſubject all the Effects of the Debtor, whether in Lands or Chattels, and his Perſon too, to ſatisfy the Creditor; for otherwiſe it would be in the Power of every bad Man, by converting his Chattels into Land, to defraud his Creditor, and againſt all Reaſon and Equity enjoy the Profits of that Land which he purchaſed with another's Money; and accordingly we find, that towards the Reign of *Ed.* 1. when *Magna Charta* had given the Tenants a Power of Alienation, without acquainting their Lords, if they left enough to anſwer the Duties of their Tenure, they began to ſubject the Land to anſwer the Debts in Trade; and as they grew more and more a trading People, it was thought reaſonable that the Perſon ſhould be liable, that a cloſe Confinement might oblige him the ſooner to ſatisfy his Creditors, as alſo make him the more wary how he contracted Debts, without the Proſpect of a competent Fund or Proviſion to diſcharge them.

Plow. 441. 3 Co. 11.

But even at Common Law we find, that the King, by his Prerogative, might have Execution of Body, Goods and Lands, but ſtill under this Reſtriction, that the Land was not extendible while the Chattels were ſufficient and the Debtor ready to anſwer the Debt.

3 Co. 12. a. Cro. Jac. 450. Plow. 441.

Alſo in Caſe of a private Perſon, the Land was liable to Execution, as in an Action of Debt againſt an Heir upon an Obligation made by his Anceſtor; if the Plaintiff had Judgment, the Law diſpenſed with the former Rules, rather than the Creditor, who fairly made out his Demands, ſhould be without a Remedy, and therefore gave the Lands deſcended, in Execution, to anſwer the Debt; for ſince the Common Law allowed the Action of Debt againſt the Heir, the Creditor could have no Benefit by the Action, unleſs he were permitted to have Execution of the Lands which deſcended to the Heir.

Rol. Abr. 226. Poph. 87. Hob. 58. Dyer 344. b. Co Lit. 144.

So if *A.* had granted for him and his Heirs, to *B.* and his Heirs, ſuch a Rent out of his Lands, in this Caſe the Heirs, being comprehended in the Contract, are bound to make good the Grant as far as they have Aſſets by Deſcent from the Grantor; and this was allowed at Common Law, becauſe the Grantee of the Rent had the Land originally in View for his Security; and by the Grant itſelf, having it in his Power to diſtrain the Land for the Rent, it was equal to the Heir, whether the Land was to

anſwer the Rent by Diſtreſs, or by an Execution upon a Judgment in a Writ of Annuity.

Thus ſtood the Common Law till the Statute of *Acton Burnell*, * and the 13 *Ed.* 1. *de Mercatoribus*, which, as appears in the Preamble, was for the Security of Merchants and Encouragement of Trade, and ſubjected not only the Goods and Perſons, but the Land likewiſe of the Debtor, into whoſe Hands ſoever they came after the Statute acknowledged. Hob. 60. 2 Rol. Abr. 475. * 11 *Ed.* 1.

Alſo in the ſame Year and Reign the *Elegit* was given; and by this (a) Statute, he who recovereth in Debt or Damages, may have either a *Fieri facias* of the Chattels of the Debtor, or a Writ on which the Sheriff ſhall deliver to him all the Chattels of the Debtor, ſaving only his Oxen and Beaſts of his Plough, and the one Half of his Land, until the Debt be levied upon a reaſonable Price or Extent. (a) Viz. 13. *Ed.* 1. *c.* 18. commonly called the Statute of Weſt. 2 *vide* 2 Inſt. 394-5.

The 25 *Ed.* 3. *cap.* 17. ſubjected the Perſon of the Debtor, and gave the *Capias ad ſatisfaciend.* in Debt, Detinue, *&c.* in the Caſe of a common Perſon. *Vide* Dalt. Sher. 144.

* (B) Of the Judgment on which Execution is to be taken out; and herein of Recognizances and Statutes which are in Nature of Judgments: And therein, * Page 330

1. Of the Nature of Recognizances at Common Law, and on the 23 *H.* 8. *c.* 6. *&c.* and of the Statute Merchant and Staple.

AN Obligation by Matter of Record is a Writing obligatory acknowledged before a Judge, or other Officer having Authority for that Purpoſe, and inrolled in a Court of Record; and of this there are two Sorts, *viz.* Recognizances or Statutes.

The Original of the Acknowledgment of Obligations in Courts of Record ſeems to be, that there might be no Occaſion to have the Trouble and Charge of the Proving, which was formerly in the Manner of Contracting more expenſive than at preſent; for formerly the Perſons under the *his Teſtibus* were joined to the Jury who tried the Cauſe, and the Creditor was obliged by Proceſs to bring them in to join them to the Jury, which Form, as my Lord *Coke* has obſerved, made great Delay in the Proceedings; to ſave this Expence, the Acknowledgment was made in Courts of Juſtice, and then the Court atteſting the Deed, there needed no Proceeding or Trial to make it evident. Co. Lit. 6.

The firſt of theſe Securities is the Recognizance at Common Law, which is no more than an Obligation on Record, and may be acknowledged before the ſeveral Judges out of Term, and in any Part of *England*, and may be entred on Record, as well out as in Term; ſo the (b) Chancellor or Keeper may take Recognizances and award Execution, or hold Plea of *Scire* Bro. Recognizance 20. Vaugh. 102. Hob. 195. 4 Inſt. 79.

(b) But if a Perſon enters into a Recognizance to the Chancellor for a Debt due to himſelf, it is a void Recognizance; for the Law will not truſt him with the Exerciſe of his Power in his own Caſe; but if one enters into a Recognizance to the Chancellor and a Stranger, it is a good Recognizance as to the Stranger; for, ſo far as his Intereſt is concerned, the Chancellor is a proper Perſon to take it, and cannot be ſaid to be a Judge in his own Cauſe. Dyer 220. 8 Co. 118. a. Co. Lit. 141. a.

Scire facias and *Audita Querela* in the Chancery, to avoid Execution, *&c.* as the Caſe requires, on all Recognizances taken in that Court.

4 Co. 64. b. 2 Inſt. 395. Cro. Eliz. 187. Rol. Abr. 557.

By the Cuſtom of the City of *London*, the Mayor, Aldermen, or the Mayor ſingly, may take Recognizances; for the Cuſtom is not only reaſonable in itſelf, but, as all other Cuſtoms of the City, has been confirmed by Act of Parliament.

Fitz. N. B. 267. Regiſter 149.

The King, by Special Commiſſion, may appoint any Perſon to take Recognizances from one Man to another, and ſuch a Recognizance duly certified with the Commiſſion into Chancery is of equal Force with the former; and though the Commiſſion be ſo particular, that it only mentions a Recognizance to be taken from *A.* to *B.* yet ſays *Fitzherbert*, the Commiſſioners have a General Power to take a Recognizance from any other Perſon.

Hob. 195.

But thoſe Recognizances at Common Law are no perfect Record, till they are inrolled in ſome Court of Record; yet if they be taken on one, and inrolled on another Day, they find as reaſonable Proviſion in the Law; for ſince it allows any one Judge out of Court, and in any Part of the Kingdom, to take theſe Recognizances which are the higheſt Security of the Common Law, it was very neceſſary they ſhould be inrolled to

• Page 331

* perpetuate the Contract, and by that Means ſecure the Creditor his juſt Debt, which muſt have been very precarious and uncertain, while the Security lay in a private Hand, who might either through Careleſſneſs miſlay, or by ill Practices be prevailed upon to ſuppreſs it.

13 *Ed.* 1. *ſt.* 3. 2 Rol. Abr. 466

A Statute Merchant is a Bond of Record, acknowledged before one of the Clerks of the Statute Merchant, and Mayor of the City of *London*, or two Merchants of the ſaid City, for that Purpoſe aſſigned, or before the Mayor or Warden of the Towns, or other diſcreet Men for that Purpoſe aſſigned; this Recognizance is to be entred on a Roll, which muſt be double, one Part to remain with the Mayor, and the other with the Clerk, who ſhall write with his own Hand a Bill obligatory, to which a Seal of the King, for that Purpoſe appointed, ſhall be affixed, together with the Seal of the Debtor.

The Deſign of this Security was to promote and encourage Trade, by providing a ſure and ſpeedy Remedy for Merchant-Strangers as well as Natives, to recover their Debts at the Day aſſigned for Payment, the Want

(*a*) 11 *Ed.* 1.

of which, ſays the Statute of (*a*) *Acton Burnel* (which firſt created the Statute Merchant), in a great Meaſure prevented the Importation of foreign Commodities, and diſcouraged Strangers to trade with us, to the Detriment not only of our own Merchants, and other Subjects, but to the Prince himſelf, whoſe Cuſtoms riſe and fall in Proportion to the Increaſe and Decay of Trade.

Winch 83.

But though the Statute Merchant ſeems firſt to be introduced, and wholly calculated for the Eaſe and Benefit of Merchants, as the Name itſelf imports; yet they were not long ingroſſed by them; for other Men finding from their own Obſervation, that they were much of the ſame Nature with Judgments given in *Weſtminſter-Hall*, but obtained with infinite leſs Trouble and Expence, out of Regard to their own Intereſt and Quiet, eaſily fell into this Way of Contracting, and by Degrees it came to be improved into a common Aſſurance, as we find it at this Day.

The Addition of the King's Seal, which was never required to any Contract at Common Law, was to authenticate and make the Security of a higher Nature than any other then known; for by this the King, in the Perſon of the Mayor, *&c.* atteſts the Contract, and takes Conuſance of the Debt, and conſequently Execution is to be awarded upon Failure of Payment at the Day aſſigned, without any meſne Proceſs to ſummon the Debtor, or the Trouble or Charge of bringing in Proofs to convict him; for

for the Judges, who are the King's Repreſentatives, for the more ſpeedy Adminiſtration of Juſtice, require theſe on common Contracts and Specialties, to ſatisfy themſelves of the Juſtice and Legality of the Plaintiff's Demands, before they award any Execution againſt the Defendant; but to this Contract the King himſelf, by the Mayor, Warden, *&c.* is a Witneſs, and has the frank Acknowledgment and Confeſſion of the Debtor, that he really owes ſo much, which is the beſt and ſureſt Proof the Law requires; therefore the Legiſlators of that Time, out of a juſt Regard to the Prerogative and Juſtice of the King, on thoſe Contracts, as on Judgments, allowed of an immediate Execution; theſe being the ſureſt Means of Conviction, *viz.* the Confeſſion of the Conuſor on Record, which the Judges at *Weſtminſter* ſeldom have to frame their Judgments on; and thus it muſt be preſumed from the Force of them, which is equal to Judgments of the Superior Courts, they obtained the Name of Pocket Judgments. 3 Sheph. Abr. 318.

This Seal of the King conſiſts of two Pieces, one to lie in the Cuſtody of the Mayor, and the other of the Clerk that inrols the Recognizance, the better to prevent any Fraud or Corruption this Security might be liable to, if the Seal lay in one Hand. Cro. Eliz. 233; 319.

The Statute Staple is a Bond of Record, acknowledged before the Mayor of the Staple, in the Preſence of all or one of the Conſtables; to this End, ſays the *(b)* Statute, there ſhall be a Seal ordained, which ſhall * be affixed to all Obligations made on ſuch Recognizances acknowledged in the Staple; this Seal of the Staple is the only Seal the Statute requires to atteſt this Contract; but it is no more under the Power or Diſpoſal of the Mayor, than that appointed by the Statute Merchant; for though the Statute appoints him the Cuſtody of it, yet it is in ſuch a Manner, that he cannot affix it to any Obligation without their Conſent, it being to remain in the Mayor's Hands, under the Security of their own Seals. 2 Rol. Abr. 466. * Page 332 (b) 27 Ed. 3. ſt. 2. c. 9. ‖ Alſo *vide* c. 8. of the ſame ſtatute; and 36 E. 3. c. 7.

To underſtand a little of the Original and Conſtitution of the Staple, and the Advantage the Nation had by this Eſtabliſhment, we muſt obſerve, that the Place of Reſidence, whither the Merchants reſorted with their Staple Commodities, was anciently called *Eſtapel*, which ſignifies no more than *Mart* or *Market*; and this was formerly appointed out of the *Realm*, as at *Calais*, *Antwerp*, *&c.* and other Ports on the Continent which were neareſt to us, and whither the Merchants might with Safety coaſt it. 4 Inſt. 238.

But beſides theſe Staple Ports appointed abroad, there were others appointed at Home, whither all the Staple Commodities were carried in order to their Exportation, ſuch as *London*, *Weſtminſter*, *Hull*, *&c.* this was found to be of great Uſe and Conſequence to the Prince in particular, and to the Intereſt and Credit of the Nation in general; for at theſe Staple Ports were the King's Cuſtoms eaſily collected, and were by the Officers of the Staple, at two ſeveral Payments, returned into the Exchequer; beſides, at theſe Staples, all Merchants Goods were carefully viewed and marked by the proper Officers of the Staple; and this neceſſarily avoided the Exportation of decayed Goods, or ill-wrought Manufactures, and conſequently fixed a Stamp of Credit on the Merchandizes exported, which, upon the View, always anſwered the Expectation of the Buyer. Maline's *Lex Merc.* 337-8. *vide* the 27 E. 3. c. 1.

The Staple Merchandizes, according to Lord (*c*) *Coke*, are only Wool, Woolfells, Leather, Lead, and Tin; (*d*) others add Butter, Cheeſe and Clothes; but whatever they were, the Mayor and Conſtables had not only Conuſance of all Contracts and Debts relating to them, but they had likewiſe Juriſdiction over the People and all Manner of Things touching the Staple; this Power was given them, leſt the Merchants ſhould be diverted (*c*) 4 Inſt. 238. (*d*) Maline's *Lex Merc.* 237. 27 E. 3. c. 8.

and drawn from their Buſineſs and Trade, by applying to the Common Law, and running through the tedious Forms of it, for a Determination of their Differences, and for the greater Encouragement of Merchants, that they might have all imaginable Security in their Contracts and Dealings, and the moſt expeditious Method of recovering their Debts, without going out of the Bounds of the Staple.

Co. Lit. 290. By this it appears, that this Security was only deſigned for the Merchants of the Staple, and for Debts only on the Sale of Merchandizes brought thither; yet in Time others began to apply it to their own Ends, and the Mayor and Conſtable would take Recognizances from Strangers, ſurmiſing it was made for the Payment of Money for Merchandizes brought to the Staple; to prevent this Miſchief, the Parliament in 23 *H.* 8. *c.* 6. *ſ.* 11. reduced the Statute Staple to its former Channel, and laid a Penalty of 40*l.* on the Mayor and Conſtables, who ſhould extend the Benefit of the Statute to any but thoſe of the Staple; but though the Statute of 23 *H.* 8. *cap.* 6. deprived them of this Benefit; yet it framed a new Sort of Security, to be uſed *ad Libitum* by all Men, known by the Name of a Recognizance on 23 *H.* 8. *cap.* 6. or a Recognizance in the Nature of a Statute Staple, ſo called, becauſe this Act limits and appoints the ſame Proceſs, Execution and Advantage in every Particular, as is ſet down in the Statute Staple.

Co. Lit. 290. a. 4 Inſt. 238. 2 Rol. Abr. 466. Co. Ent. 12. *Page 333

A Recognizance therefore in Nature of a Statute Staple, as the Words of the Act declare, is the ſame with the former, only acknowledged under other Perſons; for as the Statute runs, the Chief Juſtices of the King's Bench and Common Pleas, or in their Abſence, out of * Term, the Mayor of the Staple at *Weſtminſter*, and the Recorder of *London* jointly together, ſhall have Power to take Recognizances for Payment of Debt in the Form ſet down in the Statute; in this, as in the former Caſes, the King appoints a Seal to atteſt the Contract, which ſuch of the ſaid Juſtices ſhall have the Keeping of, and the ſaid Mayor and Recorder another of the ſame Print and Faſhion; and every Obligation made and acknowleged before either of the Juſtices, or the Mayor or Recorder, muſt be ſealed with the Seal of the Conuſor, with the King's Seal, and with the Seal of the Chief Juſtice, or the Mayor and Recorder before whom it is taken, who are likewiſe obliged to ſubſcribe their Names; beſides this, the Clerk of the Recognizance (who is to be appointed for this Purpoſe by the King) or his Deputy, ſhall make and write all Obligations thus acknowledged, and inrol them in two ſeveral Rolls indented, one whereof ſhall remain with ſuch of the ſaid Juſtices, or with the Mayor and Recorder that takes the Recognizance, and the other with the Clerk, who is farther obliged, at the Requeſt of the Conuſee, his Executors or Adminiſtrators, to certify ſuch Obligations into Chancery under his Seal. †

† But now by ſtat. 8 Geo. 1. c. 25. ſ. 1. The Clerk of the Recognizances, or his Deputy, ſhall prepare three Parchment Rolls, and ſhall at the Times of acknowledging every ſuch Recognizance, fairly write or ingroſs, inſtead of the Heads or Contents thereof, on the ſaid Rolls, the full Tenor, *in hæc verba*, of every ſuch Recognizance; and one of the Rolls ſhall contain all the Recognizances taken before the Chief Juſtice of the King's Bench; another the Recognizances taken before the Chief Juſtice of the Common Pleas; and the other the Recognizances before the Mayor of the Staple at *Weſtminſter*, and Recorder of *London*; and the Perſons before whom ſuch Recognizances ſhall be taken, as well as the Parties acknowledging the ſame, are to ſign their Names to the Roll of every Recognizance, under the Inrolment thereof, as well as ſign and ſeal the Recognizance; and all Rolls ſo ſigned ſhall, at the End of every Year, be fixed together, and made one Roll of, and are to remain in the Cuſtody of the Clerk, who is to keep a Docket for Searches.

Execution.

2. Of the ſeveral Proceſſes on theſe Securities when forfeited, in order to a full Execution.

But before we enter into a particular Inquiry concerning theſe Proceſſes, it is proper to take Notice, that the Intereſt gained upon an Execution of a Statute or Recognizance is to be followed by an actual Entry of the Conuſee to perfect his Security, and till ſuch Entry the Conuſee hath only a Poſſeſſion in Law, which he cannot aſſign or transfer over to any other Perſon; therefore where the Adminiſtrator of a Conuſee in a Statute after his Death ſued forth an Extent, and upon that a *Liberate*, which was returned, and before any actual Entry or Recovery of the Poſſeſſion in Ejectment, or without executing the Deed upon the Land, did by Indenture aſſign over all his Intereſt to the Leſſor of the Plaintiff, who thereupon brought his Ejectment; it was adjudged, that the Aſſignment was void; for by the Return of the *Liberate* he had accepted the Poſſeſſion, and was eſtopped to ſay the contrary; then when the Owner ſtill continues in Poſſeſſion, this turns the Poſſeſſion which the Adminiſtrator had accepted by the *Liberate* to a Right, and ſuch Right* is by no Means aſſignable; nor is this like an *Intereſſe Termini*, which, it is true, the Leſſee may aſſign over before actual Entry, becauſe in that Caſe the Leſſor is the principal Agent, and hath done all on his Part to transfer over an Intereſt to the Leſſee, which he may execute at Pleaſure; and as the Perſon, who ſues the *Liberate*, in this Caſe is eſtopped to ſay, that he hath not the Poſſeſſion; ſo is the Leſſor in the other Caſe eſtopped to ſay, that he hath the Poſſeſſion, againſt his own Leaſe.

3 Lev. 312. 4 Mod. 48. *Stephens* and *Hanham*. Salk. 563. pl. 1. S. C. See Ld. Raym. 166, 750, 808, 853. 2 Vern. 519. 10 Mod. 177, 265. 12 Mod. 573. 2 Will. Rep. 91. pl. 22. 2 Stra. 1086. Andr. 125. Caſ. Temp. Hardw. 98, 99. 2 Barnard, K. B. 217.

* See *poſt* 654. D.

1. *Of the Manner of Execution on the Recognizance at Common Law, and wherein it differs from the Statutes*, &c. *and they from each other.*

If the Conuſor be within the Juriſdiction of the Mayor, or other Officer, before whom the Statute Merchant was acknowledged, and be found there, then upon the Conuſee's bringing the Statute, *&c.* to the Mayor, *&c.* and Clerk, and their finding the Record of it, and the Day of Payment lapſed, the Mayor may apprehend and impriſon the Conuſor, (if he be lay) there to remain till he ſatifies his Creditor. 13 Ed. 1 ſt. 3.

* And although there be no Day of Judgment expreſſed in the Statute, yet this Omiſſion of the Clerk does not vitiate the Statute; for in this, as in Obligations, where no actual Day is appointed for Payment, the legal Day is preſently, or when the Conuſee pleaſes to demand it. * Page 334 Winch 82. Jon. 52.

But there may be a Day of Payment fixed in the Statute, and yet the Statute void; as if it be payable at *Michaelmas* after *J. S.* goes to *Paul's*, or returns from *Rome*; theſe are void Statutes, becauſe it does not appear judicially to the Mayor, when to award Execution; but if the Statute be payable the firſt Return of *Michaelmas* Term, or before *Michaelmas*, there is ſufficient Certainty in theſe, and the Mayor ought to take Notice of them. Winch. 83, 85.

But if the Conuſor be out of the Juriſdiction of the Mayor, then ſhall he ſend the Recognizance under the King's Seal into Chancery, after which Certificate 2 Rol. Abr. 473.

Certificate the firſt Proceſs is a *Capias* to take his Body only; and if upon this the Sheriff returns a *Cepi Corpus*, the Debtor ſhall remain in Priſon a Quarter of a Year, in which Time he may diſpoſe of his Goods and Lands to the beſt Advantage, to pay his Debts; but if the Conuſor either omits to ſatisfy his Creditor in that Time, or if the Sheriff had returned on the *Capias non eſt inventus*, or the Conuſor dead, then ſhall the Execution be granted againſt Lands, Goods and Chattels, and they be delivered to the Conuſee by a reaſonable Extent till the Debt be levied; this Writ of Execution the Sheriff is to return into one of the Benches, and how he hath performed the Service,

And here we muſt take Notice, that the Proceſs on a Statute Merchant differs from that on the Statute Staple, and the Recognizance in Nature of a Statute Staple in four Particulars:

Bro. Statute Merchant 16.

1. If the Conuſor cannot be found within the Staple, nor their Goods, to the Value of the Debt; the firſt Proceſs, after the Certificate under the Seal in Chancery, is to take Body, Lands and Goods, all in one Writ, in which Reſpect theſe are preferable to the Statute Merchant, as being much ſpeedier Remedies than in that

4 Inſt 79. Co. Lit. 290.

2*dly*, They differ in Reſpect of the Place of the Return; for as is before obſerved, the Writ of Execution on the Statute Merchant is returnable in either Bench; but upon the Statute Staple the Writ is returnable into Chancery; and 23 *H.* 8. *c.* 6. which firſt brought in the Recognizance in Nature of a Statute Staple, referring in this to the ſame Proceſs and Execution eſtabliſhed by 27 *E.* 3. *ſt.* 2. *c.* 9. on the Staple, the Law muſt be the ſame in both Caſes.

2 Rol. Abr. 475.

3*dly*, They differ in the Subſtance of the Writ of Execution, for upon the Statute Merchant, the Sheriff may deliver the Lands, *&c.* to the Conuſee, upon a reaſonable Extent, without the Delay or Charge of a *Liberate*; but upon the Statute Staple or Recognizance in Nature of it, the Sheriff, after the Extent, cannot deliver the Lands, *&c.* to the Conuſee, but muſt ſeize it into the King's Hands, and the Conuſee muſt have a *Liberate* to get the Lands, *&c.* into his Hands; and in this Reſpect the Statute Merchant is preferable to the Statute Staple, or Recognizance in Nature of it. *

* *Vide ante* 331, 332.

Bro. Statute Merchant 16. Moor, pl. 1097. Cro. Eliz. 494.

4*thly*, A fourth Difference is, that the Statute Merchant having the Seal of the Conuſor beſides the King's Seal, the Conuſee may waive the Execution given by the Statute, and uſe it as an Obligation, and bring an Action of Debt on it; ſo for the ſame Reaſon may the Conuſee, on the 23 *H.* 8. *c.* 6. the Recognizance having the Seal of the Conuſor to it; *ſecus* of a Statute Staple, becauſe the King's Seal only, without that of the Party, is affixed to it, which is abſolutely neceſſary in all Obligations at Common Law.

*Page 335

* 2. *At what Time Execution may be granted on each of them.*

Co. Lit. 291. 2 Inſt. 469. F. N. B. 296. Bro. Recog. 17.

For the Time of Execution we muſt diſtinguiſh between Recognizances at Common Law and Statutes Merchant, *&c.* for upon the former, if the Conuſee did not take out Execution within a Year after the Day of Payment aſſigned in the Recognizance, he was obliged to commence the Suit again by Original; the Law preſuming the Debt might have been paid, if they did not ſue Execution within the Year after the Money became payable; but this Law was (*a*) altered in *Edward* the Firſt's Time, and the Conuſee had a *Scire facias* given him to revive the Judgment, and put it in Execution if the Conuſor cannot ſtop it by pleading ſuch Matters as the Law judges ſufficient

(*a*) By Weſtm. 2. 13. E. 1. *ſt.* 1 *c.* 45. Which *vide poſt.* 361.

ſufficient for that End, ſuch as a Releaſe, *&c.* but the Conuſee of a Statute Merchant, *&c.* may at any Time ſue Execution on them without the Delay or Charge of a *Scire facias.*

If *A.* enters into a Recognizance or Statute, *&c.* to *B.* and but one Day of Payment is appointed for the whole Debt, *B.* may have Execution upon Failure of Payment in the Method before ſet down; but if the Sum be payable at three ſeveral Days, as 20*l.* at each Day, the whole Debt being 60*l.* when the firſt Day of Payment is lapſed, the Conuſee may have Execution for 20*l.* immediately, and ſo for the Reſt as it becomes due, without waiting for the laſt Day of Payment, as he muſt have done if the Debt had been due by Bond; and this holds as well on Recognizances at Common Law as upon Statutes; and the Reaſon is, becauſe theſe are in Nature of three ſeveral Judgments.

2 Rol. Abr. 468. Bro. *Execut.* 142. Co. Lit. 292. 2 Inſt. 395, 471. Reg. 147. 5 Co. 81.

3. *Who ſhall have Execution on them, as the Perſon alters.*

Here we muſt again diſtinguiſh between Recognizances at Common Law and Statutes and Recognizances introduced by Statute Law; for, in the firſt Caſe, if the Conuſee dies before Execution ſued, his Executor ſhall not ſue it even within the Year, without bringing a *Scire facias* againſt the Conuſor; the Reaſon is, becauſe the Law preſumes the Debt might have been paid to the Teſtator, and therefore would not ſuffer the Debtor to be moleſted, unleſs it appeared he had omitted to perform the Judgment; and this was to be done by *Scire facias* brought by the Executor, for the Alteration of the Perſon altered the Proceſs at Common Law; but the Statute Merchant, *&c.* being deſigned to encourage Strangers to trade with us, in this, as in many other Inſtances, have the Advantage of any Security known in the Common Law; and this dilatory Proceſs is taken away in theſe Caſes by ſeveral Acts of Parliament that firſt introduced them; and therefore upon the Death of the Conuſee of a Statute Merchant, *&c.* his Executors may come into Chancery, and, upon their producing the Teſtament and the Statute, ſhall have Execution without *Scire facias*, as the Teſtator himſelf might.

2 Inſt. 395 471. Bro. *Stat. Merch.* 16, 43, 50.

But the Difficulty in ſettling this Point will be, either when there are two Conuſees, and one of them dies after Proceſs of Execution is begun; or where there is but one Conuſee, and he dies after Proceſs begun. In order to clear theſe Points, it is to be obſerved, that that which is certified into Chancery is a Tranſcript of the Record lodged with the Mayor and Clerk, and upon ſuch Certificate the Chancery views the Pocket Security, and then proceeds to iſſue the Proceſs according to the Statute 13 *Ed.* 1. *ſt.* 3. *de Mercator*; and if there be any Diſagreement between the Pocket Judgments and the Certificate, there is a new *Certiorari* awarded to the *Mayor to inſpect the Rolls, and make a Re-certificate, as appears in the (*a*) *Regiſter.*

* Page 336 (*a*) Reg. 148. b. Dyer 180.

When the Chancery hath iſſued Proceſs in either Bench, if the Death of the Conuſor, or *Non eſt inventus* is returned, ſo that it appears, that the Perſon is not to be found to give Satisfaction, the Benches direct all other Proceſs, in order to give the Party Satisfaction; and the Reaſon of this is, from the Direction of the Statute to return the Proceſs into theſe Courts, which was upon this original Policy, that all Parties in Intereſt might come in and have an Opportunity to litigate where every Man's Property is determined.

But if the Conuſee dies after Proceſs returned into *C. B.* his Executors cannot carry on the Proceſs there, becauſe the Statute directs a Certificate of ſuch Sort of Recognizance into the Chancery, and the Benches have no Power to proceed, but according to the Authority derived from that Court;

and whenever that Authority ceaſes, as by the Death of the Party, the Proceſs is at an End; and therefore the Court of Common Pleas cannot carry it into Execution, as they could on a Judgment obtained in their own Court; but the Suitor muſt go back into Chancery, as in all Caſes where Proceſs thence iſſuing is determined by the Death of any of the Parties. When the Executor comes back into Chancery, there is a new *Certiorari* awarded to the Mayor to certify the Record, both becauſe the Statute directs, that the Chancery ſhall iſſue Proceſs upon the Recognizance returned, as alſo that it may appear to the Court, that the Security is ſtill in Being upon which the Proceſs is directed.

Rol. Abr. 467. If the Conuſee of a Statute Merchant ſues a *Capias* returnable in *B.* and upon a *Non eſt inventus*, an *Extendi facias* is awarded by the Court, and before Execution executed the Conuſee dies, his Executors cannot carry on the Execution *in Banco*, becauſe that Proceſs out of Chancery being in the Teſtator's Name is now determined, which gave the Court an Authority to proceed; but when the Executor comes back into Chancery, he is not put to a new *Capias*, but may have a ſpecial Writ upon his Caſe, to continue the Proceſs where it determined, becauſe the *Capias* would be nugatory and contrary to the Record *in Banco*, by which it appears, that the Perſonal Satisfaction failed, and the Execution was awarded on his Effects; but if the Conuſee of a Statute Merchant ſues a *Capias*, and upon a *Non eſt inventus* an *Alias* is awarded, before the Return of which he dies, his Executor, when he comes back into Chancery, muſt be put to a new *Capias*, becauſe the Teſtator died in Purſuit of the Perſonal Satisfaction, and there is no Record in this Caſe, whereby it appears deficient; and therefore the Executor is put to a new *Capias*, that the Deficiency of the Perſonal Satisfaction may appear on the Return of it, according to the Direction of the Statute; but it ſeems in both Caſes, by *Dyer* and the *Regiſter*, that there ought to be a new *Certiorari* and Re-certificate thereon, that the Exiſtence of the Security may appear at the Time when the Proceſs iſſues.

Dyer 180. b. Reg. 148.

2 Rol. Abr. 467. 29 E. 3. 38. If two Conuſees of a Statute Merchant ſue Execution, and the Sheriff returns the Conuſor dead, upon which an *Extendi* is awarded, and one of the Conuſees declares in Court, that the other died ſince the Suit commenced, and therefore prays Execution for himſelf; in this Caſe he muſt have a Re-certificate of the Record from the Mayor, and then an Action upon his Caſe directed to the Bank to continue the Proceſs where it ended at the Death of the other Conuſee; for it would be nugatory to put him to his *Capias* again, ſince it appeared by the Return of the Sheriff, that the Conuſor was dead.

2 Rol. Abr. 467. Cro. Car. 450, 457. Jones 385. * Page 337 If Conuſee of a Statute Staple dies, and *B.* his Executor ſues an Extent in Chancery, but before Execution executed *B.* dies, and Adminiſtration *De bonis non* is granted to *C.* who continues the Proceſs, and after the Extent returned ſues out a *Liberate* of the Conuſor's Lands, which were taken in Execution upon the *Extendi* brought by *B.* and has them * delivered to him; this is a void Extent, and the Conuſor may recover his Land in Ejectment; for the *Extendi* being ſued in *B.*'s Name, muſt by his Death abate, and conſequently all the Proceedings continued after by *C.* muſt fall, having no Foundation to ſubſiſt on; beſides, *C.* comes in Paramount the Writ of *B.* not as privy to him, but as the immediate Repreſentative of *A.* ſo if in this Caſe *B.* had ſued an Extent, and after Execution, and a Seizure into the King's Hands, *B.* died, *C.* ſhall have no *Liberate*, becauſe he coming in Paramount the Extent cannot continue the Proceſs, which abated by the Death of *B.*

2 Rol. Abr. 467. If a Conuſee of a Recognizance in Nature of a Statute Staple ſue Execution, and after the Extent and Seizure into the King's Hands dies, his Executor

cutor ſhall have no *Liberate*, for that were to continue the Proceſs which the Teſtator begun, and abated by his Death.

4. *Againſt whom Execution may be granted.*

If the Conuſor of a Statute dies, the Body of the Heir † is protected by the Statute from Execution, but the Lands and Goods of the Conuſor are extendible in his Hands; for it would be moſt unreaſonable to ſubject the Heir to Payment of his Father's Debts, any farther than to the Value of the Aſſets deſcended; nor are theſe extendible in his Hands, if he be an Infant at the Death of the Conuſor, till he comes of Age; the Statute in this Particular is founded on the Reaſon, and follows the Courſe of the Common Law, by which, if Judgment had been given againſt a Man for Debt or Damages, and the Defendant died before Execution ſued, his Heir within Age was not liable to Execution during his Minority; but the Parol demurred till he came of Age; and this Privilege of Infancy does not only protect the Infant, but all others who are affected by the Judgment; as if there be Father and two Daughters, and Judgment be given for Debt againſt the Father, who dies, one of the Daughters being within Age, Partition being made, the Eldeſt ſhall not be charged alone, but ſhall have the Benefit of her Siſter's Minority, which puts a Stop to the Execution.

Bro. Stat. Merch 33. Co. Lit. 290. Moor, pl. 121, 203. Dyer 239. Co. Ent. 12.

† Where Execution ſhall go againſt the Heir after an Alienation of Lands deſcended, *vide* 3 W. & M. *c.* 14. *ſ.* 5, 6.

So if the Conuſor of a Statute Merchant dies, and his Heir within Age endows his Mother, the Land in Dower ſhall not be extended during the Minority of the Heir.

Co. Lit. 290. Bro. Stat. Merch. 33.

In the next Place, let us ſee how the Law directs the Execution, where the Conuſor conveys the Land to ſeveral Perſons after the Statute acknowledged; it would be very unreaſonable to load one Feoffee with the whole Debt, when the Burthen ought to be on the whole Land, into whoſe Hands ſoever it comes after the Recognizance acknowledged; and therefore the Law allows of Contribution againſt the other Purchaſers, by which we muſt not underſtand, that they are to allow the Purchaſer, whoſe Land is extended, any Thing by Way of Contribution to the extraordinary Charge, which he ought not to bear alone; but the Perſon grieved muſt relieve himſelf by *Audita Querela*, which ſets aſide the Execution, and reſtores him to the meſne Profits, and obliges the Conuſee to ſue Execution of all the Lands.

3 Co. 14.

And here we muſt conſider by what Rules the Law has governed itſelf in ſuch Executions; by the Words of the Statute *de Mercatoribus*, all the Lands of the Conuſor are liable, and therefore the Conuſee may extend the Execution to them all; but if while they continue in the Hands of the Conuſor, he takes but Part, 'tis a merciful Execution to the Conuſor, becauſe it leaves him the Reſt of the Land for his Subſiſtence in the mean Time, and therefore he cannot ſet aſide the Execution as for Partiality, ſince it is plainly made for his Advantage; but if the Conuſor aliens Part of his Land, then the Caſe is very much altered; for if the Conuſee ſues out Execution of * the Land of the Alienee, that were apparent Partiality in him, and contrary to the Intent of the Conuſor, which makes all the Land equally liable; and therefore ſuch Execution may be ſet aſide by *Audita Querela*, for the apparent Partiality and Injuſtice of it; and it is the ſame Law where there

Plow. 72. *Pope* and *Roſs*. 3 Co. 12.

* Page 338

are ſeveral Feoffees, and Execution is ſued againſt one of them only, and this for the ſame Reaſon; but if the Lands of the Conuſor only, after ſuch Alienation, had been taken in Execution by the Conuſee, this Execution had been good, for ſuch Conuſor could not charge him with any Partiality ſince the Debt was his own, and his Perſon and Effects ſtill liable after ſuch Alienation, and he is ſuppoſed to receive the Purchaſe-money from the Alienee; and therefore there is no Reaſon to bring him into the Payment of the Debts which ſuch Conuſor had previouſly contracted.

Bro. Stat. Merch. 49. 2 Inſt. 396. 3 Co. 13. a. 7 Co. 39. a. Rol. Abr. 311. 2 Rol. Abr. 472. Plow 72.

If *A.* ſeiſed of three Acres in Fee, acknowledges a Statute to *J. S.* and enfeoffs *B.* of one Acre, and *C.* of another, if *J. S.* ſues out Execution againſt *B.* he may have an *Audita Querela* to oblige the Conuſee to charge the Lands of *A.* and *C.* equally, for 13 *Ed.* 1. ſays, that all the Lands of the Conuſor ſhall be extended into whoſeſoever Hands they come; and therefore the Acre of *B.* ſhall not be liable to the whole Debt, when the Statute in this Caſe ſubjects the other Two: But if *J. S.* had ſued Execution againſt *A.* the Conuſor only, he ſhall have no *Audita Querela* to avoid it; ſo if in this Caſe the Conuſor had died, and Execution had been ſued againſt the Heir, he ſhall have no Contribution againſt *B.* and *C.* becauſe the Heir comes to the Land without any Conſideration, and the Conuſor might bind his Heir, as far as the Land deſcended would anſwer his Debts; and yet in ſome Caſes the Heir ſhall have Contribution; as if the Anceſtor acknowledge a Statute, and dies, leaving Iſſue two Daughters; or if the Land which deſcends be of the Nature of Borough Engliſh or Gavelkind, the Heir at Law ſhall make the Special Heirs contribute, becauſe all of them come in as Heirs to the Land deſcended, and are equally charged with his Debts.

Hob. 25. Co. Lit. 376.

2 Bulſt. 14, 15.

But if *A.* in the Principal Caſe had conveyed his three Acres to *B. C.* and *D.* and the Conuſee extended the Acre of *B.* who after the Extent conveys by Fine his Acre to *J. N.* in this Caſe *J. N.* cannot avoid the Extent by *Audita Querela*, and have Contribution againſt *C.* and *D.* for though the Feoffee of a Feoffee may have Contribution where the Conveyance is before the Extent; yet in this Caſe *J. N.* claiming under a Fine levied after the Land was actually extended, muſt hold it under the Incumbrance, for *tranſit terra cum onere*; and 'tis no Way unreaſonable that he ſhould hold it as he purchaſed, ſince he is ſuppoſed to pay a Conſideration accordingly; beſides the Judgment in the *Audita Querela* is, that the Plaintiff ſhall be reſtored to all the meſne Profits, which *J. N.* cannot have in this Caſe, becauſe the Extent was ſued before he purchaſed, and he can have no Title to them but from the Fine levied.

3 Co. 13. a. 2 Co. 25. b.

If *A.* binds himſelf in a Recognizance or Statute, and after his Death ſome of his Lands deſcend to the Heir of the Part of the Father, and ſome to the Heir of the Part of the Mother, both Heirs ſhall be uſually charged; and if the Conuſee loads one only, he ſhall have Contribution.

2 Rol. Abr. 468.

If *A. B.* and *C.* bind themſelves jointly and ſeverally in a Statute, the Conuſee may have Execution againſt one of them alone, or againſt all together; but he cannot have Execution againſt Two only; for the Execution muſt purſue the Statute, which is joint or ſeveral, but Execution againſt Two is neither one nor the other.

3. What Things are bound by them, and are liable to be extended for the Satisfaction of them.

* Page 339

The Statute of 13 *Ed.* 1. *de Mercatoribus*, which, as appears in the Preamble, was for the Security of Merchants and Encouragement of Trade, ſubjected not only the Goods and Perſon, but the Land likewiſe of the Debtor into whoſe Hands ſoever they came, after the Statute acknowledged; therefore if the Perſon of the Conuſor be only taken in Execution on a Statute, and dies, his Goods and Lands are ſtill liable to the Extent, becauſe being all due at firſt to ſatisfy the Conuſee, he may, at Diſcretion, take them all at one Time, or at ſeveral.

Hob. 60. 2 Rol. Abr. 475.

So if a Conuſor ſells all or Part of his Lands, after he has bound himſelf, the Conuſee may ſtill extend it by the Words of the Statute; otherwiſe it would be in the Power of the Conuſor to fruſtrate the Security intended by the Law; ſo if the Conuſor purchaſes after he has bound himſelf, ſuch Lands are ſubject to Execution; for the Statute ſays, All his Lands ſhall be extended, which ſtill muſt be underſtood of thoſe only which he has a Power over, and may charge, and conſequently what he diſpoſed of for valuable Conſideration before his entering into the Statute, is not liable in the Hands of the Purchaſer, for they really in no Senſe can be called his Lands.

3 Co. 12. 2 Rol. Abr. 472. Winch 84.

If the Conuſor has two Manors, the Conuſee may ſue Execution in which of the Manors he pleaſes, for he may diſpenſe with any Part of the Proviſion the Statute has made for him.

2 Rol. Abr. 472.

If Tenant in Tail acknowledges a Statute and dies, and the Conuſor ſue Execution againſt the Iſſue, the Iſſue may avoid it, either by Aſſiſe or *Audita Querela*; for no Charge of the Conuſor's can affect the Land in Tail longer than his own Life, by virtue of the Statute *de donis*, which as to ſuch Lands repeals the other.

Bro. *Execution* 85. Cro. Jac. 85.

If in this Caſe, Tenant in Tail, after he had bound himſelf, had enfeoffed *J. S.* and for his further Aſſurance had levied a Fine to him, the Conuſee may extend the Land in the Hands of *J. S.* and neither he nor the Iſſue in Tail can avoid the Execution, for the Iſſue is totally barred by the Fine, and *J. S.* purchaſed the Land under the Charge, and conſequently muſt hold it ſo.

2 Rol. Abr. 473.

But if Tenant in Tail binds himſelf in ſuch Recognizance or Statute, and dies, and his Iſſue enfeoffs *J. S.* it ſeems the Conuſee may extend the Lands in the Poſſeſſion of *J. S.*

Bro *Execut.* 76. *Qu.* [As this does not ſeem to be Law, nor conſiſtent with the Caſe next but one. *Supra.*]

If a Reverſioner upon a Leaſe for Years acknowledges a Statute, both the Reverſion and Rent are extendible, and the Conuſee may have an Action of Debt for the Rent; ſo a Rent upon an Eſtate for Life may be extended for Satisfaction of a Statute; but the Conuſee in this Caſe can have no Action of Debt for the Rent, no more than the Reverſioner himſelf could have; becauſe, during the Continuance of the Freehold, no Action of Debt lies for the Rent.

2 Rol. Abr. 472. *Vide* Head of *Rent*.

If a Reverſioner in Fee upon an Eſtate for Life acknowledges a Statute, and after grants the Reverſion upon the Death of Tenant for Life, the Conuſee may extend the Land, for the Reverſion being a Tenement is bound by the Statute.

Moor, pl. 118. 2 Rol. Abr. 473.

So if *A.* ſeiſed of a Rent-charge bind himſelf in a Statute Merchant, this Rent is extendible, for the Word *Land*, which the Statute ſubjects to the Exe-

Moor, pl. 104. Co. Lit. 135.

Execution, includes all Hereditaments extendible, and the Conuſee in this Caſe may diſtrain and avow for the Rent, though the Tenant never attorned; for the Law creating his Eſtate gives him all Means neceſſary for the Enjoyment of it.†

† By ſtat. 27 E. 3. ſt. 2. c. 9. The Conuſee hath an Eſtate of Freehold. Com. Dig. 5 V. 476. *Vide poſt.* 342. Alſo *vide* 346, and *ante* 331, 332, 334.

7 Co. 39. *Lillingſton's* Caſe. * Page 340

If the Grantee of a Rent-charge, after the Acknowledgment of the Statute, had releaſed to the Tenant, by which the Rent was extinguiſhed, * yet upon Failure of Payment the Conuſee may extend it; for to this Purpoſe it has ſtill a Continuance, the Statute *de Mercatoribus* binding all the Land (which includes all Hereditaments extendible) the Conuſor had at the Time of entering into the Statute; conſequently this muſt be liable into whoſe Hands ſoever it comes.

5 Co. 105. Moor, pl. 351. 2 Inſt. 397. 2 Rol. Abr. 472. Hob. 47. but Dyer 372. cont.

If the Conuſor has Lands in Ancient Demeſne, they ſhall be extended on Forfeiture of the Statute; for tho' diſputed Titles to theſe Lands are not determinable in Courts of Common Law (and therefore Ejectment does not lie of them) leſt the Tenants ſhould be brought from the Service of the Plough; yet they are extendible in this Caſe, for the Extent is performed by the Sheriff *in Pais*, and the Title of the Land is not directly put in Plea or Diſpute in the King's Courts, by which the Tenant might be brought from his Buſineſs.

Co. Lit. 222. 2 Co. 59. *Julius Winnington's* Caſe.

If a Feoffment be made to *A.* upon Condition to re-infeoff the Feoffor, and *A.* binds himſelf in a Statute; if *A.* continues ſeiſed of the Land, or re infeoffs the Feoffor, the Land in either Caſe may be extended by the Conuſee; for whoever comes to the Land under the Feoffment of *A.* takes it chargeable with the Statute, and conſequently is liable to the Execution; but if the Feoffor had entered, as he well might, becauſe the Feoffee had diſabled himſelf to perform the Condition, in as much as he cannot return it in the ſame Plight it was given him, then he ſhould not be charged; for this being a lawful Entry, like an Eviction in a Court of Record, ſets aſide all Incumbrances; but if in this Caſe *A.* had been diſſeiſed, and then bound himſelf in a Statute, this had not charged the Land during the Diſſeiſin, and conſequently there is no Diſability to perform the Condition; for a Diſſeiſee can no more charge his Right, as ſuch, than he can tranſfer it; nor is the Land extendible in the Hands of the Diſſeiſor; becauſe, though his Entry is tortious, yet he held it free during the Diſſeiſin, as the Diſſeiſee enjoyed it; but if the Diſſeiſee enters or recovers by Action, then the Land becomes chargeable with the Statute.

Co Lit. 184. b. 2 Rol. Abr. 88. 6 Co. 79. Lord *Abergavenny's* Caſe.

If *A.* and *B.* be Jointenants in Fee, and *A.* enters into a Statute, and dies before Execution ſued, the Land is not extendible in the Hands of *B.* becauſe he claims the Land as Survivor from the firſt Feoffment which conveyed it to him free from any Charge; but if the Conuſee had ſued Execution before the Death of *A.* the Survivor *B.* ſhould hold it charged; for Execution is equivalent to a Sale, and, like a Leaſe for Years, ſhall bind the Survivor; ſo if *A.* in this Caſe had, after the Acknowledgment of the Statute, releaſed to *B.* then the Land would be chargeable with the Statute, though *A.* ſhould die before Execution, becauſe the Acceptance of the Releaſe prevents his claiming by Survivorſhip; for by the Releaſe *B.* had the Land before his Companion died.

Co. Lit. 185. a. 6 Co. 78, 79.

Co. Lit. 185. a.

But the Law is otherwiſe in the Caſe of Parceners; for if one of them charged the Land, the other ſhall hold it under the Incumbrance of the Statute, for he comes in as Heir by Deſcent under the Charge; whereas the Jointenant ſurviving claims from the firſt Feoffment, which is prior to the Charge.

If a Conuſor, at the Time of acknowledging a Statute, has Goods and Chattels to a great Value, they are all liable to ſatisfy the Conuſee, if they be found in his Hands when Execution is ſued; but if the Conuſor diſpoſes of them, they ſhall not be extended in the Hands of a Purchaſer, as Lands may be; for ſince there is no Solemnity eſtabliſhed or required, 'tis impoſſible to find in whoſe Poſſeſſion they lie, in order to extend them; beſides, it muſt neceſſarily put a Stop to Trade and Commerce, if Execution was to purſue the Goods wherever they were found. 2 Rol. Abr. 472.

If a Huſband, *poſſeſſed* of a *Term* in Right of his Wife, acknowledge a Statute, and die, the Leaſe ſhall not be extended in the Hands of the Wife; for though the Law gives him an abſolute Power over the Term, ſo as to diſpoſe of it; yet if he does not make Uſe of that Power during the Coverture, the Wife ſhall enjoy it free as ſhe brought it to him; but if * the Execution had been ſued in his Life, and the Term extended, this had bound the Wife; for the Extent is a Diſpoſition in Law to anſwer the Conuſee's Debt, and therefore ſhall affect the Wife as much as if he had ſold the Term, or granted it for Years. Rol. Abr. 346, 444. Co. Lit. 46. *Vide* Tit. Baron and Feme. * Page 341

If the Huſband be *ſeiſed* of Lands of *Inheritance* in the Right of his Wife, and acknowledges a Statute, upon which Execution is ſued, the Heir upon the Death of the Feme, may enter and avoid the Extent; but this muſt be underſtood of Lands of which he cannot be Tenant by the Curteſy; for ſuch he may as well charge as convey during his Life, to bind the Heir. Bro. Stat. Merch. 18. Co Lit. 30. a.

By what has been ſaid, it appears what Things are extendible and liable to Execution for the Satisfaction of Statutes Merchant, of the Staple, and Recognizances in the Nature of the Statute Staple; and the ſame are alſo liable to ſatisfy all Debts due on Recognizances at Common Law, only with this Difference; that in the former Caſes both Body, Goods and Lands, being all due, the Conuſee may take all at once, or different Times; ſo that if he extends the Lands firſt, he may afterwards take the Body; whereas upon the Recognizance at Common Law, if the Conuſee ſues an *Elegit*, he can have no *Capias* afterwards to take the Body, becauſe he hath determined his Choice by that Writ to the Goods and Chattels, and a Moiety of the Land. 2 Rol. Abr. 475. 2 Inſt. 395. Hob. 60.

4. What Proviſion the Law has made for Tenant by Statute Merchant, &c. in caſe of Eviction.

By the Common Law, after a full and perfect Execution had by Extent, returned and entered on Record, the Conuſee could have no new Re-extent on the Effects of the Conuſor, becauſe there was once Satisfaction given to the Creditor on Record, though the Lands had been recovered from him before he had levied the Debt out of them; the Severity of this Law was laid aſide in *Henry* VIII's Time, for in the 32d Year of his Reign it was enacted, That if Lands delivered in Execution on juſt Cauſe be recovered from the Tenant by Execution before he hath received his whole Debt, the Conuſee (and by a favourable Conſtruction of the Statute, his (*a*) Executors) may have a *Scire facias* out of that Court where Execution is firſt awarded, or out of any Court where the Record ſhall be moved by Writ of Error and affirmed; but this Statute is to be conſtrued under theſe Reſtrictions, that where the Conuſee hath Remedy for Part of his Debt *in præſenti*, or *in futuro*, for the whole or for Part, there he can have no Aid nor Benefit of this Statute. 32 H. 8. c. 5 (*a*) 8 Co. Lit. 290.

As

Co. Lit. 289. As if all the Lands extended be recovered from the Conuſee but one Acre, he ſhall have no Advantage of this Statute, becauſe the Act relieves thoſe Conuſees only who are clearly without Remedy, which the Conuſee cannot be ſaid to be in this Caſe, where he has one Acre left him, though it be but a poor Remedy.

Co. Lit. 289. b 4 Co. 67. If *A.* be bound to *B.* in one Statute, and to *C.* in another, and *C.* firſt ſues Execution, and extends the Lands, and afterwards *B.* extendeth and takes the Lands from *C.* as by Law he may, becauſe his Statute is prior, *C.* ſhall have no Benefit of this Statute, though he has not one Acre left him, becauſe he hath a Remedy *in futuro*; for after the Extent of *B.* is ended, he ſhall re-enjoy the Lands by Force of the former Execution; ſo for the ſame Reaſon, if the Wife of the Conuſor recover Dower againſt the Tenant by Execution, he hath no Relief from this Statute.

Co. Lit. 289. If a Leſſor ouſts his Leſſee for Years, or diſſeiſes his Tenant for Life, and then acknowledges a Statute, and the Conuſee ſues Execution; if the Leſſee in either Caſe re-enters, the Conuſee is not relieved by this * Page 342 * Act, becauſe he hath a Remedy *in futuro*, *viz.* after the Death of the Leſſee, or the Leaſe ended by holding over.

2 Inſt. 396. Co. Lit. 43. b. If Tenant in Execution, by Recognizance at Common Law, or by Statute Merchant, *&c.* be diſſeiſed, they may, by the expreſs Words of the Statute, have an Aſſiſe of Novel Diſſeiſin and Rediſſeiſin alſo; as of a Freehold to them and their Aſſigns, till the Debt be paid; and if there be no Aſſignment by the Conuſee in his Life-time, they ſhall go to the Executor, being really but Chattels, who in Caſe of a Diſſeiſin ſhall have the ſame Remedy the Teſtator might have had by an equitable Conſtruction of the Statute.

Before we conſider in what Caſes theſe Tenants by Statute Merchant, *&c.* can hold over the Time of their Extent, it is firſt to be obſerved, that the Sheriff is to make a reaſonable Extent of the Lands; ſo that computing the Debt and Value of the Land, it will be eaſily known how long the Extent is to continue, and when the Conuſor is to have his Land again.

4 Co. 82. 2 Rol. Abr. 478. Here we muſt diſtinguiſh between the Act of a Stranger and the Act of the Conuſor; for in Caſe of a Diſſeiſin or any Interruption by a Stranger, the Conuſee ſhall not hold over the Time of the Extent, but is to have Satisfaction for the Injury done by Action againſt the Stranger; but if the Conuſor himſelf had given the Tenant by Execution any Interruption, or hindered him from taking the Profits, there the Tenant might either hold over, or have an Action againſt the Conuſor; for as, in the firſt Caſe, it would be unreaſonable to puniſh the Conuſor for the Act of a Stranger, by keeping him out of his Lands; ſo in the laſt Caſe it would be equally unreaſonable to permit the Conuſor, by any Act of his, to turn the Conuſee out of the Land before he has levied the Debt.

2 Rol. Abr. 479. If Land of a Leſſee for Life, or Years, be extended upon a Statute, and afterwards Part is recovered in an Action of Waſte, for Waſte done by the Conuſor before the Extent, the Conuſee ſhall hold the Reſidue over the Time of the Extent, becauſe no Act of the Conuſor's ſhall prejudice the Conuſee, or hinder him from levying his juſt Debt out of the Lands; but if the Land had been recovered for what was committed by the Conuſee, there he ſhould not take Advantage of his own Wrong, and hold over to the Prejudice of the Conuſor.

3 Co. 67. 2 Rol. Abr. 478. 9. So if Tenant in Execution either ſuffers the Land to lie Waſte, or neglects to levy the Debt out of it, or if he makes a conditional Surrender of the Land to him in the Reverſion, and enters for the Condition broken; theſe are all his own wilful Acts; and it is but reaſonable he

ſhould

ſhould ſuffer for them, and not hold over the Land to the Prejudice of the Conuſor.

But on the other Hand, where there is no Default or Negligence in the Conuſee, but he is prevented from making the uſual Profits of the Land by the Act of God, as where the Land is ſurrounded by Water, or rendered unprofitable by Wild-fire, there the Conuſee ſhall hold over the Time of the Extent; for it would be unreaſonable to puniſh the Conuſee for what he could by no Induſtry or Poſſibility prevent. 4 Co. 82. b. 2 Rol. Abr. 478.

7. The ſeveral Ways of Vacating and Diſcharging theſe Statutes, and this either before or after Execution.

As we find that both Body Goods and Lands are liable to Execution, and the Conuſee may, at Pleaſure, take one or all by one Writ of Execution, or all at different Times by ſeveral Writs of Execution, we ſhall conſider,

* 1*ſt*, What Acts of the Conuſee will diſcharge the Land, or ſuſpend the Execution of it for a Time; and this either before or after Execution ſued. * Page 343

2*dly*, What Acts of the Conuſee will vacate the Statute, *&c.* by diſcharging both Body, Goods and Lands; and this either by cancelling the Statute, or by Defeaſance, or Releaſe, which are equivalent to it; and herein of the *Audita Querela*, which is the proper Remedy for the Conuſor, if Execution be ſued after ſuch Acts are perfected by the Conuſee.

3*dly*, In what Caſes the Conuſor may avoid and deſtroy the Statute by Entry or Plea, and in what Caſes he is put to his *Scire facias*.

As to the firſt Point; if *A.* acknowledges a Statute to *B.* and afterwards another to *C.* in this Caſe *B.* is firſt to be ſatisfied, his Statute being prior in Time to *C.*'s; yet if *B.* accepts a Leaſe for Years from *A.* then may *C.* ſue Execution firſt, becauſe *B.* by his Acceptance of the Leaſe, has ſuſpended the Execution of his Statute during the Term. 2 Rol. Abr. 479. Cro. Jac. 424, 477.

But if a Conuſee accepts a Feoffment of Parcel of the Land from the Conuſor, the Reſidue in his Hands is ſtill liable; for his Body being ſtill liable, whatever remains in his Hands muſt be ſo to; but if the Conuſor had enfeoffed a Stranger of the Reſidue, then the Conuſee, by his Purchaſe of Part, had diſcharged the whole Land; for the Conuſor, by his Purchaſe, has diſcharged that Part of the Land from being liable to the Debt, ſince his own Lands cannot in any Manner be liable to his own Securities; and having diſcharged a Part of the Land by his own Act, it is a Diſcharge of the Whole, ſince ſuch Act of his has prevented the legal Execution on the whole Lands, in the Manner the Statutes have directed, and therefore to execute it on the other Alienees is partial, and to execute it on himſelf, together with the other Purchaſers, is impracticable. Plow. 72. 2 Rol. Abr. 471. Bro. *Statute Merch.* 42. F. N. B. 104. Cro. Eliz. 756.

Thus if a Conuſee extends a Rent-charge, and after purchaſes Parcel of the Land out of which it iſſued; this frees the whole Rent from the Statute; for, beſides that the Rent-charge is extinguiſhed, and conſequently can be no longer in Extent, the Conuſee, by his Purchaſe, though it had continued, has diſcharged it, for the whole Rent was extended to anſwer the Statute; and Part of it being diſcharged by the Conuſee's own Act, the Remainder muſt be liable to the whole Debt, which would be contrary to the Extent, or elſe muſt be diſcharged. Savil 69.

2 Rol. Abr. 47.

If the Conuſor enfeoffs the Father of the Conuſee of Part of his Land, and a Stranger of the Remainder of it, and, upon the Death of the Father, that Part deſcends to the Conuſee; this Deſcent, though before Execution, diſcharges the whole Land, and the Stranger ſhall enjoy his Purchaſe free from that Statute; for ſince the Lands are made liable, which were not ſo, to any Executions at Common Law, the Conuſee muſt take the Execution according to the Statute, which in this Caſe cannot be had, ſince he cannot lay any Part of the Debt upon the Land, which he is Owner of; therefore not being able to take Execution on the whole Land, according to the Statute, his Remedy fails; and there can be, in this Caſe, no Proviſion of the Common Law in his Favour.

Bro. *Statute Merch.* 25. 2 Rol. Abr. 470.

If the Conuſor enfeoffs the Conuſee of all his Lands, by this Purchaſe the Conuſee has diſcharged the Land from the Extent, becauſe it would be moſt abſurd to extend his own Land to pay his own Debt; but if the Conuſor repurchaſes the Lands, he has revived the Extent againſt them; for the firſt Feoffment only diſcharged, or rather ſuſpended, the Execution againſt the Land, and left the Body and Goods ſtill liable; and whilſt the Conuſor is ſubject to Execution, ſo long will all Lands he purchaſes after the Acknowledgment of this Statute be ſubject.

Plow. 72.

So if the Conuſor, after the Repurchaſe, had aliened to a Stranger, the Conuſee might ſue Execution againſt him; for he purchaſed them

* Page 344

* ſubject to the Incumbrance of the Statute, ſince they were chargeable in the Hands of the Conuſor.

But all theſe Acts of the Conuſee, which diſcharge the Land only, muſt be underſtood to be done before the Execution ſued. Let us ſee in the next Place, how far ſuch Acts will affect him after Execution is ſued, and we ſhall find them not only to diſcharge the Land, but the Body and Goods alſo, as will appear by the following Inſtances.

2 Rol. Abr. 477. Plow. 72. Bro. *Statute Merch.* 42.

For where the Body and Lands of the Conuſor are in Execution, and the Conuſee purchaſes the Whole or Parcel of the Land; this diſcharges not only the Land, as in the precedent Caſes, but the Body alſo; for the Lands are taken in Execution as a real Satisfaction for the Debt, and therefore, as in all other Caſes of Execution, are a Diſcharge of the Body, which is but a Pledge for Satisfaction; but theſe Debts being preſumed to be Mercantile, are therefore to be ſatisfied as ſoon as poſſible, that the Merchant may attend his Buſineſs; for which Reaſon the Statute allows, that, where the real Satisfaction is had by the Extent of the Lands, yet the Body ſhall be a Pledge, in order for a more ſudden Satisfaction, if the Money can be raiſed; but yet if the real Satisfaction by the Purchaſe or Deſcent of the Land be diſcharged, as it muſt be when the Conuſee cannot have it in the Manner it was extended (as the Conuſee cannot have in this Caſe, ſince he cannot have the Term and Fee-ſimple in the Land together), it follows of Courſe, that the Body, which is only a Pledge, cannot continue in Execution, when that which was the real Execution is diſcharged in the Hands of the Conuſee; ſo if the Conuſee ſurrenders Part, or the whole Land, this diſcharges both Land and Body; for the Body being only in Execution, in order to oblige him the ſooner to ſatisfy the Conuſee, when he by any Act acknowledges himſelf ſatisfied, as he does by the Surrender, the Body muſt conſequently be ſet at Liberty.

2 Rol. Abr. 477.

Thus, if the Bodies of *A.* *B.* and *C.* be in Execution, and the Conuſee comes into Court, and ſays, that he will not have one of them in Execution; if this be entered of Record, it ſhall diſcharge every one of them; the Reaſon is, the Debt being intire and chargeable on each of them, his Acknowledgment of Satisfaction by this Act of one of them, ſhall, like a Releaſe, extend to all.

If

If *A.* and *B.* acknowledge a Statute to *C.* who takes their Bodies, and the Lands of *B.* in Execution; if afterwards *B.* dies, and his Land in Execution deſcends to *C.* the Conuſee; this diſcharges the Body of *A.* Bro. *Statute Merch.* 15. 2 Rol. Abr. 477.

If a Conuſor be Leſſee for Life, and his Body and Lands are taken in Execution, and the Conuſee, being in by the Extent, commits Waſte, for which the Reverſioner recovers the Land, (as he well may, becauſe the Eſtate of the Leſſee, which was extended, was ſubject to the Puniſhment of Waſte); this ſhall diſcharge the Body of the Conuſor; *ſecus* if the Land had been recovered for Waſte done by the Conuſor, for then the Body ſhould not be diſcharged, leſt the Conuſor by his Act and Wrong ſhould free himſelf from the Execution. Bro. *Statute Merch.* 15. 2 Rol. Abr. 477.

The next Thing conſiderable is, what Acts of the Conuſee will vacate the Statutes, by diſcharging Body, Goods and Lands, and this may be done,

1*ſt*, By cancelling the Statute, as tearing off the Seals, which are ſo eſſentially neceſſary, that without them the Statute, like common Specialties, is wholly void and uſeleſs.

2*dly*, By Defeaſance, which may vacate the Statute abſolutely, or upon Condition.

3*dly*, By Releaſe, which is a ſolemn Renunciation of a Man's Right by Deed; but it may be demanded how theſe Statutes, which have the Force and Solemnity of a Judgment, can be avoided by Acts of leſs Notoriety than themſelves, as theſe Acts *in Pais* muſt be confeſſed to be, which overthrows the eſtabliſhed Rule, *unumquodque ſolvi eo ligamine quo ligatur*; the Anſwer to this is, that notwithſtanding the Releaſe, *&c.* from the Conuſee, the Statute ſtill continues in Force; but the Law, with Reaſon, conſtruing all Men's Deeds moſt ſtrongly againſt themſelves, by theſe Acts, precludes the Conuſees from Execution. *Page 345

But if the Court, at the Inſtance of the Conuſee, grants him Execution, as they really ought, ſince nothing appears to them deſtructive of the Statute; what Remedy has the Conuſor? For after ſuch Releaſe or Defeaſance he cannot ſtop the Execution, becauſe he has no Day in Court to plead this in Bar; but his proper Remedy in ſuch Caſe is by *Audita Querela*, which is a Writ to ſet aſide an unjuſt Judgment, for ſome Injuſtice which could not be pleaded in Bar; for if it might, then it was the Party's own Fault not to plead it in Bar of ſuch unjuſt Demand, which is not relieved by this Writ, that Proceedings might not be endleſs. * F. N. B. 104. 2 Sid. 108, 109. Co. Lit. 290. Moor, pl. 693.

* *Qu.* If it might not be done upon Motion, a much more expeditious, and much leſs expenſive Method? The ſame *Query* is applicable to many of the following Caſes.

And if upon a *Scire facias* on a Recognizance at Common Law, the Conuſor is returned ſummoned, he ſhall never avoid it by *Audita Querela*, becauſe the Recognizance was upon Condition, which he hath performed; for by the Summons he had a Day in Court given him to plead the Performance of the Condition, which would have been ſufficient to ſtop the Execution; but if the Sheriff had returned, that he found nothing whereby to ſummons the Conuſor, on which Execution had been granted, then the Conuſor might have an *Audita Querela*, and then the Releaſe of the Conuſee, or the Performance of the Condition might well be ſuggeſted therein, becauſe he had no Day in Court to plead them in Bar of the Execution. 2 Rol. Abr. 306. Cro. Eliz. 4. 25. Sid. 55. Sid. 54 Raym. 19.

If *A.* be Tenant for Life, Remainder to *B.* his Son in Tail; *A.* enters into a Recognizance, and dies, *C.* brings a *Scire facias*, and *B.* is returned Heir and Tertenant, and warned, but makes Default, he can have no *Audita Querela* to avoid this Execution, becauſe he had a Day given in Court

Court to ſet aſide the Recognizance; and it was his Folly not to appear when warned.

F. N. B. 104. If *A.* enters into a Statute to *B.* and pays the Money at the Day aſſigned, upon which the Statute is cancelled, and after *B.* forges a new Statute in the Name of *A.* in this Caſe *A.* may relieve himſelf by *Audita Querela*; for the forged Statute having all the Eſſentials of a true one, the Court was obliged to look on it as ſuch, till the contrary appeared, which the Conuſor could not ſet forth before Execution, having no Day to appear judicially in Court, and therefore is put to this Writ to avoid the Execution founded on the Injuſtice of the pretended Conuſee.

Rol. Abr. 313. If the Conuſee of a Statute, upon Agreement with the Conuſor, delivers up the Statute in Lieu of an Acquittance, and after ſues Execution, and the Conuſor prays a Re-extent, becauſe that the Land was extended too low, and has it granted to him, he ſhall never avoid the Extent by *Audita Querela*, becauſe by his praying the Re-extent he admits the Statute good and executory.

F. N. B. 105. 2 Rol. Abr. 307. If a Conuſee of a Statute gives a Deed of Defeaſance to the Conuſor, and afterwards ſues Execution contrary to the Form of the Defeaſance, the Conuſor may have an *Audita Querela*, becauſe the Defeaſance precludes the Execution, if the Terms or Condition of it be performed by the Conuſor; and the Conuſor may have the *Audita Querela*, though the Condition be not performed according to the Defeaſance, if Execution was ſued before the Condition broken, becauſe the Conuſee extended before his Time; and therefore the Execution being unjuſtly ſued muſt conſequently be an Injury to the Conuſor.

Moor 811. pl. 1097. *Trot* and *Spurling*. * Page 346 In an *Audita Querela*, the Caſe was this; the Conuſee gave a Defeaſance, that if he ſued Execution of the Lands the Conuſor had in *Kent*, the Statute ſhould be void; the Conuſee, contrary to this Defeaſance, * extended the Land in that County; and it was adjudged this Writ well lay, to avoid the Execution and vacate the Statute; for the Defeaſance was no way repugnant to the Statute, becauſe the Conuſee might ſtill extend the Lands of the Conuſor in any other County, and take his Body and Goods.

Cro. Eliz. 40, 551. And. 133. Rol. Abr. 313. Co. Lit. 265, 291. 10 Co. 47. b. 2 Rol. Abr. 470. If the Conuſee releaſes to the Tertenant all Right, Intereſt and Demands, together with all Suits and Executions, and afterward ſues Execution, the Tertenant ſhall have an *Audita Querela* to ſet aſide this Execution; and this differs from the Caſe of *Burrows* and *Gray* in *Cro. Eliz.* for there the Conuſee releaſed only all his Right, Intereſt, and Demand to the Tertenant, which was held not to be ſufficient, becauſe he had only a Poſſibility, and no Intereſt in the Land before Execution, and conſequently could not releaſe what he had not; but in the former Caſe, though the Conuſee had no Right to the Land before Execution, yet there are Words ſufficient to diſcharge the Execution, ſince it is releaſed by expreſs Words; and in the firſt Caſe, the Words of the Releaſe refer to the Executions, Suits and Demands upon the Statute, which Statute, ſince it was in Being, the Executions and Demands upon it may be releaſed at any Time; but in the other Caſe the Words *Right, Title and Intereſt* relate to the Land, which the Conuſee had no Intereſt in till Execution ſued, and therefore cannot releaſe or transfer over what he had not; beſides, in the firſt Caſe, the Conuſee has releaſed all Suits, by which, ſays my Lord *Coke*, the Execution is gone, becauſe no common Perſon can have Execution without Prayer and Suit to the Court.

2 Rol. Abr. 480. Another Method of avoiding Executions is by *Scire facias ad rehabendum terram*; and this Writ differs from the *Audita Querela*, for that avoids an Execution unjuſtly obtained at firſt; but the *Scire facias* allows the Execu-

tion

tion juſt at firſt; but ſhews that, the End for which it was granted being obtained, it ought of Conſequence to ceaſe.

If the Conuſor, after his Land is extended, tenders the Money to the Conuſee, who refuſes it; or if the Debt, with all Coſts and Damages which the Statute *de Mercatoribus* allows, be ſatisfied from any caſual Profit ariſing from the Land, in theſe Caſes the Conuſor is put to his *Scire facias*, and cannot enter; but in Caſe of an *Elegit* on a Recognizance at Common Law, when the Conuſee is anſwered his Debt, by the Perception of the certain and uſual Profits of the Land, the Debtor may enter, and is not put to his *Scire facias*; yet in this Caſe, if the Creditor be ſatisfied by an accidental Perquiſite, there the Debtor cannot enter, but muſt have a *Scire facias ad rehabendum terram*; and the Reaſon of theſe Diſtinctions is, becauſe, in the firſt Caſe, the Execution iſſues according to the Direction of the Statute, not only till the Principal Debt be levied, but all Coſts and Damages ariſing by Reaſon thereof; and therefore, ſince the Damages are not aſcertained, the Record will always oppoſe an Entry, which is but an Act *in Pais*, and cannot be turned to the Defeaſance of a Matter of Record, till ſuch Damages are ſettled on Record in the *Scire facias*; but in the ſecond Caſe, when the Debt is certain, and the Value of the Land aſcertained in the Extent, there, when ſuch Debt is paid by Perception of ſuch ſettled Profits, there is no Act on Record to oppoſe an Entry, and therefore an Entry is lawful; but where the Satisfaction ariſes from accidental Profits, which do not appear in the Extent, this then is ſtill Matter of Record, in Oppoſition to the Entry, ſince ſuch accidental Profits do not appear in the Valuation of the Land ſettled by the Extent on Record. 2 Rol. Abr. 479, 480. 4 Co. 67. 2 Inſt. 398.

If Lands be extended on a Statute, and the Time of the Extent expired, the Conuſor is to be put to his *Scire facias*, becauſe the Conuſee may have Cauſe to hold the Land longer than the Time of Extent, for he may retain it till he has received his Coſts of Suit and reaſonable Expences, which the Chancellor ſhall aſſeſs. 4 Co. 67. 2 Rol. Abr. 479.

*No *Scire facias* lies upon a general Averment, that the Conuſee has levied the Debt before the Time of the Extent expired, becauſe this may happen by the Conuſee's Induſtry in improving the Land, which the Debtor can take no Advantage of; ſo if the Land taken in Execution be really worth 20*l.* *per Annum*, but it is extended only at 10*l.* though by this Computation 'tis evident the Conuſee might levy the Debt before the Time of the Extent is ended; yet the Conuſor, upon an Averment that the Debt is levied, ſhall have no *Scire facias*, becauſe that would be contrary to the Record, and the Court is to judge of the Value according to the Extent, by which it appears the Debt is not yet levied; but if the Conuſee has levied Part by cutting of Wood, and has received the Reſidue, as appears by an Acquittance produced by him, in this Caſe he ſhall have a *Scire facias*; the Reaſon is, becauſe the End of the Extent being only to ſatisfy the Conuſee his reaſonable Demands, when ever it appears to the Court that they are anſwered, whether it be by Perception of the Profits, or otherwiſe, they grant a *Scire facias* to avoid the Extent, and re-inſtate the Conuſor in his former Poſſeſſion, ſince the End for which it was given is anſwered. * Page 347 2 Rol. Abr. 483.

If the Conuſee has levied Part of the Debt, according to the Extent, the Conuſor, upon Tender of the Reſidue *in Court*, ſhall have a *Scire facias* to recover the Lands within the Time of the Extent, for here it appears on Record how much was due at firſt, how much was paid, and what remains due and in arrear; and the End of the Extent being to ſatisfy the Conuſee of his juſt Debt, whenever that appears to the Court the Extent ſhall ceaſe; but if the Conuſor had tendered the Remainder of the Debt out of Court, or if in Court he had only offered to come to an Agreement with the Conuſee; 2 Rol. Abr. 482.

nuſee; in neither of theſe Caſes ſhall the *Scire facias* be granted, becauſe it does not appear on Record, that the Debt is paid.

2 Rol. Abr. 482. If the Conuſee of a Statute for 100*l.* apportions the Statute, and ſues Execution for the Body and Land, for ſeveral Parts of it, in ſeveral Counties, as for 20*l.* in *Kent*, 20*l.* in *Surry*, his Body is taken in *London* for 20*l.* upon Tender of this 20*l.* in Court, the Conuſor ſhall have a Writ to the Sheriff of *London* to ſet him at Liberty; for this Writ of Extent was to take his Body, *&c.* till 20*l.* not the 100*l.* was paid, and conſequently, upon Tender of the 20*l.* the Sheriff has no Power to keep him in Priſon; *ſecus* if the Body had been taken before Apportionment, for then it could not be diſcharged upon Payment of 20*l.* it being taken at firſt for the whole Debt.

Rol. Abr. 304. Cro. Jac. 424, 477. If *A.* leaſes *Black-acre* for Years to *B.* and then acknowledges a Statute to *C.* and afterwards another to *D.* then *C.* takes a Leaſe of the Reverſion, and the Rent from *A.* by which he has ſuſpended the Execution of the Statute during the Term, and conſequently laid the Land open to the Extent of *D.* the ſecond Conuſee, who ſues Execution; if therefore *C.* ſhould extend the Reverſion and Rent during his own Leaſe, *B.* the Leſſee is not obliged to pay him the Rent, but may avoid the Extent by Plea without *Audita Querela*, becauſe *C.* hath ſuſpended the Execution of his Statute, the firſt in Date, by the Acceptance of the Leaſe from the Conuſor.

Rol. Abr. 304. If Tenant in Tail acknowledges a Statute, and dies, the Conuſor ſues Execution againſt the Heir, he may avoid it by Aſſiſe, without being put to his *Audita Querela*; ſo if a Diſſeiſor acknowledges a Statute, and the Diſſeiſee enters, the Conuſee extends the Land, the Diſſeiſee is not put to his *Audita Querela* to avoid the Extent, becauſe there is not the Appearance of Juſtice in this Extent; the Conuſor having only a tortious and unlawful Seiſin of the Land, and conſequently no Power to charge it.‡

‡ After an Extent of a Statute in one County, and a *Liberate* returned and filed, the Conuſee may have an Extent into another County, if the Prayer for the ſecond Extent was entered at the Time the firſt Extent was taken out; otherwiſe not. *Oates* v. *Robinſon*, T. 7 Geo. Stra. 461. Fort. 373. And the Chancellor will give Leave to enter the Prayer *nunc pro tunc*. *Ibid.*——See farther as to *Statutes Staple*, *&c.* Com. Dig. 5 Vol. 470, *&c.*

*Page 348 *

(C) Of the ſeveral Kinds of judicial Writs which lie after Judgment: And herein,

1. Of the Form, Teſte, and Return of ſuch Writs.

Vide Head of *Writs*. Cro. Car. 162. *Walker* and *Riches*.

THE Form of judicial Writs muſt be according to the approved Precedents in thoſe Caſes; and therefore where on a Writ of *Elegit*, which was *Ideo tibi præcipimus quod bona & catalla* of the Defendant, *quæ habuit die judicii prædict' reddit', deliberari facias*, omitting *& medietatem terrarum & Tenementorum prædictorum*, the Sheriff extended the Lands and Goods, and delivered the Moiety of the Lands, *&c.* and on Motion the Court refuſed to (*a*) amend the Writ, and held, that the Party muſt take out a new *Elegit*, the Inquiſition herein being without Warrant, the Sheriff having no Authority by this Writ to extend the Lands.

(*a*) Whether any of the Statutes of Jeofails extend to judicial Writs, *vide* Tit. *Amendment* and *Jeofail*.

Every

Execution.

Every Writ of Execution, in caſe of a common Perſon, muſt bear Teſte in Term-time, for being the Proceſs of that Court in which Judgment is given, they have no Authority of awarding it at any other Time; but original Writs iſſuing out of Chancery may bear Teſte at any Time, becauſe that Court is always open.

Co. Lit. 161. 2 Inſt. 40. Latch. 11. 2 Jon. 150. Vent. 362. —But if a Writ of Execution bear Teſte out of Term, the Sheriff is juſtifiable in executing of it, for he is not Judge of the Validity of the Proceſs, provided the Court, out of which it iſſues, has Juriſdiction of the Matter. 2 Salk. 700. pl. 4. —But though he is juſtifiable in executing ſuch Proceſs, yet if he lets a Perſon eſcape whom he arreſted on a *Capias ad Satisfaciend.* which bore Teſte out of Term, no Action lies againſt him; for the Writ was void. 2 Salk. 700. pl. 4. 2 Ld. Raym. 775. 7 Mod. 29. 11 Mod. 50. pl. 20. *per Holt* Chief Juſtice.

But if Judgment be entered as of *Hilary Term*, the Party may take out Execution in the Vacation following, by a Writ Teſte the laſt Day of the ſaid precedent Term; for having run through the whole Courſe of a judicial Proceeding, and his Cauſe ripe for Execution at that Time, it would be unreaſonable to oblige him to wait till the enſuing Term, by which he might be diſappointed of the Effect of his Judgment.

Whether it can be averred, that the Writ did not iſſue till a Day ſubſequent to the Teſte, *vide* Lev. 173. Sid. 231. Lutw. 332. 2 Show. 480. pl. 443.—Where it appeared that an Execution was levied before the Judgment was ſigned, though after the firſt Day of the Term to which the Judgment related, and after the Teſte of the *Fieri facias*, yet held naught. 2 Show. 494. pl. 460.

All Writs of Execution which are to be executed by the ſole Authority of the Sheriff, ſuch as a *Capias ad* (*b*) *Satisfaciendum*, *Habere facies Seiſinam* or *Poſſeſſionem*, *Fieri facias*, *Liberat'*, *&c.* are good when duly executed, though (*c*) never returned by the Sheriff; for the Plaintiff has the Effect of his Suit, and there is nothing farther to be done on his Part; and hence it is ſaid, that an Execution executed is the End of the Law.

5 Co. 90. *Hae's* Caſe. 4 Co. 67. (*b*) But a *Capias* in meſne Proceſs muſt be returned, for the End thereof is to compel the Defendant to appear, and therefore, if the Writ be not returned, the Arreſt is tortious. 5 Co. 90. a. Cro. Car. 447. (*c*) But if the Party apprehends himſelf injured by an erroneous Writ of Execution, he may apply to the Sheriff to return it, and if he refuſes, an Action on the Caſe lies againſt him. Keb. 551.

But in caſe of an *Elegit*, although it be a judicial Writ, yet the Sheriff muſt return it, for this is not be executed by his ſole Authority, but by an Inqueſt taken by him, according to the Statute of *Weſtm.* 2. † therefore he muſt return the Writ, that it may appear that he hath purſued the Directions of the Statute.

5 Co. 90. a. 4 Co. 74. 2 Inſt. 396. Cro. Jac. 569. Cro. Eliz. 584. † Which ſee, *infra*, 349. Div. 2.

* On this Diſtinction it hath been held, that a *Capias ad Satisfaciendum* may be taken out, returnable the Term next but one after the Teſte; for in this Caſe the intervening Term makes no Diſcontinuance, it not being neceſſary, as in Caſe of a *Capias* in meſne Proceſs, that the Defendant ſhould have a Day in Court; for his Cauſe is at an End, and he muſt be in Priſon, whether the Writ be returned or not; whereas on a *Capias* in meſne Proceſs, the Party may be at great Prejudice, by Reaſon of the Impriſonment in the mean Time.

* Page 349 2 Salk. 700. pl. 4. *Shirly* and *Wright*. 2 Ld. Raym. 775. 7 Mod. 29. 11 Mod. 50. pl. 20.

So if a *Fieri facias* iſſues to the Sheriff of *S.* returnable on a common Return-Day, and he at the Day returns *Nulla bona*, a *Fieri facias teſtatum* may iſſue the Day following, to the Sheriff of *Kent*, and Execution by him ſhall be good; for though on meſne Proceſs there can be no *Teſtatum* till the *Quarto die poſt*, yet it is otherwiſe in Writs of Execution, for on theſe the Party has no Day in Court.

2 Jon. 209.

*Page 351

* 3. Of the *Capias ad Satisfaciendum.*

This Writ lay only at Common Law, in caſe of the King, who by his Prerogative might have Execution of the Body, Goods and Lands of his Debtor; but by the Statute of (a) *Marlebridge, cap.* 23. it is enacted, That if Bailiffs, who ought to make Account to their Lords, do withdraw themſelves, and have no Lands nor Tenements whereby they may be diſtrained; then they ſhall be attached by their Bodies, ſo that the Sheriff in whoſe Bailiwick they be found, ſhall cauſe them to come to make their Account; and by the 25 *E.* 1. *cap.* 17. it is accorded, that ſuch Proceſs ſhall be made in a Writ of Debt and Detinue of Chattels, and taking of Beaſts by Writ of *Capias*, and by Proceſs of Exigent by the Sheriff's Return, as is uſed in a Writ of Account.

(a) Enacted 52 H. 3. which *vide* explained, 2 Inſt. 143. That theſe Statutes introduced the *Capias*, which did not before lie in theſe Caſes, *vide* 3 Co. 11, 12. Co. Lit. 289. 2 Inſt. 394. Godb. 290. 2 Leon. 85. 2 Bulſt. 63. Regiſter 136.

Rol. Abr. 904. Cro. Car. 240. *vide* Tit. *Eſcape*. *Ca. Sa.* returnable out of Term, not void, though liable to be ſet aſide on Motion. 2 Bur. Rep. 1187.

On this Writ the Sheriff cannot take Bail, nor can he return, that the Party was reſcued, for he may take the *Poſſe Comitatus*; and therefore if he returns, that the Party was reſcued, an Action lies againſt him for the Eſcape, or a new *Capias* againſt the Party, for an ineffectual Execution is as none.

4. Of the *Fieri facias* and *Levari facias.*

T. Raym. 346.

On *Elegit* Goods may be delivered to the Party, but not upon a *Fi. fa.*†

† But the Sheriff may ſell for the real Value to a Friend of the Plaintiff's in Truſt, and ſee *infra* 352.

The *Fieri facias* and *Levari facias* are judicial Writs which lay at the Common Law. The *Fieri facias*, on which the Goods and Chattels of the Debtor only could be taken in Execution, took its Name, as my Lord *Coke* (b) obſerves, from the Words of the Writ, *quod Fieri facias de bonis & catallis, &c.* but on the *Levari facias* the Sheriff was commanded *quod de* (c) *terris & catallis ipſius* A. *Levari facias, &c.*

(b) Co. Lit. 290. b. 3 Co. 11.

(c) But the Sheriff cannot, by Force hereof, meddle with the Debtor's Lands, ſo as to ſell or deliver them to the Creditor in Satisfaction of the Debt, but may collect the Debt out of the Profits of the Land, as the Corn or Graſs growing thereon, or out of the Rents payable to the Debtor. Godb. 290. Plow. 441. a. Finch 101. Comb. 470. & *vide* 2 Inſt. 453. what ſhall be counted the Iſſues of the Land.

2 H. 7. 13. Office of Executor 87.

The Sheriff, on theſe Writs, cannot deliver a Furnace annexed to a Freehold in Execution, though the Writ gives the Sheriff Authority to levy the Debt upon the Goods and Chattels of the Debtor; and this is indeed a Chattel; yet they do not give the Sheriff any Authority to break or diſunite any Thing from the Freehold, which he cannot do unleſs particularly impowered by Writ.

Dalt. Sh. 145. 3 Co. 13.

Nor has the Sheriff, by Force hereof, any Authority to ſell an Eſtate for (d) Life, which being a Freehold can no more be affected by theſe Writs,

(d) But in Comb. 391. it is ſaid to have been admitted, that ſince the Statute 29 Car. 2. c. 3. an Eſtate *pur auter Vie* may be ſold by the Sheriff on a *Fieri facias*.

than

than any other Eſtate of Inheritance; but he may diſpoſe of (e) Leaſes for Years, which are but Chattels, be they of ever ſo long a Continuance.

(e) But if the Sheriff on a *Fieri facias* ſells a Leaſe or Term of a Houſe, he cannot turn the Leſſee out of Poſſeſſion, but the Vendee, in ſuch Caſe, muſt bring his Ejectment. 2 Show. Rep. 85. *per Cur.*

Alſo on theſe Writs the whole Perſonal Eſtate is liable to Execution, except Wearing Apparel; but it hath been (f) held, that, if the Party hath two Gowns, the Sheriff may ſell one of them.

3 Co. 12. (f) Comb. 356. *per Holt* Ch. Juſt.

* But the abſolute Property of thoſe Goods muſt be in the Debtor, and therefore, if the Sheriff takes the Goods of a Stranger, though the Plaintiff aſſures him they are the Defendant's, he is a Treſpaſſer; for he is obliged, at his Peril, to take Notice whoſe the Goods are, and for that Purpoſe may impanel a Jury to inquire in whom the Property of the Goods is veſted; and this it is (g) ſaid ſhall excuſe him in an Action of Treſpaſs.

* Page 352 Keilw. 119, 120. Bro. Tit. *Treſpaſs* 99.

(g) Dalt. Sheriff 146.

Nor can the Sheriff take in Execution Goods pawned or gaged for Debt, nor Goods demiſed or letten for Years, nor Goods diſtrained.

Bro. Tit. *Pledges* 28. Dyer 67. b. *in Margine.*

In Treſpaſs the Sheriff juſtified, that by virtue of (h) a *Fieri facias* out of the Exchequer for the Queen's Debt, he took the Plaintiff's Beaſts, being *levant* and *couchant* upon the Land of the Debtor, and ſold them for the Queen's Debt; and adjudged that it was not lawful, for they were not to be ſold as the Goods of the Debtor, (i) but they might have been diſtrained for the Queen's Debt.

Cro. Eliz. 431. Hill. 37 Eliz. 2 Rol. Abr. 459. S. C.

(h) But the Cattle of a Stranger being levant and couchant upon the Land of a Perſon outlawed, may be taken by virtue of a *Levari facias* for the King; for this Writ commands the Sheriff to levy this Duty out of the Iſſues and Profits of the Land, and theſe Cattle being levant and couchant, are Iſſues; and were it otherwiſe, it would be in the Power of the Party, by agiſting his Lands, to defeat the King of the Benefit of the Outlawry; but for this *vide* Salk. 395. Skin. 618. Comb. 469. Ld. Raym. 305. Salk. 408. pl. 4. 5 Mod. 109. Carth. 441. Comyns 51 pl. 34. 12 Mod. 178. Raym. 17. Hard. 101. (i) That as to this Point it muſt be a Miſtake of the Printer; for that the Beaſts may be taken, and not ſold, is a Contradiction. Skin. 619. But as to the principal Point, the Caſe is good Law, being on a *Fieri facias*, which gives the Sheriff Power to diſpoſe of the Goods and Chattels of the Debtor only. Comb. 470.

Upon a *Fieri facias* the Sheriff cannot deliver the Defendant's Goods to the (k) Plaintiff in Satisfaction of his Debt; nor ought he to deliver them to the (l) Defendant againſt whom Execution is; but the Goods are to be (m) ſold, and in (n) Strictneſs the Money is to be brought into Court.

(k) Cro Eliz. 504. *Thomſon* and *Clerk*, adjudged, Lutw. 589.

S. P. (l) 2 Vent. 95. (m) Therefore if the Sheriff on a *Fieri facias* levies the Goods, and pays the Plaintiff with his own proper Money; yet he cannot keep the Goods to his own Uſe, for the Authority by which he acted was to ſell the Goods. Noy 107. *Waller* and *Weedale*, adjudged. Lutw. 589. S. C. cited. (n) But if the Sheriff pays the Money to the Party, it is good, and the Court will allow of ſuch Return, becauſe the Plaintiff is thereby ſatisfied, although the Writ run, *Ita quod habeat coram nobis.* 2 Show. 87. pl. 78.——But this is only by the Permiſſion of the Court, and not by Force of the Law. 3 Lev. 203-4.

But it hath been holden, that upon a *Fieri facias* Goods may be ſold to the Plaintiff, who ſues out the Writ, tho' not actually delivered to him.†

Comb. 452. and *vide* Carth. 419.

Ld. Raym. 251. Salk. 320. pl. 4. 5 Mod. 376. 6 Mod. 292. 12 Mod. 126. where it is admitted to be the Practice, to make a Bill of Sale of the Debtor's Goods to the Plaintiff, & *vide* 2 Vent. 95.

† For ſince the Statute of Frauds, Goods are bound by the Delivery of the Writ.

If the Defendant dies after the Execution awarded, and before it be ſerved, yet it may be ſerved upon his Goods in the Hands of his Executor

Cro. Eliz 181. Mod. 188.

S. P. adjud-ed. And Ld. Raym. 695. Com. Rep. 117. pl. 82. 2 Ld. Raym, 808, 850, 1073. 3 Will. Rep 399. 12 Mod. 130, 241.

or Adminiſtrator; (*a*) for by the Execution awarded the Goods are bound and the Sheriff need not take Notice of his Death.

(*a*) That this was clearly ſo before the 29 *Car.* 2. *c.* 3. (*poſt.* 363, &c.) before which Statute the Goods were bound from the *Teſte* of the Writ; but by this Statute they are bound only from the Time of Delivery of the Writ to the Sheriff; but even ſince the Statute, the Execution ſeems good in this Caſe, for the Statute was made for the Benefit of Strangers, who might have a Title to the Goods between the *Teſte* of the Writ of Execution and Time of the Delivery thereof to the Sheriff, and not for the Benefit of the Party, or his Executors or Adminiſtrators. *Vide* Comb. 33. 2 Vent. 218. Salk. 322. pl. 10. 2 Ld. Raym. 1072. 6 Mod. 290. 11 Mod. 34. pl. 6.

Salk. 322. pl. 10. *per Cur.*

So if the Plaintiff dies, the Execution does not abate, and the Sheriff may, notwithſtanding, proceed in it, becauſe the Sheriff has nothing more to do with the Plaintiff; for the Writ commands him to levy and bring the Money into Court, which the Plaintiff's Death does no Way hinder; beſides, an Execution is an intire Thing, and cannot be ſuperſeded after it is begun.

* Page 353

* 5. Of the *Habere facias ſeiſinam* and *Poſſeſſionem*.

Bro. Seiſin 7, 14, 30. Dalt. Sheriff 254-5. Perk. 42.

The *Habere facias Seiſinam* and *Poſſeſſionem* are judicial Writs, which (*b*) lie for the Seiſin and Poſſeſſion of Lands and Tenements; the firſt in Real Actions, where the Freehold was recovered; the laſt is founded on the (*c*) *Ejectione firmæ*, in which the Party is to be reſtored to the Poſſeſſion of his Term of which he was ouſted; the Seiſin or Poſſeſſion on theſe Writs is uſually performed by the Sheriff, by delivering the Party who recovers, a Twig, Bough, Clod, &c. of the Land; or if it be of an Houſe, by the Delivery of the Ring of the Door, &c.

(*b*) But wherever the Writ demands Land, Rent, or other Things in certain, the Demandant, after Judgment, may enter or diſtrain before any Seiſin delivered to him by the Sheriff, upon a Writ of *Habere facias Seiſinam*. Co. Lit. 34. b. (*c*) For the Recovery of the Poſſeſſion in Ejectment, *vide* Tit. *Ejectment*.

6 Co. 52. a.

To a Writ of *Habere facias Seiſinam*, the Sheriff cannot return, that another is Tenant of the Land by Right, for of this there can be no Iſſue taken between them, and the Sheriff has nothing to do but to execute the King's Writ.

Rol Abr. 663.

A Man recovers ſeveral Houſes in an Aſſiſe, and after the Tenant reverſes the Judgment in a Writ of Error, and a Writ iſſues thereupon to the Sheriff, to put him in Poſſeſſion of thoſe Houſes; in this Caſe, though the Tertenants are Strangers to the Recovery, and therefore ought not to be ouſted without a *Scire facias*; yet if the Sheriff executes the Writ, and ſo puts them out of Poſſeſſion by Virtue of it, he is no Diſſeiſor; for he acts under the Authority of the Court, which he is ſworn to obey, under the Penalty of being fined, if he does not.

Rol. Abr. 664 *Floyd* and *Bethel.*

The ſame Law in all Caſes where Execution is of a Judgment wherein the Demand is made of a Thing certain; but if an Execution is to be executed without mentioning any Thing in particular, there the Sheriff, at his Peril, ought to make Execution of the Thing in Demand, otherwiſe he will be a Diſſeiſor, for he is obliged to take Notice of the Thing in Demand.

(D) Where the Party ſhall be concluded by the Election of one of them, and what further Remedy he has when he has not received intire Satisfaction on his firſt Writ, and this either againſt the Party or Sheriff.

WHEN the Plaintiff has Judgment, he has it in his Election to ſue out what Kind of Execution he pleaſes; but he cannot regularly take out two different Executions on the ſame Judgment, nor a ſecond of the ſame Nature, unleſs upon Failure of Satisfaction on the firſt. 2 Rol. Abr. 475. Hob. 60. 2 Inſt. 395.

Therefore if the Plaintiff, upon a Judgment or (*a*) Recognizance at Common Law, ſues out an *Elegit*, he can have no *Capias ad ſatisfaciendum* * afterwards to take the Body, becauſe he hath determined his Choice by that Writ to the Goods and Chattels, and a Moiety of the Land, when being entered upon the Record, he is thereby eſtopped; and though he takes but an Acre of Land in Execution, yet it is held a Satisfaction of the Debt, be it never ſo great, becauſe in Time it may come out of it. * Page 354 Bro. Elegit 15. Rol. Abr. 896. Hob. 2, 57. 2 Bulſt. 97. 5 Co. 87. Cro. Jac.

338. S. C. 6 Co. 46. Godb. 181. Lev. 92. Comb. 232. (*a*) But on Statutes Merchant, Staple, and Recognizances in Nature of Statutes Staple, both Body, Goods and Lands, being all liable by the ſeveral Acts of Parliament that create theſe Securities, the Conuſee may take all at once or at different Times; ſo that if he extends the Lands firſt, he may afterwards take the Body. Hob. 60. 2 Rol. Abr. 475. *Vide antè* 334.

But though the Plaintiff cannot take out a ſecond *Elegit* after the firſt is returned, executed and filed; yet, if upon the firſt the Sheriff returns *Nihil*, the Plaintiff may ſue out a ſecond. Hob. 2. Cro. Jac. 339. pl. 3.

So where in Debt on a Judgment of 2000 *l.* the Defendant pleaded, that the Plaintiff had ſued three ſeveral *Elegits* on the ſaid Judgment into ſeveral Counties, on one of which the Sheriff returned, that he had levied of the Defendant's Goods 500 *l.* And on Demurrer it was adjudged, 1*ſt*. That this *Elegit* being executed on the Goods of the Party only, the Plaintiff was not precluded by his Election thereof from any Benefit he had at the Common Law, by any nice Conſtruction of the Word *Elegit* of the Statute of *Weſtm.* 2. which intended to give a farther Remedy than there was at Common Law, and that the Action well lay, otherwiſe the Statute would be a Trap to catch, and not a Remedy to help Perſons to their Debts. 2*dly*, That if, as objected, any Lands were extended on the other two *Elegits* which were not returned, the Defendant ought to have ſhewn it in pleading. 3*dly*, That after this Levy on the Goods, he might extend the Lands, and hold them till Debt paid. Lev. 92. *Glaſcock* and *Morgan*, adjudged. Keb. 465, 496, 556, 692. Sid. 184. S. C. and ſame Points adjudged; but there ſaid, that the Court was divided, whether the Plaintiff could take out any new Execution.——But it is held by my Lord *Hobart*, that if upon an *Elegit* the Execution be on the Goods only, without any Lands, and they appear not to be ſufficient, that the Party may have a *Capias*, for it is in Effect but a *Fieri facias*, though the Word be *Elegit*. Hob. 58. †

† An Extent is not avoided by Omiſſion of Lands liable. *ſt.* 16. & 17. Car. 2. *c.* 5. *ſ.* 2.——On a Defect in the firſt Execution, a new one may go by ſame *ſtat.* & 8 Geo. 1. *c.* 25. *ſ.* 4.—So a new Execution ſhall go, on the Eviction of Land extended, 32 H. 8. *c.* 5. 8 Geo. 1. *c.* 25. *ſ.* 4.—Or, on the Diſcharge of a Priſoner by Privilege of Parliament, 1 Jac. 1. *c.* 13.

Hob. 52, &c. *Foſter* and *Jackſon.* Cro. Jac. 136, 143. Rol. Abr. 903.

It was formerly held, that, if a Perſon taken on a *Capias ad ſatisfaciendum* died in Execution, the Plaintiff had no further Remedy, becauſe he determined his Choice by this kind of Execution, which affecting a Man's Liberty is eſteemed the higheſt and moſt rigid in the Law.

But now by the 21 *Jac.* 1. *cap.* 24. reciting, "That foraſmuch as daily "Experience doth manifeſt, that divers Perſons of Sufficiency in Real and "Perſonal Eſtate, minding to deceive others of their juſt Debt, for which "they ſtood charged in Execution, have obſtinately and wilfully choſen "rather to live and die in Priſon, than to make any Satisfaction accord-"ing to their Abilities; to prevent which Deceit, and for the avoiding "ſuch Doubts and Queſtions hereafter, be it declared, explained and "enacted, That the Party, or Parties at whoſe Suit, or to whom any "Perſon ſhall ſtand charged in Execution for any Debt or Damage "recovered, his or their Executors or Adminiſtrators, may, after the "Death of the Perſon ſo charged, and dying in Execution, lawfully "ſue forth and have new Execution againſt the Lands and Tenements, "Goods and Chattels, or any of them, of the Perſon ſo deceaſed, in ſuch "Manner and Form, to all Intents and Purpoſes as he or they, or any "of them, might have had by the Laws and Statutes of this Realm, "if ſuch Perſon ſo deceaſed had never been taken or charged in Exe-"cution."

"Provided, that this Act ſhall not extend to give Liberty to any Perſon "or Perſons, their Executors or Adminiſtrators, at whoſe Suit or Suits "any ſuch Party ſhall be in Execution, and die in Execution, to have or "take any new Execution againſt any the Lands, Tenements or Heredi-"taments of ſuch Party dying in Execution, which ſhall at any Time af-"ter the ſaid Judgment or Judgments be by him ſold *bona fide*, for the "Payment of any of his Creditors, and the Money, which ſhall be paid for "the Lands ſo ſold, either paid, or ſecured to be paid, to any of his Cre-"ditors, with their Privity and Conſent, in Diſcharge of his or their due "Debts, or ſome Part thereof."

* Page 355 Yelv. 52. *Wood* and *Harburn*, adjudged.

* If *A.* has Judgment againſt *B.* and he takes out a *Capias ad ſatisfaciendum*, directed to the Sheriff of *Middleſex*, who directs his Precept to the Bailiff of the Liberty of the Duchy *ad Cap.* B. *ad reſpond.* A. inſtead of *ad ſatisfaciend.* and thereupon the Sheriff returns *Cepi Corpus ſecundum exigentiam brevis*; though by this Return the Sheriff makes himſelf liable to the Debt to the Plaintiff, by not purſuing his Authority, yet *A.* may take out a new Writ of Execution againſt *B.* for he never was in Cuſtody by virtue of the *Capias ad ſatisfaciendum.*

Cro. Car. 40, 455. Vent. 4. But for this *vide* Tit. *Eſcape.*

So if a Party taken on a *Capias ad ſatisfaciendum* eſcapes, or is reſcued, though the Sheriff is hereby liable, becauſe he ought to have taken the *Poſſe Comitatus*, yet the Plaintiff may take out any new Execution, and ſhall not be compelled to take his Remedy againſt the Sheriff, who may be dead or inſolvent.

Salk. 318. pl. 1. *Oviat* and *Vyner.*

If on a *Fieri facias* all the Money is not levied, the Plaintiff may take out a new Execution; but as ſuch new Execution muſt be grounded on the firſt Writ, ſuch Writ muſt be returned, and muſt recite, that all the Money was not levied on the firſt; but if on the firſt Writ all the Money had been levied, it need not be returned, for no further Proceſs was ne-ceſſary.

Cro. Eliz. 208-9. (*a*) *Secus* if on a *Capias ad ſatisfaciend.* he pays the

If on a (*a*) *Fieri facias* the Defendant pays the Money to the Sheriff, he is diſcharged of the Execution, and the Plaintiff muſt bring his Action againſt the Sheriff.

So

Money to the Sheriff, for that Writ only impowers him to take the Body. 2 Lev. 203. 2 Jon.

So if the Sheriff take (*a*) Goods in Execution by virtue of a *Fieri facias*, whether he ſells them or not; yet, being taken from the Party againſt whom the Execution was ſued, he may plead that Taking in Diſcharge of himſelf, and ſhall not be liable to a ſecond Execution, though the Sheriff hath not returned the Writ; and the Reaſon is, becauſe the Defendant cannot avoid the Execution, and he would therefore be in a very bad Condition if he was to be charged the ſecond Time; and if the Sheriff dies after the Goods are taken in Execution, his Executors are liable to the Plaintiff, for they have *quid pro quo*, and it is in Nature of a Contract raiſed by Law.

2 Mod. 214. Salk. 223.

(*a*) So if the Sheriff takes a Bond from the Party, this is a good Execution, and the Sheriff ſhall anſwer for the Money. Keb. 551. ——But if there be an Execution againſt *J. S.* and he brings 90*l.* Part of the Condemnation Money, to the Sheriff, who refuſes to take it, ſaying the Plaintiff in the Action will not accept it, and thereupon *J. S.* deſires the Sheriff to keep the Money till the Plaintiff comes to Town; if in this Caſe the Sheriff is robbed, *J. S.* muſt pay the Money over again. 2 Show. 172. pl. 166. *vide* Tit. *Bailment*.

As therefore the Defendant in theſe Caſes is diſcharged as to the Plaintiff, hence it ſeems to be clearly agreed, that the Plaintiff may maintain an Action of Debt againſt the Sheriff; for though there is no actual Contract between the Sheriff and the Creditor, yet the levying the Money creates a Contract in Law, which lays a Lien on the Sheriff; for otherwiſe the Party would be without Remedy.

Hob. 206. 4 Mod. 404. 2 Show. 79. pl. 63, 281. pl. 271.

Alſo it has been held, that an Action lies even by an Executor againſt an Under-Sheriff for Money levied on a *Fieri facias*, as Money received to the Plaintiff's Uſe, though before the Return of the Writ; for if the Sheriff were permitted to ſtave off the Action by his Delay, in not returning his Writ, it would be allowing him to take Advantage of his own Wrong.

2 Show. 79. pl. 63. 281. pl. 271. S. P.

So it hath been held, that ſuch Action is not within the Statute of Limitations; for though it be not a Matter of Record till the Writ be returned, yet it is founded upon a Record, and hath a ſtrong Relation to it.

2 Show. 79. pl. 63. *Cockram* and *Welbye*. 2 Mod. 212.

S. C. adjudged by three Judges againſt *Scroggs* Juſt. becauſe the Action was brought againſt the Defendant as an Officer, who acted by virtue of an Execution; in which Caſe the Law did create no Contract, and that here was a Wrong done, for which the Plaintiff had taken a proper Remedy, and therefore ſhould not be barred by this Statute. Mod. 245. Cro. Car. 297. 2 Ld. Raym. 838, 880, 883, 1441.

* And as the Law ſubjects the Sheriff to an Action in theſe Caſes, ſo it (*b*) veſts ſuch a poſſeſſory Property in him in the Goods taken by him in Execution, that if they are taken out of his Poſſeſſion, he may maintain Treſpaſs or Trover againſt the Wrong-doer, at his Election, as well as a Carrier or Bailee of Goods, and here he could not return a Reſcue, but muſt anſwer for them.

*Page 356

2 Saund. 47. *Wilbraham* and *Snow* adjudged.

(*b*) But if the Sheriff returns *Nulla bona*, and there is a Recovery againſt him for his falſe Return, that veſts no Property of the Goods in him, but they remain in the Party, and are liable to any ſubſequent Execution for his Debt. 2 Vern. 238-9. ——Where the Sheriff pleaded, that he levied Goods to the Value of 16*l.* and they were reſcued out of his Hands, and held an ill Plea on Demurrer. 2 Saund. 343-4.

If *A.* and *B.* have two ſeveral Judgments againſt *C.* and they take out two Writs of *Fieri facias*, which are both delivered to the Sheriff on the ſame Day, and the Sheriff executes that which was laſt delivered, it bearing

Carth. 419, 420. *Smalcomb* v. *Buckingham & al'*

2 Jon. 97. 2 Mod. 214. *Taylor* and *Baker*, paid to Sheriff on *Ca. Sa.* 12 Mod. 230.—2 Show. 139. pl. 116. S. P. adjudged bad.—*Secus* if he had paid it to the Plaintiff's Attorney on Record. 2 Show. 139. pl. 116. admitted, for that would have been a Payment to the Plaintiff himſelf; ſo Payment on *Ca. Sa.* to Warden of *Fleet* bad. 1 Mod. 194.

Vicecom. London. Salk. 320. pl. 4. S. C. Ld. Raym. 251. 5 Mod. 176. 6 Mod. 292. 12 Mod. 126.

ing Teſt before the other; and afterwards apprehending that he ought to have executed that which was firſt delivered, he takes the ſame Goods and delivers them in Execution on the firſt Writ; this ſecond Execution is void; for though the Sheriff ought to have executed the Writ that was firſt delivered, yet having executed the laſt firſt, the Vendee ſhall keep the Goods, and the Party muſt ſeek his Remedy againſt the Sheriff; and the Reaſon hereof is, for the Quiet of Purchaſers under Sheriffs upon Executions; for otherwiſe it would be dangerous to make ſuch Purchaſes of Sheriffs; which might make Writs of Execution of no Effect.

Carth. 420. *per Cur.* See Stat. 29 Car. 2. c. 3. *poſt.* 363.

So where a Writ of *Fieri facias* is delivered to the Sheriff to Day, and another to Morrow, and the Sheriff executes the laſt firſt, by making Sale of the Goods, ſuch Sale will ſtand good, and the Vendee ſhall hold the Goods againſt him who firſt delivered the Writ to the Sheriff; and his Remedy is only by Action againſt the Sheriff.

(E) Of the Authority and Juriſdiction of the Court out of which the Execution iſſues; and herein of the Manner of executing a Judgment, where the Record has been removed from an Inferior to a Superior Court.

Cro. Car. 34.

JUdgments muſt be executed in ſuch Courts in which they are given, and by ſuch Proceſs and Means as the Law allows, and is agreeable to the eſtabliſhed Practice of thoſe Courts; and therefore, in caſe an inferior Juriſdiction refuſes to execute a Judgment, a (*b*) Writ of *Adjudicatione Judicii* lies, which if they diſobey, the Superior Courts grant an Attachment.

(*b*) For this *vide* F. N. B. 42.

4 H. 6. 17. b. 22 Aſſ. 72. Rol. Abr. 543. S. C.

If a Man recovers in a Court-Baron, they have not Power to make Execution to the Plaintiff of the Goods of the Defendant; but they muſt diſtrain him, and retain the Diſtreſs till Satisfaction.

Bro. Court Baron S. C. but a *Quære* made, for it is uſual for the Suitors aſſigned by the Steward to tax the Sums, and then to award a *Levari facias*.——By Brownl. 81. upon a *Levari* out of a Court-Baron, Goods cannot be ſold without a Cuſtom to ſell, &c. & Noy 17, 20.

*Page 357

2 Lev. 81. *Doe* and *Parmiter*.

But it hath been held, that Execution may be in a Hundred-Court by *Levari facias*, and that where the Books ſpeak of a *Diſtringas*, they muſt * be intended of a *Levari*, for a Diſtreſs infinite would be endleſs in an Execution.

2 Keb. 117, 126. S. C.——It is held, that, though the Proceſs of an Hundred-Court is a *Diſtringas*, a *Levari* may be good by Cuſtom. Comb. 124. Show. 47. 3 Danv. 304. (L) pl. 1. 2 Lutw. 1369. N. L. 439. Carth. 53.——And in 3 Lev. 203. it is held, that the Precept may iſſue from the Sheriff, though the Suitors are Judges.

Vent. 274. 3 Keb. 522. S. C. Sir

If Judgment is given in Debt in *C. B.* and the Record removed in *B. R.* by Writ of Error, and Judgment affirmed (be it after *Scire facias*, and Appearance upon it, and Errors aſſigned, or otherwiſe), and Execution awarded

awarded by *Capias*, the *Capias* ought to be ſpecial, reciting, that Judgment was in *C. B.* and removed in *B. R.* by Error, &c. for otherwiſe the *Unde convictus eſt* in the *Capias* ſhall be intended of a Conviction in *B. R.* and this was ſaid by the Clerks to be their Courſe; wherefore a *Superſedeas* was awarded of the Execution *quia erronicè emanavit*, the Writ not being returned. *William Bucknal* and *Sellwood.*

If a Writ of Error be brought of Judgment in *B. R.* in *Ireland* here, and the Judgment is affirmed, the Method is to have a Writ, reciting all the Proceedings here in *England* directed to the Judges of the King's Bench in *Ireland*, requiring them to iſſue Proceſs of Execution; and by this mandatory Writ the Cauſe is reſtored to that Court; but no Writ of Execution of ſuch a Judgment can iſſue here. Salk. 321. pl. 6. *Coot* and *Lynch.* 5 Mod. 421. S. C. Ld. Raym. 427. 12 Mod. 255. Carth. 460.

(F) Who are intitled to, and may ſue out Execution.

NO Perſon is intitled to, or can ſue out Execution, who is not privy to the Judgment, or intitled to the Thing recovered, as Heir, Executor, or Adminiſtrator to him who has Judgment. Rol. Abr. 889.

But if an Adminiſtrator, *durante minori ætate* of an Executor, recovers in Debt, and before Execution the Executor comes of Age, he ſhall have a *Scire facias* on this Judgment, for carrying on the Suit in Right of the Executor, made the Executor privy thereto. Rol. Abr. 888-9. *Margaret Wright*'s Caſe, adjudged.

So if *J. S.* makes *A.* Executor, upon Condition, that if *A.* does ſuch an Act, that the Executorſhip ſhall ceaſe, and that then *B.* ſhall be Executor; if *A.* recovers in Debt, and then does the Act, *B.* ſhall take out Execution. Rol. Abr. 889. *Walwin* and *Herbert*, by three Judges againſt one.

If a Feme, Executrix to *J. S.* marries, and her Huſband and ſhe bring an Action of Debt on an Obligation, as Executrix to *J. S.* and have Judgment, and the Wife dies; in this Caſe the Huſband, though Privy to the Judgment, ſhall not ſue out Execution, for he is not intitled to the Thing recovered, but the ſame belongs to the ſucceeding Repreſentative of *J. S.* Rol. Abr. 889. *Beamont* and *Long* adjudged. Cro. Car. 208. 227, 464, S. C.

So where *A.* ſued as Adminiſtrator to *J. S.* on an Obligation entered into by the Defendant to the Inteſtate, and had Judgment, and afterwards the Letters of Adminiſtration were repealed; though *A.* was privy to this Judgment, and took out Execution thereupon, yet the Court granted a *Superſedeas* thereof, and held, that, the Adminiſtration being revoked, the ſuing out Execution afterwards was void; for the Adminiſtrator had no Intereſt or Authority, but as a miniſterial Officer to the Ordinary. Yelv. 83. *Barnebury* and Sir *Charles Yelvertone.* 2 Saund. 148-9. S. P. adjudged between *Turner* and *Davis*, Action of the

for if he were permitted to ſue out Execution, he would, notwithſtanding, be ſubject to the rightful Adminiſtrator, which would create a Circuity of Action, which the Law abhors.

Alſo it was formerly held, that if an Adminiſtrator had Judgment in Right of his Inteſtate, and died before Execution, that the Adminiſtrator *de bonis non* could not have a *Scire facias*, ſo as to take out Execution on this Judgment, not being privy to the Record. * Page 358 Cro. Jac. 4. *Yate* and *Gough*, adjudged by three Judges againſt *Gawdy* Juſt. Yelv. 83-4. S. P. *per Cur.*

Sid. 29. *Harriſon* and *Bowden.*

But where an Executor had Judgment, and ſued out an *Elegit*, but died Inteſtate before the Debt was levied; yet it was held that the Adminiſtrator *de bonis non* ſhould take Advantage thereof, and that the *Elegit* being ſued out, made it an Intereſt veſted, though it would have been otherwiſe if Execution had not been ſued out.

And now by the 17 *Car.* 2. *cap.* 8. *par.* 2. it is enacted, "That where "any Judgment, after a *(a)* Verdict ſhall be had, by or in the Name of "any Executor or Adminiſtrator; in ſuch Caſe an Adminiſtrator *de bonis* "*non* may ſue forth a *Scire facias*, and take Execution upon ſuch Judg-"ment."

(*a*) For this *vide* 6 Mod. 290. and Salk. 323. where it is ſaid *per Curiam* to be but reaſonable, and within the Equity of this Act, that an Adminiſtrator *de bonis non* ſhould be permitted to perfect an Execution begun by an Executor or Adminiſtrator, though the Judgment was by Default, *&c.* See 2 Ld. Raym. 1072. 11 Mod. 34. pl. 6.

46 E. 3. 25. b. Rol. Abr. 889. S. C.

If a Man has Judgment for the Arrearages of Rent, and dies, his Executor ſhall ſue out Execution, and not the Heir; for by the Recovery it becomes a Chattel veſted, to which the Executor is intitled.

19 E. 4. 5. b. 43 E. 3. 2. Rol. Abr. 889.

So if the Demandant in a Writ of Couſenage, or (*b*) other real Action, in which Land and Damages are recovered, has Judgment, and dies, the Heir ſhall take out Execution as to the Land, and the Executor as to the Damages.

(*b*) So of a Recovery in Waſte, the Heir ſhall have Execution of the Land, and the Executor of Damages. 43 E. 3. 2. Rol. Abr. 889. S. C.

48 E. 3. 12. b. Rol. Abr. 889. S. C.

If a Statute be entred into, to Huſband and Wife, and the Huſband dies, the Wife ſhall take out Execution.

But for this Rol. Abr. 342, 889, 890.

So if Huſband and Wife recover Lands and Damages, and the Huſband dies, the Wife ſhall have Execution of the Damages, and not the Executors of the Huſband.

Hob. 61.

If there are two Executors who have Judgment, and the one prays a *Capias*, and the other a *Fieri facias*, it is ſaid the *Capias* ſhall be awarded, as being beſt for the Teſtator.

Cro. Jac. 159. Doctor *Atkins* ver. *Gardener*, adjudged without Argument.

If the Preſident of the College of Phyſicians brings an Action againſt one for practiſing Phyſick in *London* without Licence, purſuant to the Statute 14 & 15 *H.* 8. *c.* 5. and has Judgment, and dies before Execution; the Succeſſor, and not the Executor of him who recovered, ſhall ſue out Execution; for this Action is given to the Preſident by an Act of Parliament, and the Proceedings, and Judgment thereupon obtained by him, was in his Corporate Capacity; and therefore the Succeſſor, on whom the Law transfers the Duty, ſhall take out Execution.

(G) Of the perſons againſt whom Execution may be ſued out: And herein,

1. Of ſuing Execution where there are ſeveral Parties concerned.

15 H. 7. 6. Rol. Abr. 888.

IF a Man has Judgment in an Aſſiſe againſt any Three for Lands and Damages, he cannot ſue Execution by *Capias* againſt one only, for the Damages;

Damages; but the *Capias* ought to be againſt all, for the Execution ought to enſue the Nature of the Original. ‡

‡ *Sed qu.* of this, if the Recovery againſt the three is ſtated, that it may agree with the Record, as every Defendant is liable for the whole, and may, if he is taken in Execution, and pays the whole, call on the others for Contribution?

* So if a Man has Judgment in Debt againſt two, he muſt take out joint Execution againſt both, and (*a*) cannot have a *Capias* againſt one, and an *Elegit* againſt the other.† * Page 359 Rol. Abr. 888. *Beverley* and *Beverley*. Cro. Car. 75.

For this *vide* Cro. Eliz. 573-4. 5 Co. 86-7. S. P. (*a*) *Vide* Hob. 59.

† See the laſt Note

But if a Man has Judgment for Damages againſt Two, and he ſues out a *Scire facias* againſt both; if one be returned ſummoned, and he makes Default, and it be returned, and the other hath (*b*) nothing, the Plaintiff may have Execution againſt him who made Default for the Whole. 1 E. 3. 13. Rol. Abr. 890. S. C. (*b*) So if it be returned that one of them is dead, he ſhall have Execution for the whole againſt the other. 1 E. 3. 13. b. Rol. Abr. 890. S. C.

So if Two become Bail for *J. S.* and he is condemned, and there is Judgment on *Scire facias* againſt the Bail, the Plaintiff may take out Execution againſt either of them, being ſeverally as well as jointly bound. Rol. Abr. 888. *Dixon* and *Adams*, but for this *vide* Head of *Bail*.

If there be Judgment in Debt againſt Two, and one dies, a *Scire facias* lies againſt the other alone, reciting the Death, and he cannot plead, that the Heir of him that is dead has Aſſets by Deſcent, and demand Judgment, if he ought to be charged alone; for at (*c*) Common Law, the Charge upon a Judgment being (*d*) Perſonal ſurvived, and the Statute of *Weſtm.* 2. *c.* 18. or 13 *E.* 1. *c.* 18. that gives the *Elegit*, does not take away the Remedy of the Plaintiff at the Common Law; and therefore the Party may take out his Execution which Way he pleaſes, for the Words of the Statute are, *Sit in Electione*; but if he ſhould, after the Allowance of this Writ and Revival of the Judgment, take out an *Elegit* to charge the Land, the Party may have Remedy by (*e*) Suggeſtion, or elſe by *Audita Querela*. Raym. 26. *Edſar* and *Smart*. Lev. 30. S.C. Keb. 92. 123. S. C. (*c*) So adjudged. 1 E. 3. 13. pl. 41. 3 E. 3. pl. 37. & *vide* 29 Aſſ. pl. 37. 29 E. 3. 29. (*d*) For the Difference between Real and Perſonal Execution, and that a Perſonal Execution will ſurvive, though a real one will not, *vide* 3 Co. 14. Yelv. 209. Raym. 153. 2 Keb. 3. 331. 4 Mod. 315. 3 Keb. 295. Salk. 319. pl. 2. Show. 402. Holt 1. pl. 2. Carth. 236. Salk. 261. pl. 1. (*e*) For this *vide* F. N. B. 166. 44 E. 3. 10. See Comb. 441. 5 Mod. 338. Carth. 404. Show. 405. Ld. Raym. 244.

2. Of ſuing out Execution againſt the Heir and Executor.

If there be Judgment againſt one who has Lands in Fee-ſimple, or if ſuch a one acknowledges a Statute, and dies, and his Lands deſcend to his Heir,* Execution may be taken out againſt the Heir, but his Body is protected; for it would be moſt unreaſonable to ſubject the Heir to the Payment But for this *vide* Tit. *Heir and Anceſtor*, & *vide* Dyer 81. pl. 62. 207. pl. 15. 344. pl. 1. Moor, pl. 203. Co. Lit. 103, 290.

* See the ſtat. 3 W. & M. c. 14. ſ. 5, 6. where Execution ſhall go againſt the Heir, after an Alienation of Lands deſcended.

ment of his Anceſtor's Debts, any farther than to the Value of the Aſſets deſcended.

So if there be Judgment againſt *J. S.* and he dies Inteſtate, or having made his Executor, a *Fieri facias* may be executed of his Goods in the Hands of the Executor or Adminiſtrator.

For this *vide* Head of *Executors and Adminiſtrators, & vide* Mod. 188. 2 Vent. 218. Skin. 257. pl. 4. 2 Show. 485. pl. 449. Salk. 322, pl. 10. 2 Ld. Raym. 808, 850, 1073. 3 Will. Rep. 399. 12 Mod. 130. See Ld. Raym. 244. Salk. 319. pl. 3. 5 Mod. 338. Carth. 404.

3. Of ſuing out Execution againſt Infants.

By the (*f*) Common Law, if Judgment be given againſt a Man for Debt or Damages, and the Defendant dies before Execution ſued, his * Heir within Age is not liable to Execution during his Minority; but the Parol muſt demur in ſuch Caſe till he comes of Age.

* Page 360
Co. Lit. 290. a.
Rol. Abr. 140.

(*f*) But tho' upon a Judgment in Debt, or upon a Statute or Recognizance, there can be no proceeding againſt an Infant at Common Law during his Minority, yet there may in Chancery, and a Sequeſtration may iſſue againſt his Lands. 2 Chan. Ca. 163-4.——That the Lands of one who enters into a Statute Merchant, Staple, or Recognizance, are not extendible in the Hands of his Heir, until he comes of Age, *vide* Bro. Stat. Merch. 33. Co. Lit. 290. Moor, pl. 121, 203. Dyer 239. Co. Ent. 12. *Vide ante* 337.

Co. Lit. 290. a. And this Privilege of Infancy does not only protect the Infant, but all others who are affected by the Judgment; as if there be Father and two Daughters, and Judgment be given for Debt againſt the Father, who dies, one of the Daughters being within Age, Partition being made, the eldeſt ſhall not be charged alone, but ſhall have the Benefit of her Siſter's Minority, which puts a Stop to the Execution.

Co. Lit. 290. a. Bro. Stat. Merch. 33. So if the Conuſor of a Statute Merchant dies, and his Heir within Age endow his Mother, the Land in Dower ſhall not be extended during the Minority of the Heir.

4. Of ſuing out Execution againſt a Feme Covert.

Rol. Abr. 890. but for this *vide* Tit. *Baron and Feme*, and Cro. Car, 518, 526. 3 Keb. 205. If a Perſon recovers in Treſpaſs againſt Baron and Feme, Execution may be ſued out againſt the Feme after the Death of her Huſband.

39 H. 6. 45. Rol. Abr. 346. S. C. So if a Recovery be in an Aſſiſe againſt them upon a Diſſeiſin, Execution ſhall be againſt the Feme after the Death of her Huſband, as well for the Damages as for the Principal.

46 E. 3. 23. Rol. Abr. 890. S. C. So if in a *Quare Impedit*, Damages be recovered againſt Baron and Feme to the Amount of two Years, and the Huſband dies, the Damages may be recovered againſt the Wife.

5. Of ſuing out Execution againſt privileged Perſons.

But for this *vide* Tit. *Privilege*. There can be no Execution taken out againſt a Member of Parliament during Privilege of Parliament.†

Alſo

† For preventing Delays of Juſtice, by Reaſon of Privilege of Parliament, ſee 10 Geo. 3. c. 50. which enacts, That Suits may at any Time be proſecuted in Courts of Record, Equity, or Admiralty, and Courts having

Alſo no *Capias* can iſſue againſt a Peer; for even in the Caſe of a private Perſon at Common Law, the Body was not liable to a Man's Creditors; and the Statute of *E.* 3. which ſubjects the Body, does not extend to Peers, becauſe of the Sacredneſs of their Perſons; as alſo the Law ſuppoſes, that Perſons thus diſtinguiſhed by the King, have wherewithal otherwiſe to ſatisfy their Creditors. 6 Co. 52. Hob. 61. Cro. Car. 205.

6. Of ſuing out Execution againſt a Clerk, or one in Holy Orders.

If a Writ of Execution be taken out againſt a Clerk in Holy Orders on a Judgment obtained againſt him, or upon a Statute Staple, or Recognizance in Nature of it, which he has entred into; and the Sheriff returns, that he is a Clerk, he ought to extend his Lay Fee and Chattels, or return that he hath neither; but if he returns, *quod Clericus ſit beneficiatus nullum habens Laicum Feodum, ſed quod beneficiatus eſt* in ſuch a Dioceſe, then (*a*) a Writ of Sequeſtration ſhall iſſue to the Biſhop to ſequeſter the Living. 2 Rol. Abr. 474. Rol. Abr. 891. 2 Inſt. 472. Jenk. 207.

(*a*) That the Writ in this Caſe is like a *Fieri facias*, and the Biſhop is in Nature of a Temporal Officer or Eccleſiaſtical Sheriff, and may, as the Sheriff in other Caſes, ſeize Eccleſiaſtical Things and ſell them, and muſt return *Fieri feci*, and not *Sequeſtrari feci* upon this Writ. Mod. 257. 2 Mod. 258.

So if the Conuſor of a Statute Merchant be a Clerk within Orders, by the Statute 13 *E.* 1.† the Sheriff cannot take the Body in Execution; and if he returns, that he is a Clerk, no Execution ſhall be granted to the Sheriff to levy the Debt *de bonis Eccleſiaſticis*, for his Perſon is protected * by the Letter of the Statute, and the Statute doth not ſubject the *Bona Eccleſiaſtica* to the Execution; but in this Caſe the Conuſee may have Execution granted out of his Lay Fee. * Page 361 2 Rol. Abr. 468. Reg. Jud. 8.

Bro. Stat. Merch. 38. Co. Ent. 13. † 13 E. 1. ſtat. 3.

On a *Fieri facias* againſt a Fellow of *Wincheſter* College, the Sheriff returned *Clericus beneficiatus nullum habens Laicum Feodum*, whereupon a *Fieri facias de bonis Eccleſiaſticis* iſſued to the Biſhop, who ſent his Mandate to the Warden and Fellows of the College to ſequeſter his Salary, and they refuſed; and it being moved in *B. R.* to know, whether the Biſhop might not compel them by Eccleſiaſtical Cenſures, the Court thought that this was not an Eccleſiaſtical Conſtitution, the Univerſities being only Societies *ad Studendum & Orandum*, but ſaid that a Prebend is an Eccleſiaſtical Benefice; and in ſuch Caſe, if the Prebend have a ſole diſtinct Corps, it may be ſequeſtered; but where he is only a Member of the Body aggregate, and the Inheritance is in the Dean and Chapter, there cannot be a Sequeſtration, and therefore they left the Biſhop to do as he ought by Law. Salk. 320. pl. 5. *Moſeley* and *Warburton*. Ld. Raym. 265.

having Cognizance of Cauſes matrimonial and teſtamentary againſt Peers, and Members of the Houſe of Commons, and their Servants. But the Perſons of Members of the Houſe of Commons are not to be arreſted or impriſoned.

(H) At what Time Execution may be ſued out, and herein of the Neceſſity of a Scire facias.

2 Inſt. 471. 5 Co. 88. Cro. Eliz. 416. 6 Mod. 288. See Salk. 258. pl. 11. 322. pl. 9. 3 Mod. 187, 189. 6 Mod. 14. 212, 292, 296, 12 Mod. 377. 506. 3 Will. Rep. 36. Barnes 132. 2 Barnes, 165, 172. Stra. 100, 301. Show. 402. Salk. 261. pl. 1. Holt. 1. pl. 2. Carth. 236.

AT Common Law, in Real Actions where Land was recovered, the Demandant, after the Year, might take out a *Scire facias* to revive his Judgment, becauſe the Judgment being particular in the Real Action, *quoad* the Lands with a certain Deſcription, the Law required, that the Execution of that Judgment ſhould be entred upon the Roll, that it might be ſeen, whether Execution was delivered of the ſame Thing of which Judgment was given; and therefore if there was no Execution appearing on the Roll, a *Scire facias* iſſued to ſhew Cauſe, why Execution ſhould not be.

2 Inſt. 469. Carth. 30, 31. Sid. 351.

But if the Plaintiff, after he had obtained Judgment in any Perſonal Action, had lain quiet, and had taken no Proceſs of Execution within the Year, he was put to a new Original upon his Judgment, and no *Scire facias* was iſſuable by Law on the Judgment, becauſe there was not a Judgment for any particular Thing in the Perſonal Action, with which the Execution could be compared; therefore after a reaſonable Time, which was a Year and a Day, it was preſumed to be executed, and therefore the Law allowed him no *Scire facias* to ſhew Cauſe why there ſhould not be Execution; but if the Party had ſlipped his Time, he was put to his Action on the Judgment, and the Defendant was obliged to ſhew how that Debt, of which the Judgment was an Evidence, was diſcharged.

To remedy this, and make the Forms of Proceeding more uniform in both Actions, the Statute of *Weſtm.* 2. 13 *E.* 1. *ſt.* 1. *c.* 45. gave the *Scire facias* to the Plaintiff to revive the Judgment, where he had omitted to ſue Execution within the Year after Judgment was obtained; the Words of the Act are *Quod ea quæ inveniuntur irrotulata Coram eis qui record' habent, ſive ſervitia aut conſuetudines recognitæ, aut alia quæcunque irrotulata, ſi recens ſit cognitio, viz. infra annum, ſtatum habeat conquerens illius recognitionis, & ſi forte a majore tempore tranſactio facta fuerit aut illa recognitio, præcipiatur vic' quod Scire faciat, &c.*

Sid. 351. 2 Salk. 600. pl. 8. Ld. Raym. 669.

It hath been doubted, whether a *Scire facias* lay to revive a Judgment in Ejectment after a Year and a Day, either by the Common Law, or by *Force of this Statute; for at Common Law this was looked upon as a Perſonal Action and it was thought that the Statute extended only to ſuch Perſonal Actions in which Debt or Damages are recovered, and not to provide a Remedy in this Caſe, when at the Time of making the Act the Poſſeſſion was not recovered in this Action; but it ſeems now ſettled and confirmed by daily Practice, that a *Scire facias* lies on a Judgment in Ejectment, for the Words of the Act are, *Sive ſervitia ſive conſuetudines ſive alia quæcunque irrotulata*, which comprehend all Judgments, and give the like Remedy on them by *Scire facias*, as the Demandant had on a Judgment in a Real Action at Common Law.

* Page 362

Co. Lit. 291. a. 2 Inſt. 469. F. N. B 296. Bro. Recognizance 17.

Here alſo it may be proper to diſtinguiſh between taking out Execution on Judgments and Recognizances at Common Law, and on Statutes Mer-

chant and Staple; that on the firſt *Scire facias* after the Year and Day, is abſolutely neceſſary; but as to Statutes Merchant, *&c.* the Conuſee may at any Time ſue Execution on them, without the Delay or Charge of a *Scire facias*.

The Reaſon, why the Plaintiff is put to his *Scire facias* after the Year, is becauſe where he lies quiet ſo long after his Judgment, it ſhall be preſumed he hath releaſed the Execution, and therefore the Defendant ſhall not be diſturbed without being called upon, and having an Opportunity in Court of Pleading the Releaſe, or ſhewing Cauſe, if he can, why the Execution ſhould not go. 2 Inſt. 470. and admitted to be the Reaſon in all the Caſes on this Head.

Alſo it is ſaid in *Salkeld*, that, if a Judgment be above ten Years ſtanding, the Plaintiff cannot ſue a *Scire facias* without Motion in Court; and if it be under ten, but above ſeven, he cannot have a *Scire facias* without a Motion at the Side-Bar; and a Note is added, that if after ſuch Motion, and Judgment revived by *Scire facias*, the Defendant dies before Execution, the Plaintiff muſt ſue a new *Scire facias*, but may have it without Motion, for the Judgment was revived before. 2 Salk. 598. pl. 3. *per Cur'*.

But though the general Rule be, that the Plaintiff cannot take out Execution after the Year and Day without a *Scire facias*, yet the Rule muſt be underſtood with theſe Reſtrictions.

That if the Defendant brings a Writ of Error, and thereby hinders the Plaintiff from taking his Execution within the Year, and the Plaintiff in Error is nonſuit, or the Judgment affirmed, the Defendant in Error may proceed to Execution after the Year without a *Scire facias*, becauſe the Writ of Error was a *Superſedeas* to the Execution, and the Plaintiff muſt acquieſce till he hears the Judgment above; beſides, while the Cauſe is depending on the Writ of Error, the Cauſe is ſtill *ſub judice*, whether the Plaintiff ſhall recover, or not, and the Year for the Execution ought to be accounted from the final Judgment given. Cro Jac. 364. Yelv. 7. 15 H. 7. 16. b. Rol. Abr. 899. 4 Leon. 197. 5 Co 88. Carth. 236-7. 6 Mod. 288.

So if the Plaintiff hath a Judgment, with Stay of Execution for a Year, he may, after the Year, take out his Execution without the *Scire facias*, becauſe the Delay is by Conſent of Parties, and in Favour of the Defendant; and the Indulgence of the Plaintiff ſhall not turn to his Prejudice, nor ought the Defendant to be allowed any Advantage of it, when it appears to be done for his Advantage, and at his Inſtance. 6 Mod. 288. Rol. Rep 104.

Alſo if the Plaintiff enters on the Roll of the Judgment, an Award of an *Elegit* of the ſame Term with the Judgment, and continues it down with *vicecomes non miſit breve*, he may take out that Writ at any Time afterwards, without ſuing out any *Scire facias*, though, upon Debate of this Matter, the Judges at firſt inclined that the *Elegit* ſhould be actually taken; otherwiſe ſuch an Award as this might be entered at any Time, paying only for the Continuances, and the Party thereby tricked out of the Benefit which the Law gives him him of Pleading any Matter *poſt factum* upon the *Scire facias*; but upon Examination of ſeveral of the antient practiſing Clerks then in Court, this appeared to have been the conſtant Practice amongſt them for many Years; and therefore the Court, conſidering the Inconveniency of opening a Gap to deſtroy ſo many Executions, for * this Irregularity, and becauſe the Practice had prevailed ſo long, that it was become the Law of the Court, ordered that the Execution ſhould ſtand good. Carth. 283-4. *Seymour* and *Grenvill*, & *vide* Rol. Rep. 104. 2 Show. 235. pl. 233. Comb. 346. * Page 363

But if the Defendant had been tied up by an Injunction out of Chancery for a Year, yet he cannot take out Execution without a *Scire facias*, becauſe the Courts of Law do not take Notice of Chancery Injunctions, as they do of Writs of Error; beſides, in that Caſe it had been no Breach of the Injunction to have taken out the Execution within the Year, and continued it down by *Vic' non miſit breve*, which cannot be done in the Caſe of a Writ of Error, becauſe that removes the Record out Salk. 322. pl. 9. 6 Mod. 288. S. C. *Booth* and *Booth*. This Rule of a previous *Sci fa.* does not hold,

where the Defendant hath himſelf affected the Delay; ſo far from it, that the Defendant's Rule "to ſhew Cauſe why ſuch an Execution ſhould not be ſet aſide," was diſcharged even with Coſts. 2 Bur. Rep. 660. *

out of the Court where the Judgment was; and therefore there can be no Proceedings below till it be affirmed, and returned to the Inferior Courts.

* If a *Fieri facias* be ſued within the Year, and *Nulla bona* returned, and continued down ſeveral Years, a *Capias ad Satisfaciendum* may iſſue without a *Scire facias* Stra. 100.——If Plaintiff gets Judgment in the Petty-Bag, (or any Court) and is ſtayed by Injunction; after Year and Day he cannot ſue out Execution without *Scire facias*. 3 P. Will. 35. Barnes 197.——If Execution is not returned by the Sheriff, or not filed, Continuances thereon cannot be entered on the Roll; and if they are, and thereupon a *Ca. Sa.* iſſues after the Year, without *Scire facias*, Defendant ſhall be diſcharged out of Cuſtody, and Plaintiff pay Coſts. 2 Wilſ. 82. Barnes 213.——The Year ſhall be computed from the Day of ſigning Judgment to iſſuing the Writ, not by the Number of Terms. Barnes 197. Judgment, Action on it, ſuperſeded for Want of a Declaration; *Ca. Sa.* after a Year from the Judgment without *Scire facias* ſhall be ſet aſide; for the *Capias ad reſpondendum* will not warrant Continuance on the Roll. Barnes 206.——*Sci. fa.* muſt be in the ſame County where Judgment, or where Execution is awarded. Barnes 207.

(I) To what Time the Execution ſhall have Relation, ſo as to avoid any Alienation by the Party; and herein of the Statute of Frauds.

Co. Lit. 102. a. b.
8 Co. 171.
Sir *Gerrard Fleetwood's* Caſe.
Rol. Rep. 77-8.
Mod. 217.
Chan. Ca. 268.

AS to Lands, they are bound from the Time of the Judgment, ſo that Execution may be of theſe, though the Party aliens *bona fide* before Execution ſued out; ſo of Statutes Merchant, Staple, and Recognizances, which alſo bind the Lands from the Time of entering into them.

Therefore if a Man has Judgment for Debt, or is Conuſee of a Statute; and the Debtor, before Execution ſued, aliens by Fine, and five Years paſs, yet the Plaintiff may ſtill ſue out Execution.

But here it is neceſſary to obſerve, that by the 29 *Car.* 2. *cap.* 3. called the *Statute of Frauds*, reciting, that it had been found miſchievous, that Judgments in the King's Courts in *Weſtminſter* do many Times relate to the firſt Day of the Term whereof they are entered, or to the Day of the Return of the Original, or filing the Bail, and bind the Defendant's Lands from that Time, although in Truth they were acknowledged or ſuffered and ſigned in the Vacation-time after the ſaid Term, whereby Purchaſers find themſelves aggrieved.

By the 14th *Par.* of that Statute, it is enacted, "That any Judge or "Officer of any of his Majeſty's Courts of *Weſtminſter*, that ſhall ſign "any Judgments, ſhall, at the ſigning of the ſame, without Fee for "doing the ſame, ſet down the Day of the Month and Year of his ſo "doing, upon the Paper-Book, Docket, or Record which he ſhall ſign, "which Day of the Month and Year ſhall alſo be entered upon the "Margent of the Roll of the Record where the ſaid Judgment ſhall be "entered."

And *Par.* 15. it is enacted, "That ſuch Judgments, as againſt Pur-"chaſers *bona fide*, for valuable Conſideration of Lands, Tenements, or

"Here-

" Hereditaments to be charged thereby, ſhall, in Conſideration of Law, " be Judgments only from ſuch Time as they ſhall be ſo ſigned, and ſhall " not relate to the firſt Day of the Term whereof they are entered, or the " Day of the Return of the Original or Filing the Bail."

And *Par.* 18. it is enacted, " That the Day of the Month and Year of " the Inrolment of Recognizances ſhall be ſet down in the Margent of the " * Roll where the ſaid Recognizances are inrolled, and that no Recogni- * Page 364 " zance ſhall bind any Lands, Tenements or Hereditaments, in the Hands " of any Purchaſer *bona fide*, and for valuable Conſideration, but from the " Time of ſuch Inrolment.

Alſo for the greater Security of Purchaſers, by the 4 & 5 *W.* & *M. cap.* 20. it is enacted, " That the Clerk of the Eſſoins of the Court of *C. B.* " the Clerk of the Doggets of the Court of King's Bench, and the Maſter " of the Office of Pleas in the Court of Exchequer, ſhall make and put into " an alphabetical Dogget, by the Defendants Names, a Particular of all " Judgments by Confeſſion, *Non ſum informatus*, or *Nihil dicit*, entered in " their ſeveral Courts, *&c.* and that no Judgment not doggetted, and en- " tered in the Books as aforeſaid, ſhall affect any Lands or Tenements as to " Purchaſors or Mortgagees, or have any Preference againſt Heirs, Execu- " tors or Adminiſtrators, in their Adminiſtration of their Anceſtors, Teſta- " tors or Inteſtates Eſtates."

Here alſo we muſt obſerve a Difference as to Judgments which affect the Lands of an Anceſtor, and thoſe which affect the Heir; for as to the firſt, the Plaintiff ſhall not have Execution, but only of that Land which the Defendant had at the Time of the Judgment, becauſe the Action was brought in Reſpect of the Perſon, and not in Reſpect of the Land. Co.Lit.102.a.

But if an Action of Debt be brought againſt the Heir, and he alieneth, pending the Writ; yet ſhall the Land he had at the Time of the (*a*) Original purchaſed be charged, for the Action was brought againſt the Heir in (*b*) Reſpect of the Land.† Co.Lit.102.b.

(*a*) That filing a Bill in *B. R.* is as effectual for this Purpoſe as an original Writ. Carth. 245.

(*b*) And therefore, if the Anceſtor deviſed away the Lands, Creditors, whoſe Securities were inferior to Judgments, had no Remedy at Common Law, either againſt the Heir or Deviſee. Abr. Eq. 149. But now by the 3 & 4 W. & M. c. 14. it is enacted, that all Wills concerning Lands, or any Rents, Profits, Term, or Charge out of the ſame, whereof the Deviſor ſhall be ſeiſed in Fee ſimple, in Poſſeſſion, Reverſion or Remainder, ſhall be deemed to be fraudulent and void againſt Creditors upon Bonds or other Specialties, their Executors, Adminiſtrators, *&c.* and ſuch Creditors ſhall have their Actions of Debt againſt the Heir at Law and the Deviſees jointly.

† Where Execution ſhall go againſt the Heir after an Alienation of Lands deſcended, *vide* 3 W. & M. c. 14. ſ. 5, 6.

Hence it hath been adjudged, that if there are two Creditors, *viz. A.* and *B.* of *J. S.* whoſe Heir is bound, and who has Lands by Deſcent, and *A.* files an Original in *C. B.* and hath Judgment thereon, *Trinity Term* 2 *Jac.* 2. by Default, and thereupon a general *Elegit* iſſues againſt all the Lands of the Heir, and a Moiety thereof is delivered to *A.* And *B.* on a Bill filed in *B. R.* 1 & 2 *Jac.* 2. has a ſpecial Judgment againſt the Aſſets confeſſed by the Heir, *Trinity Term* 3 *Jac.* 2. though *B.*'s Judgment be ſubſequent to *A.*'s, yet it appearing that his Bill or Original was filed before *A.*'s, the Judgment ſhall have Relation thereto, and therefore he muſt be firſt ſatisfied. Carth. 245. *Gree* and *Oliver.*

Alſo in the above Caſe it ſeems, that though *A.*'s Judgment had been on an Original actually filed before *B.*'s, that *B.* muſt have been preferred, becauſe his Judgment was general againſt the Heir, and the Execution a general and common Execution by *Elegit*, and not againſt the Aſſets only by Way of Extent; and therefore ſuch a general Judgment will not operate by Way of Relation to the Original, but binds only in common Caſes from the Time of the Judgment given. Carth. 181, 246.

8 Co. 171. Cro. Eliz. 174, 440. 2 Vent. 218.

As to Goods and Chattels, the Execution at Common Law had Relation to the Time of the Awarding thereof, and therefore, if after the *Teſte* of the Writ of Execution, the Defendant had ſold the Goods, though *bona fide*, and for valuable Conſideration, yet were they ſtill liable to be taken in Execution, into whoſe Hands ſoever they came.

Mod. 188. Sid. 271.

But as this created ſome Inconveniency with Reſpect to Trade, in making thoſe Goods ſtill ſubject to Execution, though in the Hands of a Perſon who came by them for valuable Conſideration, and without Notice of any ſuch Execution; and as there was a farther Inconveniency in making * a Writ of Execution taken out in Vacation, to have Relation to the laſt Day of the precedent Term; for Remedy hereof,

* Page 365

For the Expoſition of this Statute *vide* Carth. 419. Salk. 320. pl. 4. Ld. Raym. 251. 2 Vent. 218. Comb. 33. Show. 173. 5 Mod. 376. 6 Mod. 292. 12 Mod. 126.

By the 29 *Car.* 2. *cap.* 3. *par.* 16. it is enacted, "That no Writ of *Fieri facias*, or other Writ of Execution, ſhall bind the Property of Goods "againſt whom ſuch Writ of Execution is ſued forth, but from the Time "that ſuch Writ ſhall be delivered to the Sheriff, Under Sheriff, or Coroners, to be executed; and, for the better Manifeſtation of the ſaid "Time, the Sheriff, under-Sheriff, and Coroners, their Deputies and "Agents, ſhall, upon the Receipt of any ſuch Writ (without Fee for doing "the ſame) indorſe upon the Back thereof the Day of the Month or Year "whereon he or they received the ſame."

(K) Of the King's Precedency in Executions.

Hob. 60. 2 Inſt. 19. 2 Rol. Abr. 472.

IT hath been already obſerved, that the King, by his Prerogative, may have Execution of the Body, Lands, or Goods of his Debtor, at his Election.

8 Co. 171. 2 Rol. Abr. 156-7.

And here we muſt obſerve, that the King's Execution relates as to Land to the Time of becoming in Debt to the King; for as to Debts that were of Record, they always bound the Lands and Tenements; for all Lands being held mediately or immedately from the King, when any Debt was returned of any Perſon, it laid the Eſtate as liable to ſuch Debt, as if it had been a Reſervation on the firſt Grant.

And as to Debts not of Record, they bind the Lands from the Time they are entered into; but this is by Force of the Statute 33 *H.* 8. *cap.* 39. by which it is enacted, "That if any Suit be commenced or taken, or "any Proceſs hereafter be awarded for the King, for the Recovery of any "of the King's Debts, that then the ſame Suit and Proceſs ſhall be preferred before any Perſon or Perſons; and that our ſaid Sovereign Lord, "his Heirs and Succeſſors, ſhall have firſt Execution againſt any Defendant or Defendants, of and for the ſaid Debts, before any other Perſon "or Perſons, ſo always, that the King's ſaid Suit be taken and commenced, or Proceſs awarded for the ſaid Debt, at the Suit of our ſaid "Sovereign Lord the King, his Heirs or Succeſſors, before Judgment "given for the ſaid other Perſon or Perſons."

But for this *vide* Tit. Prerogative.

As to the King's Execution of Goods, the ſame relates to the Time of the Awarding thereof, which is the Teſte of the Writ, as it was in the Caſe of a common Perſon at Common Law; for though by the 29 *Car.* 2. *c.* 3. "no Execution ſhall bind the Property of the Goods, but from the Time "of the Delivery of the Writ to the Sheriff;" yet as this Act does not extend to the King, an Extent of a later Teſte ſuperſedes an Execution of the Goods by a former Writ; becauſe by the King's Prerogative at Common Law, if there had been an Execution at the Subject's Suit, and afterwards an

an Extent, the Execution was ſuperſeded till the Extent was executed, becauſe the Publick ought to be preferred to the private Property, and the rather, becauſe the King is ſuppoſed by publick Buſineſs not to be able to take care of every private Affair relating to his Revenue, and therefore no Time occurs to (or runs againſt) the King; and if he was to be prevented of his Execution, by another Perſon's coming in before him, Laches muſt be imputed to him, which the Law does not.

If the King's Debt be prior on Record, it binds the Lands of the Debtor, into whoſe Hands ſoever they come, becauſe, as has been obſerved, it is * the Nature of an Original Charge upon the Land itſelf, and therefore muſt ſubject every Body that claims under it; but if the Lands were alienated in whole or in part, as by granting a Jointure before the Debt contracted, ſuch Alienee claims prior to the Charge, and in ſuch Caſe the Land is not ſubject.

* Page 366 But for this *vide* 2 Rol. Abr 156-7. Moor 126. 3 Leon. 239, 240. 4 Leon. 10.

(L) Of the proper Officer to do Execution, and herein of the preceding and ſucceeding Sheriff.

THE Sheriff or Officer, who has proper Authority to begin an Execution, is compellable to proceed in the ſame. †

Salk. 223. *vide* Tit. Sheriff.

† As to his Fees, ſee 23 H. 6. *c.* 9. 29 El. *c.* 4. 3 Geo. 1. *c.* 15. *ſ.* 16, 17. 8 Geo. 1. *c.* 25. *ſ.* 5. and 7 Geo. 3. *c.* 29.

Hence it hath been adjudged, that if a Sheriff on a *Fieri facias* ſeizes Goods in his Hands to the Value of the Debt, and pays Part of the Debt, and is diſcharged, without having ſold the Reſt of the Goods, or having returned his Writ, that notwithſtanding ſuch Diſcharge, and without any Writ of *Venditioni exponas*, he may ſell the Goods remaining in his Hands, and ſuch Sale and Execution ſhall be good by Force of the Writ of *Fieri facias*.

Cro. Jac. 73. *Ayre* and *Aden.* Moor 757. S. C. Rol. Abr. 893. S. C. but in Yelv. 44. the S. C. is reported, and his Authority there held contrary to the Reſolution in all the other Books, that the Sale was void, and that ceaſed with his Office; but Q. & *vide* 2 Sand. 47. Latch 117.

If a *Fieri facias* be delivered to an Under-Sheriff, 9 *Nov.* 34 *Eliz.* on which he levies Part of the Debt; and on the ſame Day a Writ of Diſcharge is delivered to him, dated 6 *Novem.* yet if it be not proved, that he had Notice of this Diſcharge prior to this commencing the Execution, he ſtill remains Under-Sheriff, and liable to the Plaintiff's Action for the Money levied by him.

Cro. Eliz. 440. *Boucher* and *Wiſeman.*

As the Authority of the old Sheriff continues, ſo the Law has provided a Remedy to oblige him to proceed in the Execution, which is by (a) *Diſtringas nuper vicecomitem*, which is, either to diſtrain the old Sheriff to ſell and bring in the Money, or to ſell and deliver the Money to the new Sheriff to bring into Court.

Salk. 323. (a) For which *vide* Theſ. Brev. 90. 34 H. 6. 36. Raſt. Ent. 164. —That the *Diſtringas*, which commands the new Sheriff to diſtrain the old one to ſell and bring in the Money, is the moſt uſual. 6 Mod. 299.

(M) Of

(M) Of the Manner of compelling him to do Execution, and herein of the Party's Remedy against him for Neglect of his Duty.

Vide Tit. *Attachment* and *Sheriff.*

IF the Sheriff refuses to execute any judicial Writ; this is a Contempt to the Court, for which an Attachment will be granted.

Salk. 323.

So if he executes the Writ, and makes a false Return, the Party injured may have an Action on the Case against him.

7 Mod. 118. 6 Mod. 299. Salk. 323.

If a *Fieri facias* be directed to the Sheriff, and he returns, that he levied Goods to such a Value, he must answer Goods to that Value, and in such Case, if he returns, that they remain in his Hands for Want of Buyers, then

*Page 367

* a *Venditioni exponas* shall be awarded; upon which, if he refuses to sell the Goods, a *Distringas* issues to the Coroner.

For this *vide* Cro. Jac. 514. Godb. 276. 2 Rol. Rep. 57. Bridgm. 53. *Sly* and *Finch.* Cro. Jac. 566. *Coryton* and *Thomas.* Cro. Car. 53. 2 Saund. 343.

But if to a *Fieri facias* the Sheriff returns, that he seized Goods to such a Value, and that they were rescued out of his Hands; in this Case he makes himself liable to an Action of Debt, or a *Scire facias* may be brought against him by the Plaintiff, for the Sheriff having levied the Goods, he can have no Remedy against the Defendant; also in this Case there can be no *Venditioni exponas* to the Sheriff, because by his own shewing it appears, that he has not the Goods in his Hands.

(N) Of the Sheriff's Authority in doing Execution, and herein of breaking Doors, &c.

5 Co. 91, &c. *Semaine's* Case. 3 Inst. 162. Moor 668. Yelv. 28. Cro. Eliz. 908. Dalt. Sher. 350.

IT is laid down as a general Rule in our Books, that the Sheriff, in executing any judicial Writ, cannot break open the Door of a Dwelling-house; this Privilege, which the Law allows to a Man's Habitation, arises from the great Regard the Law has to every Man's Safety and Quiet, and therefore protects them from those Inconveniences which must necessarily attend an unlimited Power in the Sheriff and his Officers in this Respect; and hence it is, that every Man's House is called his Castle.†

† In *Trin. T.* 17 Geo. 3. in a Cause of *Yates and others* against *Delamayne*, Esq; the Court set aside an Execution levied on Defendant's Goods, in his Dwelling-house, because the Officer forcibly broke into the House to execute the Writ.

But yet, in Favour of Executions, which are the Life of the Law, and especially in Cases of great Necessity, or where the Safety of the King and Commonwealth are concerned, this general Case hath the following Exceptions:

5 Co. 91. b.

1. That whenever the Process is at the Suit of the (*a*) King, the Sheriff, or his Officer, may, after Request to have the Door opened, and Refusal,

(*a*) That upon a *Capias Utlagatum*, though on mesne Process, and at the Suit of the Subject, the Sheriff may break open any outward Doors after Demand and Refusal. 2 Show. 87. pl. 78.

break and enter the Houſe to do Execution, either on the Party's Goods, or take his Body, as the Caſe ſhall be.

2. So in a Writ of Seiſin, or *Habere facias Poſſeſſionem* in Ejectment, the Sheriff may juſtify breaking open the Door, if he be denied Entrance by the Tenant; for the End of the Writ being to give the Party full and actual Poſſeſſion, conſequently the Sheriff muſt have all Power neceſſary for this End; beſides, in this Caſe the Law does not, after the Judgment, look upon the Houſe as belonging to the Tenant, but to him who has recovered. 5 Co. 91.

3. Alſo this Privilege of a Man's Houſe relates only to ſuch Executions as affect himſelf; and therefore if a *Fieri facias* be directed to the Sheriff to levy the Goods of *A.* and it happens that *A.*'s Goods are in the Houſe of *B.* if, after Requeſt made by the Sheriff to *B.* to deliver theſe Goods, he refuſes, the Sheriff may well juſtify the Breaking and Entering his Houſe. 5 Co. 93. a. Sid. 186.

4. Alſo this Privilege extends to a Man's Dwelling-houſe or Out-houſe adjoining thereto, and therefore it hath been adjudged, that the Sheriff, on a *Fieri facias*, may break open the Doof of a Barn, ſtanding at a Diſtance from the Dwelling-houſe, without requeſting the Owner to open the Door, in the ſame Manner as he may enter a Cloſe, *&c.* Sid. 189. *Penton* and *Browne*. Keb. 698. S. C.

5. So on a *Fieri facias*, when the Sheriff or his Officers are once in the Houſe, they may break open any *(b)* Chamber-Door or Trunks for the Compleating the Execution. 2 Show. 87. pl. 78. agreed *per Cur.*'

(b) Q. Whether this muſt not be after Requeſt and Refuſal. Palm. 54.

* 6. So if the Sheriff's Bailiffs enter the Houſe, the Door being open, and the Owner locks them in, the Sheriff may juſtify breaking open the Door, for the inlarging and ſetting at Liberty the Bailiffs; for if in this Caſe he were obliged to ſtay till he could procure a *Homine replegiando*, it might be highly inconvenient; alſo it ſeems, that in this Caſe, the Locking in the Bailiffs is ſuch a Diſturbance to the Execution, that the Court will grant an Attachment for it. * Page 368 Palm. 52. *White* and *Whitſhire*. Cro. Jac. 555. S. C. 2 Rol. Rep. 132. S. C.

7. That if the Sheriff, in executing a Writ, breaks open a Door where he has no Authority for ſo doing by Law, yet the Execution is good, and the Party has no other Remedy but an Action of Treſpaſs againſt the Sheriff. 5 Co. 93. a.

(O) Of the Offence of hindring or obſtructing an Execution.

THERE were anciently Caſtles, Fortreſſes and Liberties, where they reſiſted the Sheriff in executing the King's Writs, which creating great Inconvenience, the Statute of *Weſtm.* 2. *cap.* 39. hindred the Sheriff from returning Reſcuers to the King's Writs of Execution, the Words of which Statute are, *Multoties etiam falſum dant reſponſum Mandando, quod non potuerunt exequi præceptum regis propter reſiſtentiam poteſtatis alicujus magnatis, de quo caveat Vic' de cætero, quia hujuſmodi reſponſa multum redundant in dedecus Domini Regis & coronæ ſuæ; & quam cito ſub-ballivi ſui teſtificentur quod invenerunt hujuſmodi reſiſtentiam, ſtatim omniſſis Aſſump' ſecum Poſſe Comitat. ſui eat in propria Perſona ad faciend' Execution, & ſi inveniat.* 2 Inſt. 450.

The Judges conſtrued theſe Words only to Executions, and not to Writs on meſne Proceſs, and that the Sheriff was not obliged to carry the *Poſſe Comitatus* where the Man was bailable, for they did not preſume, that in ſuch Caſes the King's Writ would be diſobeyed.

2 Inſt. 454. The Original of Commitment for Contempts ſeems to be derived from this Statute; for ſince the Sheriff was to commit thoſe who reſiſted the Proceſs, the Judges who awarded ſuch Proceſs muſt have the ſame Authority to vindicate it. Hence, if any one offers any Contempt to his Proceſs, either by Word or Deed, he is ſubject to Impriſonment during Pleaſure, *viz. a qua non deliberentur ſine ſpeciali præcepto Domini Regis*; ſo that, notwithſtanding the Statute of *Magna Charta*, that none to be impriſoned *ſine judicio parium vel per legem terræ*, this is one Part of the Law of the Land to commit for Contempts, and confirmed by this Statute.

Salk. 321. pl 7. *Kinzſdale* and *Mann*. 6 Mod 27. S. C. See Ld. Raym. 252, 346, 482, 718, 725. 2 Ld Raym. 1072-3. But though the Court will on Affidavit grant an Attachment againſt the Party, whether he be the Defendant or a Stranger who diſturbs the Execution; yet where the Sheriff delivered Poſſeſſion by virtue of an *Habere facias Poſſeſſionem* in the Morning, and ſome Hours after the Sheriff was gone, and the Party in Poſſeſſion, the Defendant came and turned him out again; and the Court held, that if the Plaintiff had been turned out immediately after he was put into Poſſeſſion, or while the Sheriff and his Officers were there, an Attachment might have been granted, for this had been a Diſturbance to the Execution, and a Contempt, but being ſeveral Hours after, they doubted; but it was agreed in this Caſe, that the Court might grant a new *Habere facias Poſſeſſionem*, if the firſt was not returned.

* Page 369 Cro. Car. 109. *Mynn* and *Coughton*, *vide* Tit. Actions on the Caſe. * Alſo though the Court will grant an Attachment, yet if *A.* be taken on a *Capias ad ſatisfaciendum* at the Suit of *B.* and reſcued by *J. S. B* may bring an Action on the Caſe againſt *J. S.* for the Reſcue, or the Sheriff may have ſuch Action againſt the Reſcuer, becauſe he is liable to *B.* but his being liable does not prevent *B.* from bringing his Action againſt which of them he pleaſes.

(P) Of the Party's Remedy when there hath been an irregular Execution, and how the ſame is to be ſet aſide.

(a) IF upon an *Elegit* the Sheriff delivers all the Party's Lands, or a third Part, or more than a Moiety, the Extent is void; but in this (b) Caſe it can only be made void by (c) Writ of Error or *Audita Querela*. *

(a) Sid. 91. (b) Carth. 453. (c) That an irregular Execution may be avoided in Evidence in Ejectment brought for the Lands. Lev. 160.

* *Sed qu.* If the Court would not ſet it aſide on Motion.

Carth. 453. But if upon an *Elegit* the Sheriff delivereth a Moiety of an Houſe without Metes and Bounds, ſuch Return is ill, and ſhall be quaſhed for Incertainty on (d) Motion, without a Writ of Error or *Audita Querela*.

(d) May for this be quaſhed, though it be filed and entered upon Record, becauſe it appears by the Record to be void for Incertainty, *per Hale* Ch. Juſt but *Wyld* Juſt. held, that it being entred upon the Record, there was no avoiding of it, but by Writ of Error. Vent. 259. & *vide* Vent. 274. 3 Keb. 522.

So

So if a *Fieri facias* be not warranted by the Judgment upon which it is awarded, though the Sheriff ſhall be (*a*) excuſed, yet it is merely void as to the Party. Vent. 259.

(*a*) Upon a *Fieri facias* to the Under-Sheriff of the County of *Bucks*, who ſold the Goods of a poor Man for 22 *l.* 13 *s.* 4 *d.* the Goods being well worth 80 *l.* and it appeared to the Court, that the Sheriff had perſuaded the Jury to prize the Goods at an Under-value, perſuading them it would be better for the poor Man; whereupon they appraiſed them *ut ſupra*, and he delivered them to the Plaintiff for the ſaid Sum. The Court held, that it was Oppreſſion, and inquirable at the Aſſiſes by Indictment, or puniſhable in the Star-Chamber; † and commanded that the Under Sheriff, being an Attorney, ſhould be brought before them. Cro. Jac. 426. Sayer, Sheriff of *Buckingham's* Caſe.

† A Court that is now aboliſhed, by 16 Car. 1. *c.* 10.

Hence it has been held, that in Treſpaſs againſt the Sheriff, it is enough for his Juſtification, to ſhew a Writ; ſo it is in the Caſe of his Bailiff or Officer, with this Difference, that the Sheriff muſt ſhew the Writ was returned, if returnable; but the Bailiff need not, becauſe it is not in his Power; but in Treſpaſs againſt the Plaintiff himſelf, or a mere Stranger, they cannot juſtify themſelves, unleſs they ſhew there was a Judgment as well as an Execution, for the Judgment may be reverſed, and it ought to be at their Peril, if they take out Execution afterwards; but it ſeems, that if one comes in Aid of the Officer, at his Requeſt, he may juſtify as the Officer may do, but ſuch Requeſt or Command of the Officer is traverſable. Salk. 409. pl. 5. 3 Salk. 320. pl. 8. Ld. Raym. 632. 12 Mod. 320. 396.

So where a Man had Judgment and Execution executed, and afterwards the Judgment was vacated for being unduly obtained, and Reſtitution awarded, and afterwards the Defendant brought (*b*) Treſpaſs againſt the Plaintiff in the firſt Action for the Taking of the Goods; and it was adjudged, that it well lay againſt the Party, for by the Vacating of the Judgment it is as if it never had been, and is not like a Judgment reverſed by * Error; but in this Caſe it was held, that no Action would lie againſt the Sheriff, who had the King's Writ to warrant what he did. Lev. 95. *Turner* and *Felgate*. Raym. 73. S. C.

(*b*) Where an Action will lie for taking out Execution on a Judgment which the Plaintiff knows to be ſatisfied, *vide* Hob. 205, 266.

* Page 370

If after a Writ of Error ſued out, and Bail put in, the Plaintiff takes out Execution, the Court will grant a *Superſedeas quia executio erronice emanavit*. But for this *vide* Tit. Error Letter (H) and 3 Lev. 312.

(Q) To what the Party ſhall be reſtored, when ſuch erroneous Execution is ſet aſide.

IF upon his Judgment the Plaintiff takes out a *Fieri facias*, and thereupon the Sheriff ſells a Term for Years to a Stranger, and the Judgment is afterwards reverſed, the Defendant ſhall only be reſtored to the Money Rol Abr. 778. 8 Co. 19, 143. Cro. Eliz. 278.

Moor 573. Leon. 96. 3 Leon. 89. Cro. Jac. 246. Godb. 27. Goulſ. 103.

for which the Term was ſold, and not the Term itſelf; for by the Writ the Sheriff had Authority to ſell; and if the Sale may be avoided afterwards, few would be willing to purchaſe under Executions; which would render Writs of Execution of no Effect.

Rol. Abr. 778. Cro. Jac. 246. Yelv. 179. Brownl. 107, 108.

But if the Plaintiff takes out an *Elegit* on his Judgment, and the Sheriff, upon this Writ, delivers a Leaſe for Years, of the Defendant's, to the Value of 50 *l.* to the Plaintiff *per rationabile pretium & extentum*, to have as his own Term, in full Satisfaction of 50 *l.* Part of the Sum recovered, and after the Defendant reverſes the Judgment, he ſhall be reſtored to the ſame Term, and not to the Value; for though the Sheriff might have ſold the Term on this Writ, yet here is no Sale to (*a*) a Stranger, but a Delivery of the Term to the Party that recovered by way of Extent, without any Sale, and therefore the Owner ſhall be reſtored.

(*a*) That it would be otherwiſe if ſold to a Stranger, *vide* Yelv. 108. Brownl. 107.

Rol. Abr. 778.

And for this Reaſon, if Perſonal Goods were on this Writ delivered to the Party *per rationabile pretium & extentum*, upon the Reverſal of the Judgment he ſhould be reſtored to the Goods themſelves.

5 Co. 90. Rol. Abr. 778. Cro. Eliz. 278.

So if the Goods of an outlawed Man are ſold by the Sheriff on a *Capias Utlagatum*, and after the Outlawry is reverſed by Writ of Error, he ſhall be reſtored to the Goods themſelves, becauſe the Sheriff was not compellable to ſell theſe Goods, but only to keep them to the Uſe of the King.

2 Rol. Abr. 491. *Sare* and *Shelton*; but for this *vide* Rol. Abr. 492. Cro. Eliz. 597. Moor 542. Style 159. Vent. 255. Comb. 389.

So if upon a *Fieri facias* on a Judgment againſt *B.* the Sheriff takes the Goods of *B.* into his Hands, but before any Sale of them, *B.* delivers to the Sheriff a *Superſedeas* on a Writ of Error, *B.* ſhall have the Goods again, for by this Seiſure no Property is altered. ‡

‡ See *ante* 231.

*Executors and Administrators.

* Page 371

ACCORDING to the Civil and Canon Law there are three Perſons who are called Executors, and who have to do with the Execution of a Perſons Goods after his Deceaſe; the firſt is the Ordinary, or Biſhop of the Dioceſe, and is called *Executor a Lege conſtitutus*. 2dly, *Executor a Teſtatore conſtitutus*, being appointed by the laſt Teſtament of the Party. 3dly, *Executor ab Epiſcopo conſtitutus*, who in the Civil Law is called *Executor dativus*, and in our Law an *Adminiſtrator*. Godolph. 75. Swinb. 360.

As the Manner of appointing Executors and Adminiſtrators, and the Nature and Duty of their Offices, have been Matters of great Debate and Controverſy in our Law, it will be neceſſary to branch out this Head into ſeveral Diviſions; and therefore we ſhall conſider,

(A) What Perſons may be Executors. 374.

And herein,

1. Of appointing the King Executor. 374.
2. Whether Corporations may be Executors. 375.
3. Who in Reſpect of their Crimes are diſabled from being Executors. 375.
4. Who in Reſpect of their Country. 375.
5. Who in Reſpect to their Want of Underſtanding. 376.
6. Who in Reſpect of their Fortune and Circumſtances; and therein of obliging an Executor to give Security. 376.
7. Of making Infants Executors. 377.
8. Of a Feme Covert Executrix. 378.
9. Of making Creditors Executors. 378.
10. Of making Debtors Executors. 379.

(B) Of the different Kinds of Executors and Adminiſtrators. 381.

And herein,

1. Of an Adminiſtrator *durante minori ætate* of an Infant Executor or Adminiſtrator. 381.

And herein,

1. *Who may be such an Administrator.* 381.
2. *What Acts he may do.* 381.
3. *When his Authority determines.* 382.

2. Of an Administrator *de bonis non,* where the first Administrator dies, or the Executor dies intestate, or without Probate of the Will. 385.

And herein,

1. *In what Cases Administration* de bonis non *shall be granted, and to whom.* 385.

* Page 372 * 2. *What Things unadministred such an one is intitled to.* 386.

3. *In what Actions commenced before his Time, may an Administrator* de bonis non *proceed.* 386.

3. Of an Executor *de son tort.* 387.

And herein,

1. *What Acts or Degree of Intermeddling will make an Executor* de son tort. 387.
2. *What Acts of his are as valid, as if done by a lawful one.* 390.
3. *How he is to be charged, and how far a subsequent Administration purges the first Wrong.* 391.

(C) Of the Manner of appointing an Executor. 392.

And herein,

1. By what Words an Executor is constituted. 392.
2. Of appointing an Executor absolutely, or on Condition. 393.
3. Of appointing a temporary Executor. 394.
4. Of appointing an Executor with a limited Power, as to administer such a Part of the Estate, *&c.* 394.

(D) Of appointing Co-Executors. 395.

And herein,

1. What Acts done by any one of them shall be as valid as if done by them all. 395.

2. Where

2. Where they must answer for each other's Acts, and what Remedy the one has against the other. 395.
3. Where they must jointly sue and be sued; and therein of Summons and Severance. 396.

(E) Of the Probate of Wills, and granting Administration. 397.

And herein,

1. To whom the Probate of Wills and the Granting of Administration did originally belong. 397.
2. Of the King's Jurisdiction herein. 399.
3. Of the Archbishop's Jurisdiction; and therein of *bona notabilia*. 399.

And herein,

1. *Of what Value the Goods and Effects must be, that will make* bona notabilia. 400.
2. *Of the Nature of such Goods as will make* bona notabilia, *and how far it is necessary that they should be in several Dioceses.* 400.
4. Of the Probate of Wills, and granting Administration by the Bishop of the Diocese. 401.
5. Of the Probate of Wills, and granting Administration, where the Party died within some peculiar Jurisdiction. 402.
6. Of the Jurisdiction of some Lords of Manors in the Probate of Wills. 402.
7. Of the Jurisdiction of some Mayors in Respect of the Burgesses within such a Place. 402.
* 8. The Form of Proving a Will and taking out Administration, and therein of Entering a Caveat. 403. * Page 373
9. Of the Executor's Refusal. 405.
10. What Acts amount to an Administration, so that the Party cannot afterwards refuse. 406.
11. Of bringing in an Inventory. 406.
12. Where Administration unduly obtained may be revoked or repealed. 410.
13. How far a Repeal makes all mean Acts void. 411.
14. What Things an Executor may do before Probate of the Will. 412.

(F) What Persons are intitled to Administration. 413.

(G) In

(G) In what Manner the Ordinary may grant it: And herein of granting it to one or more, or for a particular Thing. 415

(H) What shall be deemed the Testator's Personal Estate, or Assets in the Hands of the Executor. 416.

And herein,

1. What shall be such an Interest vested in the Testator, as shall go to his Executors. 416.
2. How far Debts due to the Testator are Assets. 417.
3. What shall be deemed his Personal Estate, and therein what Things shall go to the Heir, and not to the Executor. 418.
4. What Things shall go to the Wife of the Deceased, and not go to the Executor. 421.
5. Where after Debts and Legacies paid the Executors shall have the Surplus to themselves, or are to be Trustees for the next of Kin. 423.

(I) How the Personal Estate after Debts paid is to be distributed when the Party dies Intestate, and herein of the Share the Husband or Wife are intitled to, of the ascending, descending, and collateral Line, and Admission of the Half-Blood, and where the Distribution shall be per Stirpes, and not per Capita. 426.

(K) Of Advancement and bringing into Hotchpot. 429.

(L) What shall be a Devastavit, either in Executors or Administrators, and herein of the Order of paying Debts and Legacies. 430.

And therein,

1. What Manner of Wasting will amount to a *Devastavit*. 430.
2. Where it will be a *Devastavit* to pay Debts of an inferior Nature before those of a superior, and the Order in which Debts are to be paid. 432.
3. Of paying Legacies before Debts, and therein of the Executor's Assent to a Legacy. 435.
4. What shall be allowed on Account of Funeral Expences. 436.

Executors and Administrators.

(M) In what Cases an Executor may make himself liable de bonis propriis. 436. * Page 374

And herein,

1. Where he shall be liable *de bonis propriis* by his false Pleading. 436.
2. Where by his Promise to pay or discharge the Testator's Debts or Legacies. 438.

(N) What Actions Executors or Administrators may bring in Right of those they represent. 439.

(O) How such Actions must be laid; and herein of joining a Matter in Right of the Testator, and in their own Right in the same Action. 440.

(P) Of Actions and Remedies against Executors and Administrators. 442.

And herein,

1. Upon what Contracts or Engagements of their Testators or Intestates Executors or Administrators are liable. 442.
2. Of Personal Torts which are said to die with the Party. 444.
3. Of Remedies against Executors or Administrators of Executors. 445.
4. Where they shall be excused from Costs. 446.
5. Where excused from putting in Special Bail. 447.

(A) What Persons may be Executors: And herein.

1. Of appointing the King Executor.

IT seems to be admitted, that the King may be (*a*) appointed Executor; but as he is presumed to be so far engaged and taken up with the publick and arduous Affairs of the Kingdom, as not to have Leisure to attend to the private Concerns of any particular Person, so the Law allows him

4 Inst. 335, Godolph. 76.

(*a*) Also my Lord *Coke* says, that it was assented in Parliament, that the King might make his Testament, and appoint Executors, but he does not tell us of what. 4 Inst. 335.

to nominate ſuch Perſons as he ſhall think proper, to take upon them the Execution of the Truſt, againſt whom all Perſons may bring their Actions; alſo the King may appoint others to take the Accounts of ſuch Executors.

4 Inſt. 335. Accordingly we find, that *Katherine* Queen Dowager of *England*, Mother of *Henry* VI. who died *June* 2, 1436, made her Will, and thereof appointed *Henry* VI. ſole Executor, and that the King appointed *Robert Rolleſton* Keeper of the Wardrobe, *John Merſton* and *Richard Alreed* to execute the ſaid Will, by the Overſight of the *Cardinal*, the Duke of *Glouceſter*, and the Biſhop of *Lincoln*, or any two of them, to whom ſuch Executors ſhould account. ‖

‖ *Qu.* If there is not a late Inſtance of a Will made by one of our Kings?

* Page 375

* 2. Whether Corporations may be Executors.

It ſeems by (*a*) *Wentworth*, that (*b*) Aggregate Corporations conſiſting of divers Perſons cannot be Executors. 1*ſt*, Becauſe they cannot be Feoffees in Truſt for the Uſe of others. 2*dly*, Becauſe they are a Body framed for a Special Purpoſe. 3*dly*, Becauſe they cannot come to prove a Will, or at leaſt to take an Oath, as others do.

(*a*) Office of Executor 17. *vide Id.* 25. But in the Year-Book, 12 E. 4. 9. b. it is ſaid, that a Mayor and Commonalty may be Executors. Rol. Abr. 915. (*b*) But ſuch Corporations, as may duly prove the Will and take the Oath of an Executor, may be Executors. Godolph. 85.

3. Who, in Reſpect of their Crimes, are diſabled from being Executors.

There are few or none, who, by our (*c*) Law, are diſabled, on Account of their Crimes, from being Executors; and therefore it hath been always (*d*) holden, that Perſons attainted or outlawed may ſue as Executors or Adminiſtrators, becauſe they ſue *in auter droit*, and for the Benefit of the Party deceaſed.

(*c*) How far by the Civil and Canon Law, Hereticks, Apoſtates, Traitors, Felons, Perſons outlawed, inceſtuous Baſtards, famous Libellers, manifeſt Uſurers, Sodomites, uncertain Perſons, &c. are excluded from being Executors, *vide* Godolph. 85. Off. of Exec. 17. Swinb. 346. (*d*) As in Co. Lit. 128. Cro. Car. 8, 9. Rol. Abr. 914, 5. Vern. 184. Outlawry no Plea in Bar.

(*e*) 18 H. 6. 4. Rol. Abr. 915. (*f*) 21 E. 4. 50. Alſo a Villein (*e*) may be an Executor, and the Lord cannot ſeize thoſe Goods which he has to the Uſe of the Deceaſed; nay (*f*) where a Villein was made Executor, he might ſue his own Lord for a Debt due to the Teſtator.

Co. Lit. 134. 43 E. 3. 13. Theol. 11. Swinb. 349. Godolph. 85. But an (*g*) excommunicated Perſon cannot be an Executor or Adminiſtrator, for by the Excommunication he is excluded from the Body of the Church, and is incapable to lay out the Goods of the Deceaſed to pious Uſes.

(*g*) Whether the Statute 3 Jac. 1. c. 5. which enacts, that every Popiſh Recuſant convict ſhall ſtand to all Intents and Purpoſes diſabled, as a Perſon lawfully excommunicated, extends to diſable ſuch Perſon from being an Executor, *vide* Hawk. P. C. 23-4. and Off. of Ex. 17. where it is ſaid, that Recuſants convicted at the Time of the Death of any Teſtator, are diſabled to be his Executors; and 1 Show. 293. where the Probate of a Will was refuſed to an Executrix, ſhe being a Papiſt convict, and the Conviction exhibited into the Spiritual Court.

4. Who,

4. Who, in Respect of their Country, may be Executors.

It seems agreed, that by our (*b*) Law an Alien, or one born out of the Allegiance of our King, may be an Executor or Administrator; also it hath been adjudged, that such a one shall have Administration of Leases as well as Personal Things, because he hath them *in auter droit*, and not to his own Use.

(*b*) Off. of Exec. 17. —But by the Civil Law, Aliens cannot be Executors, unless they are so appointed in Military Testaments; and the Reason hereof is, that in such Testaments Respect is had only to the *Jus Gentium*. Godolph. 86. Cro. Car. 8, 9. Sir *Upwell Caroon's* Case. Vent. 417. S. C. cited.

But it has been long (*i*) doubted, whether an Alien Enemy should maintain an Action as Executor; for on the one Hand it is said, that by the Policy of the Law alien Enemies shall not be admitted to Actions to recover Effects, which may be carried out of the Kingdom to weaken ourselves and enrich the Enemy, and therefore public Utility must be * preferred to private Convenience; (*k*) but on the other Hand it is said, that those Effects of the Testator are not forfeited to the King by Way of Reprisal, because they are not the alien Enemy's, for he is to recover them for others; and if the Law allows such alien Enemies to possess the Effects as well as an alien Friend, it must allow them Power to recover, since in that there is no Difference, and by Consequence he must not be disabled to sue for them; if it were otherwise, it would be a Prejudice to the King's Subjects, who could not recover their Debts from the alien Executor, by his not being able to get in the Assets of the Testator.

(*i*) Cro. Eliz. 142. Owen 45.

* Page 376

(*k*) Cro. Eliz. 683. Moor 431. Carter 49. 191. Skin. 370.

5. Who, in Respect of their Want of Understanding, are disabled from being Executors.

By our Law, as well as by the Civil Law, Ideots and Lunatics are incapable of being Executors or Administrators, for these Disabilities render them not only incapable of executing the Trust reposed in them; but also by their Insanity and Want of Understanding they are incapable of determining whether they will take upon them the Execution of the Trust, or not. Godolph. 86.

Therefore it hath been agreed, that if an Executor became *Non Compos*, that the Spiritual Court may, on Account of this natural Disability, commit Administration to another. Salk. 36. pl. 1.

6. Who, in Respect of their Fortune and Circumstances, may be Executors, and therein of obliging an Executor to give Security.

It seems to be now agreed, that the Spiritual Court cannot refuse to grant the Probate of a Will to a Person appointed Executor, on Account of his Poverty or Insolvency; for, as he is but a Trustee for the Deceased, and such a Person as the Testator thought proper to appoint for that Office, without any previous Qualification, the refusing to admit him Executor would be attended with these Inconveniencies: 1*st*, That though he has a Temporal Interest, yet he cannot sue for the Debts of the Testator before Probate, which may be a considerable Detriment to the Testator's Estate, and consequently to Creditors and Legatees. 2*dly*, That whilst this Affair is in Controversy, there will be neither Executor nor Administrator against whom an Action may be brought to recover Debts or Legacies. 3*dly*, That if

Sal. 36. pl. 1. 299. pl. 11. Carth. 457. Show. 293. See Ld. Raym. 361. Salk. 250. pl. 1 Wil. Rep. 25. pl. 6, 27, 51. 594 pl. 171. 595. Comyns 87. pl. 56.

if Administration ſhould be granted to another, it would be a good Plea at Law to an Action brought by ſuch a one, that there was a Will and an Executor appointed.

Comb. 185. Skin. 299. pl. 2. 12 Mod. 9. Holt 305. pl. 4. 2 Show. 280. pl. 282. 3 Salk. 138. pl. 3. 12 Mod. 409.

Therefore, where to a *Mandamus* to the Judge of the Prerogative Court, to grant the Probate of a Will to a Perſon named Executor therein, the Ordinary returned, that he was an abſconding Perſon and inſolvent, and that he refuſed to give Caution to pay Legacies bequeathed to ſome of the Teſtator's Infant Relations; and a peremptory *Mandamus* was granted; for the Ordinary has no Authority to interpoſe and demand Caution of the Executor, when the Teſtator himſelf required none.

Carth. 457. *The King* v. Sir *Richard Raines*. Salk. 299. pl. 11. Rep. 361. S. C. and there ſaid, that there had been no Precedents nor Practice of this Nature.

So where after Probate of the Will the Executor became a Bankrupt, and there being a Suit commenced in the Eccleſiaſtical Court to revoke the Probate, and grant Adminiſtration to another, the Court of King's Bench granted a Prohibition.

Show. 293. *Hill* and *Mills*. Salk. 36. pl. 1. S. C. Skin. 299.

But an Executor is conſidered but as a bare Truſtee in Equity; ſo if he be inſolvent, the Court of (*a*) Chancery will oblige him, as they will any other Truſtee, to give Security before he enters upon the Truſt.

*Pae 377 Carth, 458. Show. 294.

(*a*) Where, during the Litigation of a Will in the Spiritual Court, the Court of Chancery, on Suggeſtion that the Perſon who claimed as Executor under the Will was inſolvent, ordered that the Debtors to the Deceaſed's Eſtate ſhould forbear to pay any Money till the Matter was ſettled in the Spiritual Court. Chan. Ca. 75.

As where the Teſtator deviſed a Legacy to *J. S.* payable at the Age of twenty-one Years, on a Bill, ſuggeſting that the Executor waſted the Eſtate, and praying that he might give Security to pay the Legacy when due, it was decreed accordingly.

Chan. Ca. 121.

So where the Teſtator deviſed a Legacy to his Child, an Infant, payable at the Age of twenty-three, and made his Wife Executrix and Reſiduary Legatee, and ſhe married a ſecond Huſband and died, and he took out Adminiſtration *de bonis non*, with the Will annexed, (his Wife being Reſiduary Legatee); and upon a Suggeſtion of Inſolvency, the Court decreed him to give Security to pay the Legacy when it ſhould become payable.

2 Vern. 249. *Rous* and *Noble*.

7. Of making Infants Executors.

An Infant may be appointed Executor, but he cannot adminiſter till he is of the Age of Seventeen, (*b*) during which Time Adminiſtration is to be granted to ſome Friend of his.

Godolph. 103. Off. of Exec. 208.

(*b*) For this *vide Poſtea* Letter (B). 381. *&c.*

So a Child *in Ventre ſa mere* may be appointed, and if the Mother is delivered of two or more Children at the Birth, they ſhall be all Executors.

Godolph. 102. Off. of Exec. 213.

As to Acts done by an Infant in Execution of the Office of an Executor, it ſeems agreed, that regularly all Acts done by him in this Reſpect, before the Age of ſeventeen, are not binding, as if he (*c*) ſells the Teſtator's

Off. of Exc. 213, 214. Godolph. 103.

(*c*) That an

Teſtator's Goods, (*d*) aſſents to a Legacy, (*e*) receives Debts due to the Teſtator, *&c.* Infant Executor before the Age of

Seventeen cannot ſell a Leaſe for Years, which he has in Right of the Teſtator, with an Intent to pay the Debts of the Teſtator, and diſcharge the Debts of the Infant himſelf. Rol. Abr. 730.——But in Cro. Eliz. 254. it is held, that an Infant Executor, at the Age of thirteen, or other Perſon by his Order, may ſell Goods to pay Debts.——And though ſold for leſs than worth, yet the Sale is good. 3 Leon. 143. *& vide* Keilw. 51. a (*d*) That an Infant Executor cannot aſſent to a Legacy unleſs he hath Aſſets to pay Debts. Chan. Ca. 257. (*e*) Eſpecially before the Age of fourteen. Off. of Exec. 217.

But all Things that an Infant Executor doth after he attains the Age of ſeventeen, though before the Age of twenty-one, if done according to the Office and Duty of an Executor, will hold good and ſhall bind him, as Paying of Debts, Suing for and Recovering Debts, Selling the Teſtator's Goods, *&c.* Off. of Exec. 215, 216. Cro. Car. 490. Jon. 400. Moor 852. And 177. 5 Co. 27. Moor 146.

But if an Infant Executor, after the Age of ſeventeen, but before the Age of twenty-one, gives an Acquitance or Releaſe for a Debt or Duty owing to the Teſtator, ſuch a Releaſe, without an actual Payment to the Infant is (*f*) void; for if this ſhould be conſtrued good, it would be * taking away the Privilege which the Law allows Infants to avoid their Acts, when they are apparently to their Diſadvantage; and this, which is in Prejudice both to the Infant and to the Eſtate of the Teſtator, cannot be ſaid to be done according to his Office as an Executor. *Page 378 5 Co. 27. *Ruſſel's* Caſe. Co. Lit. 172. a. S. P. Off. of Exec. 285. S. C. —— From hence it is ſaid, that is twenty-one.

though an Infant may adminiſter at ſeventeen, yet he cannot commit a *Devaſtavit* till he Vern. 328.——And the Author of the Off. of Exec. 213-14. inclines to think, that an Infant's Conſent to a Legacy, though after the Age of Seventeen, is not good, eſpecially if it may ſubject him to a *Devaſtavit*, as it may do when there are not Aſſets ſufficient to pay Debts. (*f*) So if a Bond be forfeited, and the Infant Executor receives only the Principal Sum without the Penalty, and gives a general Releaſe of all the Debt, this Releaſe at Law is no Bar of the Penalty. Cro. Car. 490. *Knivveton* and *Latham*.

If an Infant Executor ſues or is ſued, he muſt regularly appear by his Guardian and not by Attorney, for by Law he is diſabled to make an Attorney; for if he ſuffers by the Neglect or falſe Pleading of his Attorney, he has no Remedy againſt him. But for this *vide* Tit. *Infancy and Age*, and where he may appear

by Attorney being joined with others, who are of full Age, *vide* Cro. Eliz 541. Poph. 130. Cro. Jac. 441. Mod. 47, 298. 3 Bulſt. 180. Vent. 102. Sid. 449. Lev. 299. 2 Saund. 212. Yelv. 130. Lev. 181. Cro. Eliz. 378. Carth. 122. Salk. 205. pl. 1. 4 Mod. 7.

8. Of a Feme Covert Executrix.

A Feme Covert may be appointed Executrix, and in the Spiritual Courts ſhe is conſidered as Feme Sole, capable of ſuing and being ſued without her Huſband; and therefore it ſeems, that according to their Law ſhe may take upon her the Probate of the Will without the Aſſent of the Huſband who hath no Right to interpoſe or meddle in the Affair. Off. of Exec. 202. Godolph. 110.

But by our Law, Huſband and Wife are conſidered but as one Perſon, and as having one Mind, which is placed in the Huſband as moſt capable to rule and govern the Affairs of the Family, and therefore the Wife can do no Act, which may prejudice the Huſband, without his Conſent and Concurrence: Hence the Huſband muſt be joined in all Actions by or againſt his Wife; and conſequently a Wife cannot, by our Law, take upon her the Office of Executorſhip, without the Conſent of her Huſband. Keilw. 122. And. 117. Off. of Exec. 203.

Off. of Exec. 203. Therefore it ſeems, that if a Wife, who is made Executrix, is cited in the Spiritual Court to take upon her the Executorſhip, and the Huſband appears and refuſes his Conſent thereto, if afterwards they proceed to compel her, a Prohibition will be granted.

Godolph. 109, 110. Alſo a Wife cannot, againſt her Conſent, though her Huſband is willing, be compelled to take upon her an Executorſhip; but if the Huſband adminiſters, ſhe will be bound by it during the Coverture.

Godolph. 110. So if a Wife adminiſters, though againſt the Conſent of the Huſband, and an Action is brought againſt them, they are eſtopped to ſay, that the Wife was not Executrix.

Bro. Executor. Godolph 110. So if a Feme Sole be made Executrix, and ſhe marries before ſhe intermeddles with the Eſtate, and her Huſband adminiſters; this is ſuch an Acceptance as will bind her, and ſhe can never afterwards refuſe it.

Off. of Exec. 198-9. but how far the Huſband's Conſent is neceſſary to make the Will of a Feme Covert good, *vide* Tit. Deviſes, Letter (A). It is ſaid, that a Feme Covert Executrix may, without the Conſent of her Huſband, make a Will, and appoint an (*a*) Executor as for thoſe Things which ſhe hath as Executrix, for ſhe has them *in auter droit*.

(*a*) May make her Huſband ſuch Executor. Godolph. 110.

9. Of making Creditors Executors.

12 H. 4. 21. Plow. 185. Hutt. 128. Off. of Exec. 31. Godolph. 115. Salk. 304. Godb. 216. A Debtor may make his Creditor Executor, and in ſuch Caſe the Executor may retain ſo much of the Teſtator's Aſſets, as will ſatisfy himſelf; but this muſt be underſtood where the Debt is in an equal Degree with ſuch Creditors; for if he be a ſimple Contract Creditor, he cannot retain againſt a Creditor by Specialty, or any other of a ſuperior Nature.

Hob. 10. Cro. Car. 372. Jon. 345. Keilw. 59.

* Page 379 Godolph. 115. Off. of Exec. 31. * So if Adminiſtration be (*b*) granted to a Creditor, he may retain ſo much of the Inteſtate's Aſſets, as will ſatisfy himſelf; but this alſo muſt be underſtood as to Creditors in equal Degree.

(*b*) But an Executor *de ſon tort*, who is a Creditor, cannot retain, becauſe this would be allowing him to take Advantage of his own Wrong. 5 Co. 30. *Caulter*'s Caſe. †

† But if he can obtain Adminiſtration as a Creditor, though after Action brought againſt him, but before Trial, he may retain, and give his own Debt, and ſuch Retainer in Evidence on *plene Adminiſtravit*; tho the Plea was pleaded, and Iſſue joined, before ſuch Adminiſtration obtained. See *infra* 391.

Rol. Abr. 940. *Aſhby* and *Child*. Style 384. Alſo ſuch an Adminiſtrator, who is a Creditor by Specialty, may bring an Action of Debt againſt one who poſſeſſes himſelf of the Inteſtate's Goods as Executor *de ſon tort*, with an Averment, that none of the Goods came to his Hands to ſatisfy the Debt; for though he may bring Trover or Treſpaſs againſt him as Adminiſtrator, yet as againſt a Stranger he is not deprived of this other Remedy; for the Reaſon why the Debtor's making the Creditor Executor, or his taking out Adminiſtration, is ſaid to ſuſpend or extinguiſh the Action, is on Suppoſition of Aſſets.

Salk. 304. Rol. Abr. 940. So if there are no Aſſets, he may ſue the (*c*) Heir of the Obligor, where the Heir is bound.

(*c*) So if a Creditor is made Executor with others, he may ſue the others, eſpecially if he hath not adminiſtered. Off. of Exec. 32. Godolph. 115. & *vide* Cro. Car. 372. Jon. 345.

3 Keb. Rep. 116. So if *A.* and *B.* be jointly and ſeverally bound to *C.* and *A.* makes *C.* his Executor (or as the Caſe was) makes *D.* his Executor, who makes *C.* his Exe-

Executor; in this Case, if *C.* has not received Satisfaction of the Assets of *A.* he may sue *B.* for, being jointly and severally bound, he may sue which of them he pleases, tho' Debt be one, yet Obligations are several, and no Assets appear of the Value of the Debt to retain, and there might be a Judgment against which he could not retain. 2 Lev. 73. *Cock* and *Croft*.

10. Of making Debtors Executors.

It is laid down as a general Rule, that if a Creditor makes his Debtor Executor, it is an (*c*) Extinguishment of the Debt, for he cannot sue himself. Rol. Abr. 920-21. 5 Co. 30. in *Needham*'s Case. Off. of Exec. 30. Godolph. 113.

(*c*) For being a Personal Action, and once suspended, it cannot be revived again. Hob 10.——But though it is a Discharge of the Action, yet the Debt is Assets, and the making him Executor does not amount to a Legacy, but to Payment and a Release. Salk. 306. *per Holt* Ch. Just.

But if a Person dies intestate, and the Ordinary commits Administration to a Debtor, the Debt is not thereby (*d*) extinguished, for he comes into the Administration by the Act of Law, whereas the other is the Act of the Party. 5 Co. 136. Salk. 306. Off. of Exec. 31.

(*d*) And therefore if an Obligor administers to the Obligee, and makes his Executor, and dies, the Creditor of the Obligee may well bring an Action against him. Sid. 79.

If the Debtee makes the Debtor and another Co-executors, and one of them makes his Executor and dies, the surviving Co-executor shall not have an Action to recover the Debt against the Executor of the Debtor, because the Debt was once extinct; for it could not be brought but in the Names of both the Co-executors, notwithstanding (*e*) one alone administered; and it could not be brought in both their Names, because the Debtor could not sue himself. 8 E. 4. 3. 20 E. 4. 17. Plow. 264. Leon. 320.

(*e*) If the Obligee makes the Obligor and others his Executors, and the Obligor refuses, but the others administer, and the Obligor dies first, yet the Debt is released; for the Obligor, notwithstanding the Refusal, might have come in and administered, and the Probate by the others was for his Benefit. Salk. 308. *per Holt*.

So where *A.* being bound in an Obligation to *B.* *B.* makes *A.* his Executor, who administers several of the Goods, but dies before Probate of the Will, and Administration to *B.* being granted to *J. S.* he brought his Action against the Heir of *A.* but it was held, that the Debt was released * in this Case, though *A.* never proved the Will; for by administring as Executor he was complete Executor for this and several other Purposes. Salk. 299. pl. 12. *Wankford* and *Wankford*. *Page 380

But all these Cases of Extinguishment by making Debtors Executors, must be understood where there are Assets sufficient to discharge and satisfy the Testator's Debts and Legacies. Cro. Car. 373. Off. of Exec. 30.

Therefore, where a Debtor and another were made Executors by the Debtee, who by his Will appointed, that out of the Debt due to him they should pay a certain Legacy, it was adjudged, that as to that Legatee this Debt was not extinct, but that it remained Assets to pay Legacies as well as Debts; and this being a Legacy, and properly recoverable in the Spiritual Court, the Court of *B. R.* refused to grant a Prohibition to a Suit for it there, and the rather in this Case, because it was expressly devised to be paid out of the Debt. Yelv. 160. *Flud.* and *Rumsey*.

So in a late Case, where the Testator devised several Legacies, and amongst the Rest gave considerable Legacies to his two Executors, to whom also he devised *Selwin* and *Brown*, de-

treed and affirmed in the House of Lords, 21 *March* 1734. Cas. Temp. Talb. 240, &c. *See* 2 Str. 865. Fitzgib. 126. (*a*) Chan. Ca. 292. S. P. decreed.

devised the Surplus of his Estate; and there being a Debt of 3000*l.* due by Bond to the Testator from one of the Executors, he insisted, that, there being sufficient Assets to satisfy all the Legacies, this 3000*l.* should not be brought into the Surplus of the Testator's Estate, but that the same was extinguished for his Benefit by his being made Co-executor; and that though the Surplus of the Estate was devised to them both, yet that this Debt could not be taken to be Part of that Surplus, being before extinguished; but it was decreed, that the 3000*l.* (*a*) should be taken as Part of the Surplus of the Testator's Personal Estate, and both Executors equally intitled to the same; for though in some Books the Testator's making a Debtor Executor is said to be an Extinguishment of the Debt, because an Executor cannot sue himself; yet it was never doubted, but that such a Debt remained Assets to satisfy Creditors, and was also resolved to be Assets to satisfy Legacies; and this Devise of the Surplus and Residue of the Testator's Estate being as much a Legacy, and as well recoverable in the Spiritual Court, as any particular Legacy, it was but fitting, that, since the Courts of Equity claim now a concurrent Jurisdiction with the Ecclesiastical Courts in Matters of this Nature, there should be the same Measure of Justice in both these Courts.

11 H. 4. 83. Cro. Car. 372. Jon. 345. (*b*) But if the Obligee takes the Obligor to Husband; this is an Extinguishment of the Debt, because it would be a vain Thing for the Husband to pay the Wife Money in her own Right. Co. Lit. 264. Salk. 306.——But if the Executrix of the Obligee takes the Obligor to Husband, this is no Extinguishment of the Debt, for he may pay Money to her as Executrix, because, if she lays the Money so paid to her by itself, the Administrator *de bonis non* of her Testator (if she dies intestate) shall have that Money as well as any other Goods that were her Testator's. Leon. 320. Moor 236. Salk. 306.

If the Debtee make the Executrix of the Debtor his Executrix, and dies, this is no Extinguishment of the Debt, because the Executrix is intitled to the same, not in her (*b*) own Right but in the Right of another.

2 Mod. 315. *Joan Bailie's* Case. See 12 Mod. 9, 205.

Under this Head of making Debtors Executors, it may be proper to observe, that if a Debtor be in Execution, and the Plaintiff dies, by which the Right of Administration descends upon the Debtor; in this Case he cannot be discharged upon a *Habeas Corpus*, because *Non constat de persona*; neither can he give a Warrant of Attorney to acknowledge Satisfaction; and therefore it seems most advisable to renounce the Administration, and get it granted to another, and then he may be discharged by a Letter of Attorney from such Administrator.

* Page 381 * (B) **Of the different Kinds of Executors and Administrators:** And herein,

1. Of an Administrator *durante minoritate* of an Infant Executor or Administrator.

1. *Who may be such an Administrator.*

Godolph. 102. 5 Co. 29.

IF one makes an Infant his Executor, or dies Intestate, and the Right of Administration devolves upon an Infant, in these Cases the Ordinary is to grant Administration during the Minority of the Infant, *i. e.* in the first

firſt Caſe, till he arrives at the Age of Seventeen, when by the Civil Law, he may be Executor, and in the latter till he arrives at the Age of Twenty-one, when only he is fit to be a Truſtee, becauſe an Infant cannot, before his full Age, give Bond to adminiſter faithfully, and it is the Age by Common Law.

And as ſuch an Adminiſtrator is but in Nature of a Curator for the Infant in Civil Law, and has no Intereſt or Benefit in the Teſtator's or Inteſtate's Eſtate, but in Right of the Infant; it has been always held diſcretionary in the Ordinary to whom to grant it, and therefore it hath been frequently (*a*) adjudged, that he is not obliged within the Statute 21 *H.* 8. *c.* 5. to grant it to the next of Kin either of the deceaſed, or the Infant.

Grandiſon v. Dover, Skin. 155.

(*a*) Hob. 250. Vent. 219. 8 Mod. 244, 327.

Ld. Raym. 262, 338, 667, 685. 2 Ld. Raym. 1071. Salk. 36. pl. 1. 299. pl. 1. Show. 294. See 6 Mod. 304. Vern. 25, 256, 326, 397. 10 Mod. 21, 105, 386. 11 Mod. 137. pl. 4. 145. pl. 2. 223. pl. 18. 12 Mod. 194. See Carth. 446. 5 Mod. 395. Comb. 475. Salk. 29, 39. pl 7. 12 Mod. 501. Comyns Rep. 112, 159, pl. 107. Fitzgib. 110, 125, 303. 2 Will. Rep. 576. pl. 188. 3 Will. Rep. 81, 166, 337. Comyns 96, pl. 65, 110. pl. 72. 150. pl. 102. 159. Stra. 73, 481, 552, 667, 703. 2 Stra. 857, 892, 911, 956, 961, 1137.

If *A.* makes *B.* his Executor, and *B.* makes *C.* an Infant Executor, and Letters of Adminiſtration are granted to *J. S.* during the Minority of *C.* *J. S.* cannot bring an Action againſt a Debtor of the firſt Teſtator by Virtue of this Adminiſtration, nor hath he Authority to meddle with his Goods.

Cro. Eliz. 211. *Limner* and *Every.*

If an Infant, and one of full Age, are made Executors, he who is of full Age may take out Adminiſtration *durante minoritate* of the Infant, and may declare his Executor or Adminiſtrator *durante minoritate*, and there is no Abſurdity in this Caſe, that there ſhould be an Executor and Adminiſtrator to the ſame Party, and this is only to enable him to ſue alone. *

2 Lev. 239, 240.

* If there are ſeveral Executors, all muſt join in the Action. *Reg.* 140. a. b. That is the Reaſon of the Rule laid down in the Text.——Tho' ſome do not prove the Will, but refuſe before the Ordinary, 9. Co. 37. 1 Lev. 161. ——As to one of them being an Infant, ſee farther. 2 Sand. 213. 1 Sid. 449. 1 Brownl. 101. Yel. 130. Alſo 2 Lev. 239, 240. cited above.——If any of the Executors have not proved, and the other is about to bring an Action, the Executors who have not proved muſt be ſummoned and ſevered.——In an Action againſt an Executor, he cannot plead that there is another Executor, not named, unleſs he ſhews that the other hath adminiſtered. 1 Lev. 161. 9 Co. 37. b. Clift. 15.—— As to *Summons and Severance*, ſee *poſt.* 396.

2. *What Acts he may do.*

It ſeems to be agreed, that though an Adminiſtrator *durante minoritate* hath but a limited and ſpecial Property in the Eſtate of the deceaſed, yet he may do all Acts which are incumbent on an Executor, and which are for the Advantage of the Infant and Eſtate of the deceaſed, and therefore he may ſell *Bona Peritura*, as a Bailiff may, ſuch as fat Cattle, Grain, or any Thing elſe which may be the worſe for Keeping; ſo he may (*b*) aſſent to a Legacy, and may ſue and be ſued.

Rol. Abr. 910. Owen 35. 5 Co. 29. Cro. Eliz. 718. Godb. 104.

(*b*) But not unleſs there Aſſets to pay Debts. 5 Co. 29. a.

But cannot do any Thing to the Prejudice of the Infant, and therefore he cannot ſell the Goods of the deceaſed any farther than they are neceſſary

5 Co. 29. S. C. 2 And. 132.

Prince's Caſe. Cro. Eliz. 217. 2 And. 132. 3 Leon. 278. S. C. & *vide* 6 Co. 67. b. in Sir *Moyl Finch's* Caſe, a Diverſity taken, where Adminiſtration is granted *durante minori ætate Executoris*, in ſuch

for Payment of the Debts, nor can he otherwise sell a Term for Years during the Minority of the Infant, for the Words of his Authority are, *Administrationem omnium & singulorum bonorum ad opus, commodum & utilitatem executricis durante sua minori ætate, & non aliter nec alio modo committimus, &c.*

* Page 382 *Special* Manner as this Case of *Prince's* is; and when such Administration is granted in a *general* Manner; for in the first Case such Administrator cannot make Leases of any Term vested in the Executor, but in the other Case he may, and they shall be good till the Executor attain the Age of seventeen, and until he enter.

Rol. Abr. 910, 911. If Administration *durante minoritate* be granted to *A.* and afterwards repealed and granted to *B.* who obliges *A.* to account to him, and afterwards gives him a Release; this Release will not bind the Infant, for this does not appear to be for the Benefit or Advantage of the Infant.

Latch. 267. And. 34. Mod. 174. Sid. 57. 6 Co. 18. b. See Mod. 66. 10 Mod. 254. 324, 428, 495. 12 Mod. 291, 411, 496. If an Administrator *durante minoritate* wastes the Assets, the more proper Way to charge him is by Action on the Case by the Infant when he comes of Age; also by some Opinions he may bring Detinue against him for those Goods which he still continues in his Possession, or he may oblige him to account in the Spiritual Court, but cannot bring a Writ of Account against him at Law; neither is he chargeable in any Action at the Suit of a Creditor, after the Infant comes of Age; but such Creditor may sue the Infant, who has his Remedy against the Administrator.

527. Post. 410. Salk. pl. 16. Ld. Raym. 338, 678. Gilb. Eq. Rep. 190. Fitgib. 77. Vern. 143, 293, 457. Ch. Prec. 534, 540. Comyns 110. pl. 72. 159. pl. 107. 2 Will. Rep. 295. pl. 73. 131. 201. pl. 46. 678. pl. 195. 430, 730. 2 Will. Rep. 81. 296, 298. pl. 81. 447, (620.) 665, 3 Will. Reb. 323, 324, 399, 400, 402.

Hob. 250. *Briers* and *Goddard*: but a *Quære* is added, how the Case would be if the Wife died, by which the Husband would be no longer chargeable, & *vide* Raym. 484. If an Administratix *durante minori ætate* of her Infant Daughter Executrix, gives several Bonds to the Testator's Creditors for their Debts, and takes a second Husband, the Husband may retain, as his own, so much of the Goods of the Testator as amounted to the Value of the Debts paid and undertaken by the Wife.

Comb. 465. resolved *per Holt*. See Carth. 432. Ld. Raym. 265. So if an Action be brought against a special Administrator, and the Administration determines pending the Action, he ought to retain Assets to satisfy the Debt which is attached on him by the Action.

3. *At what Time the Authority of an Administrator* durante minoritate *determines.*

5 Co. 29. Hob. 251. Cro. Eliz. 602. Cro. Car. 516. Carth. 446. Comb. 475. Salk. 39. pl. 1. 5 Mod. 395. Ld. Raym. 338, 667. 12 Mod. 194, 501. Comy. Rep. 112, 159. pl. 107, 160. It has been already observed, that there is an established Difference, where Administration is granted to one as Guardian to an Infant, who hath a Right to administer, but is incapable to take it by Reason of his Minority, and where an Administration is granted during the Minority of an Infant Executor; that in the last Case the Administration determines as soon as the Executor attains the Age of seventeen Years; but in the other Case it continues till the Infant attains his full Age.

Alſo it ſeems agreed, that, if Adminiſtration be granted during the Minority of ſeveral Infants, it determines upon the coming of Age of any one of them; and it is laid (*a*) down by my Lord *Coke*, that Adminiſtration granted during the Minority of an Infant Executrix ceaſes upon her Marriage.

(*a*) In *Prince*'s Caſe, 5 Co. 29.

But as this Matter was fully debated in a late Caſe, I ſhall here inſert ſo much thereof as relates to this Point.

One made his Will, and thereby, after ſeveral ſpecifick and pecuniary Legacies, gave and deviſed the Reſidue and Remainder of his Perſonal Eſtate to his four Nieces, and made *J. S.* his Executor, and died; the Executor proved the Will, and afterwards died inteſtate, and thereupon Adminiſtration *de bonis non*, & *cum teſtamento annexo* was granted to the Plaintiff during the Minority of the four Nieces; the reſiduary Legatee, one of the Nieces, married a Perſon who was of full Age; but ſhe herſelf was an Infant under the Age of twenty-one Years, though above ſeventeen; and Sir *Henry Johnſon*, in the Year 1696, having given the Teſtator a promiſſory Note for the Payment of 800 *l.* and upwards, by his Will in 1719, * gave and deviſed all his Real and Perſonal Eſtate to *William Guidott*, Eſq; for the Payment of his Debts, Legacies, and ſubject thereto, in Truſt for ſuch Child or Children as the Defendant, the Lord *Strafford*, ſhould have by his Lady, who was the only Daughter and Heir of Sir *Henry Johnſon*, to whom he had been married about ſix or ſeven Years; and in the ſame Year 1719, Sir *Henry Johnſon* died, Mr. *Guidott*, the Executor, renounced, and the Lord *Strafford*'s Children being Infants of tender Years, the Lord *Strafford* took out Letters of Adminiſtration *cum teſtamento annexo*, during the Minority of his Children, to Sir *Henry Johnſon*; and there being likewiſe a Bond given by Sir *Henry Johnſon* to the ſame Perſon, for Payment of a further Sum of Money, the Plaintiff *Jones* brought an Action of Debt upon the Bond in the Court of Exchequer, to which the Defendant, the Lord *Strafford*, pleaded *Solvit ad Diem*; and alſo by Leave of the Court pleaded further as a double Plea, purſuant to the Act for Amendment of the Law, that he had fully adminiſtered, *præterquam* ſuch and ſuch Judgments, to ſeveral Perſons, and that he had not Aſſets *ultra* ſufficient to pay and ſatisfy thoſe Judgments; upon this Plea the Plaintiff *Jones* brings his Bill for a Diſcovery and Account of Aſſets, and the three Nieces, who were Infants and unmarried, and likewiſe the married Niece, who was alſo an Infant, and her Huſband, were Co-Plaintiffs in the Bill. To this Bill, which was not only for a Diſcovery of Aſſets of Sir *Henry Johnſon*, but likewiſe for Payment and Satisfaction both of the Bond-Debt, and likewiſe of the ſimple Contract Debt due on the Note, the Defendant, the Lord *Strafford*, put in a Demurrer, which was, that by the Plaintiff's own ſhewing in their Bill it appeared, that one of the Nieces was married, and therefore having a Huſband capable of acting for her, the Adminiſtration granted to the Plaintiff *Jones*, during the Minority of the four Infants, was determined; and the Queſtion was, Whether, one of the four Nieces being married, and her Huſband of full Age, the Adminiſtration granted to the Plaintiff *Jones*, during the Minority of the four Nieces, determined, though ſhe herſelf was ſtill under the Age of twenty-one Years. It was agreed on all Hands, that where an Infant is made Executor, and Adminiſtration is granted during his Minority, that ſuch Adminiſtration ceaſes *ipſo facto*, when the Infant attains the Age of ſeventeen Years; and the Opinion of Lord *Coke*, 5 *Co.* 29 in *Prince*'s Caſe, was cited, that ſo it would likewiſe, if ſuch Infant Executrix, being under ſeventeen, ſhould marry, becauſe her Huſband was capable of acting for her; and it was argued for the Defendant, that if this were ſo in caſe of an Infant Executrix, there was the ſame Reaſon for it in the preſent Caſe, where one of the four Nieces, during whoſe Minority Adminiſtration *cum Teſtamento annexo* was granted, was married; that it

Jones verſus Lord *Strafford*, Hil. 1730. Lord Chancellor, aſſiſted by Lord Ch. Ju. *Raymond*, on Pleas and Demurrers.

* Page 383

it was agreed on the other Hand, that, whenever any one of the four Nieces attained the Age of twenty-one Years, the Adminiſtration ceaſed, and there was the ſame Reaſon when one of them married and had a Huſband capable of acting for her; that this was to be reſembled to the Caſe of a Guardian at Common Law, and that if an Infant Feme married, the Guardianſhip was determined, becauſe the Huſband was immediately on the Marriage become her Guardian; and it would be inconſiſtent that ſhe ſhould at the ſame Time be under the Power of another Guardian; ſo here ſhe, from her Marriage, became under the Care and Guardianſhip of her Huſband, and he was capable of acting for her, and conſequently the Adminiſtration granted during the Minority of the four was then determined in the ſame Manner as if ſhe had attained her Age of twenty-one Years; and then the Plaintiff *Jones*, during the Minority of the four, had no Right to bring this Bill, and that the Demurrer was good; and for this were cited 5 *Co.* 29. *Prince*'s Caſe, 6 *Co.* Sir *Moyle Finch*'s Caſe, 1 *Salk.* 39. and that the only Caſe againſt it was 2 *Jon.* 48. and they alſo cited the Opinion of Juſt. *Twiſden*, 1 *Vent.* 103. But on the other Side it was argued, and the Court was clear of Opinion, that the Adminiſtration in this Caſe did not determine by the Marriage of one of the four Nieces; they ſaid,

*Page 384 * that it was by no Means clear, even in the Caſe of the Infant Executrix, that, if ſhe married under the Age of ſeventeen, the Adminiſtration granted during her Minority was thereby determined; that this was not the principal Point in *Prince*'s Caſe, but only the Opinion of, or an *Obiter* Caſe put by, my Lord *Coke*; that the ſame Caſe was reported in *Cro. Eliz.* 718. and 1 *And.* and there nothing ſaid of it; that in the Office of Executors, ſuppoſed to be written by Juſtice *Doddridge*, he much marvels at this Opinion of the Lord *Coke*; that in the Spiritual Courts, where theſe Adminiſtrations are granted, they take no Notice of the Huſband, nor will in ſuch Caſe grant Probate of the Will or Adminiſtration to him, but look upon the Wife as to this Purpoſe as a Feme Sole, and that the only Power, which the Huſband hath in theſe Caſes, is derived to him from the Common Law, by which he is in many Caſes enabled to pay and receive, and to act for his Wife; but the Property of none of the Goods or Chattels, which the Wife hath as Executrix or Adminiſtratrix, is veſted in him; for if ſhe ſurvive, they likewiſe ſurvive to her, and if ſhe dies firſt, there muſt be an Adminiſtration *de bonis non* of her Teſtator granted to another; and if this be ſo in the Caſe of an Infant Feme Executrix, that the Adminiſtration granted during her Minority does not ceaſe by her Marriage, much leſs in the preſent Caſe; for here the Adminiſtration is granted to the Plaintiff *Jones*, *donec una earum quatuor vigeſimum primum ann' ætatis attigerit*; ſo that, by the expreſs Words of the Adminiſtration, it is not to determine ſooner; and though it does then determine, when any one of the four attains her Age of twenty-one Years, that is not the preſent Caſe; for here, though ſhe is married, yet ſhe is ſtill under twenty-one, and the Huſband has nothing to do with it; he, by his Marriage, is not become next of Kin to the Teſtator, nor will the Spiritual Court grant Adminiſtration to him; and if the Marriage were to be a Determination of the firſt Adminiſtration, he could not ſucceed to it, for in that Caſe the Adminiſtration could only be granted to the Wife; nay, they would not grant it to the Huſband and Wife jointly; that the Wife, in this Caſe, was not intitled to the whole Perſonal Eſtate, as an Infant Executrix is, but only to her own undivided fourth Part; and tho' the Spiritual Court may grant Adminiſtration as to a particular Thing, or in a particular Place, yet they never grant Adminiſtration as to an undivided third or fourth Part of the ſame Thing; for then who ſhould bring the Action for it, as of a Horſe, or other intire Thing? The Huſband in this Caſe would be intitled but to a fourth Part of it in Right of his Wife; and muſt there be ſeveral Adminiſtrations granted

granted for one and the ſame Thing? This would be abſurd, as well as to Actions to be brought by them, as to Actions brought againſt them; that if the Adminiſtration is determined by the Marriage, it will be to no Manner of Purpoſe for an Application to the Spiritual Court; they will not grant it to the Huſband, and the Wife being ſtill under Age, they muſt grant it to ſome other Perſon during the Minority of her and her three Siſters, as it was before; and then it would be doing a vain Thing to determine it; that the Spiritual Court by 31 *E.* 3. *ſt.* 1. *c.* 11. is to grant Adminiſtration to the next of Kin, which the Huſband is not in this Caſe; that the Law takes Notice of an Executor before Probate, and he may do ſeveral Things before Probate; but the Power of an Adminiſtrator is derived to him only by the Letters of Adminiſtration; that if the Huſband has no Right to claim the Adminiſtration in this Caſe, no more has the Wife; for ſhe being ſtill under Age as well as the other Nieces, the Court will grant Adminiſtration to none of them; or, if they would, might grant it to any of the others as well as to her, it being in the Diſcretion of the Ordinary; and if the Spiritual Court ſhould grant Adminiſtration to the Huſband, that is not *de Jure*, that he is intitled to it, but they may grant it to him as they would to any other Perſon. So the Court was of Opinion, that *Jones* ſtill continued Adminiſtrator during the Minority of the four Nieces, notwithſtanding the Marriage of one of them, and that ſuch Adminiſtration did not determine till one of them came to the Age of twenty-one Years, and ſo over-ruled the Demurrer. * Page 385

Although it ſeems clear, that the Authority of an Adminiſtrator *durante minoritate* of an Infant Executor determines at Seventeen, and that of an Adminiſtrator *durante minoritate* of an Infant, who is intitled to Adminiſtration, at the Age of Twenty-one; yet if an Action be brought againſt ſuch an Adminiſtrator, the Plaintiff in his Declaration need not aver, that the Infant is ſtill under thoſe Ages, for this is a Matter more properly within the Conuſance of the Defendant, and if his Power be determined, he ought to ſhew it; but he cannot object it, eſpecially after he has taken Iſſue on another Point, which is an Admiſſion that his Authority ſtill continues. Hob. 251. Cro. Jac. 590. 2 Rol. Rep. 209. 5 Co. 29. a. Rol. Abr. 910. Yelv. 128.

But it is (*a*) ſaid, that if ſuch an Adminiſtrator brings an Action, he muſt aver, that the Infant is ſtill under Age, becauſe it is a Matter within his Conuſance, and the Thing that intitles him to the Action; but in this Caſe alſo it hath been (*b*) adjudged, that the Defendant muſt take Advantage of this Omiſſion by way of Plea or Demurrer, and cannot object it after he has joined Iſſue with him on another Point, which admits the Continuance of his Authority. (*a*) Hob. 51. Cro. Jac. 590. 2 Rol. Rep. 209. Rol. Rep. 400. (*b*) Cro. Car. 240.

But if an Action of Debt be brought againſt an Adminiſtrator generally, and the Defendant pleads in Abatement, that Adminiſtration was granted to him during the Minority of his Wife, he muſt aver, that the Wife is ſtill living; for though he was a Special Adminiſtrator at firſt, yet if his Wife were dead, he might be Adminiſtrator generally, as the Declaration ſuppoſeth. Comb. 465. Ld. Raym. 265. Carth. 432. *Sparks* and *Crofts*.

It ſeems to be clearly ſettled, that if an Adminiſtrator *durante minoritate* brings an Action and recovers, and then his Time determines, that the Executor may have *Scire facias* upon that Judgment. Rol. Abr. 888-9. Cro. Car. 227. 2 Brownl. 83. Godb. 104. Lev. 181. Keb. 750. Vern. 25.

Alſo it hath been held, that if ſuch an Adminiſtrator obtains Judgment, he may bring a *Scire facias* againſt the Bail, and they cannot object, that 2 Lev. 37. *Enbrin* and *Mompeſſon*.

but *per Hale*, in this Caſe, if after the Infant came of Age he had ſued out Execution upon the Principal Judgment, it might have been a Queſtion, whether that ought to be ſued out by him, or by the Infant.

the Infant is of full Age; for the Recognizance being to the Administrator himself by Name, though he be Administrator *durante minori ætate tantum*; yet he may have a *Scire facias* against the Bail.

2. Of an Administrator *de bonis non*, where the first Administrator dies, or the Executor dies intestate, or without Probate of the Will, And herein:

1. *In what Cases Administration* de bonis non *shall be granted, and to whom.*

These Kind of Administrations are granted in the following Instances:

Swinb. 396. Rol. Abr. 907. Vaugh. 182. 1. If a Person dies Intestate, and Administration is granted to *J. S.* who dies without having administered all the Intestate's Goods, in this Case the Ordinary must grant Administration of the Goods unadministered to another; for the first Administrator cannot continue the Trust reposed in him to his Executor or Administrator, because he has no Interest but what he derives from the Act of the Ordinary.

Rol. Abr. 907. Vaugh. 182. 2. So if an Executor dies Intestate, Administration *de bonis non cum testamento annexo* of the Testator must be granted by the Ordinary, for they are not devolved on the Administrator of the Intestate, because he had them *in auter droit*, in order to discharge the Trust reposed in him; * Page 386 * but if the Executor makes his Executor, then the Trust is devolved on him; and after Payment of the Debts and Legacies of the first Testator, he has an absolute Property in the Goods.

Rol. Abr. 907. Salk. 305. Dyer 372. 3. If the Executor dies before Probate, tho' he (*a*) administred in Part by disposing of the Testator's Goods, *&c.* yet his Executor cannot be Executor to the first Testator; but in this Case there is not an Administration *de bonis non administrat'* granted, but an immediate Administration, because the Executor died *ante onus Executionis testamenti super se susceptum*, which is the Foundation the Spiritual Courts proceed upon.

(*a*) Because the Administring is an Act *in Pais*, of which the Spiritual Court cannot take Notice, yet the Acts done by the Executor are good. 1 Salk. 308, *per Holt.*

9 Co. 37. *Hensloe's* Case. 4. So if an Executor (*b*) refuses Administration with the Will annexed, it is to be granted to another.

(*b*) An Executor may renounce, but cannot assign over the Executorship, because it is a Personal Trust. Vaugh. 182.—Also where an Executor before Probate possessed himself of the Goods, paid a Debt, and converted some of the Goods, and after, before the Ordinary, refused; and upon such Refusal the Ordinary granted Administration to the Widow of the deceased; and adjudged such Administration was void, there being a rightful Executor that had administered. Mod. 213-14. *Parten* and *Basteden*. See 2 Will. Rep. 145. 3 Will. Rep. 251, 337. 12 Mod. 441, 471.

Dyer 372. a. *Isted* and *Stanley*. Show. 25. 3 Mod. 59. Rep. 3. pl. 3. In these Cases Administration is to be granted to the next of Kin to the first Testator or Intestate; but if the Testator appoints a Residuary Legatee, such Legatee is intitled to Administration.

Vern. 200. Ld. Raym. 86, 363. 5 Mod. 247. Will Rep. 7. pl. 2. Comb. 378. Com.

2. *To what Things unadminiſtred an Adminiſtrator* de bonis non *is intitled.*

An Adminiſtrator *de bonis non* is intitled to all the Goods and Perſonal Eſtate, ſuch as Terms for (*c*) Years, Houſhold Goods, *&c.* which remain *in Specie*, and were not adminiſtered by the firſt Executor or Adminiſtrator, as alſo to all Debts due and owing to the Teſtator or Inteſtate.

Salk. 306. Skin 143. pl. 15. (*c*) Whether an Adminiſtrator *de bonis non* be intitled to an Eſtate *pur auter Vie*, within the Letter and Meaning of the Statute 29 Car. 2. c. 3. Carth. 376. 2. See Carth. 166. See Ld. Raym. 96. 2 Salk. 464. Comb. 388. 12 Mod. 103. 3 Salk. 137. pl. 2. 2 Will. Rep. 381. 3 Will. Rep. 102. By ſtat. 14 Geo. 2. c. 20. ſ. 9. Diſtribution ſhall be made of Eſtates *pur auter Vie*, whereof there is no ſpecial Occupant, and which are undeviſed.

Alſo it is held, that if an Executor receives Money in Right of the Teſtator, and lays it up by itſelf, and dies Inteſtate, that this Money ſhall go to the Adminiſtrator *de bonis non*, being as eaſily diſtinguiſhed to be Part of the Teſtator's Effects, as Goods *in Specie*. Salk. 306.

But if *A.* dies Inteſtate, and his Son takes out Adminiſtration to him, and receives Part of a Debt, being Rent Arrear to the Inteſtate, and accepts a Promiſſory Note for the Reſidue, and then dies Inteſtate; this Acceptance of the Note is ſuch an Alteration of the Property as veſts it in the Son, and therefore on his Death it ſhall go to his Adminiſtrator, and not to the Adminiſtrator *de bonis non*. Vern. 473. *Barker* and *Talcot*, decreed, *& vide* 2 Vent. 362. Rol. Abr. 380.

3. *In what Actions commenced before his Time, may an Adminiſtrator* de bonis non *proceed.*

If a Feme Executrix to *J. S.* takes a Huſband, and the Huſband and Wife bring an Action of Debt upon an Obligation in Right of the Wife, as Executrix to *J. S.* and they have Judgment to recover the Debt with Damages and Coſts; if the Wife dies, the Huſband cannot take out Execution, for he is not intitled to the Thing recovered, but it ſhall go to the ſucceeding Adminiſtrator of *J. S.* as the Inteſtate's Effects. Rol. Abr. 889. W. Jones 248.

*But yet in theſe Caſes, though the Adminiſtrator *de bonis non* was intitled, yet he could not ſue out Execution, becauſe he was not privy to the Judgment, and therefore was driven to a new Action; but this being very inconvenient, no new Action while Judgment may be executed. * Page 387 Yelv. 33, 83. Latch. 140. Palm. 443. 2 Saund. 149. Sid. 29.

By the (*d*) 17 *Car.* 2. *cap.* 8. it is enacted, "That where any Judgment "after (*e*) a Verdict ſhall be had by or in the Name of any Executor or "Adminiſtrator, in ſuch Caſe an Adminiſtrator *de bonis non* may ſue forth "a *Scire facias*, and take Execution upon ſuch Judgment."

(*d*) Made perpetual by 1 Jac. 2. c. 17.

(*e*) For this *vide* 6 Mod. 290. Salk. 322. pl. 10. Ld. Raym. 1072. S. C. 11 Mod. 34. pl. 6. Adminiſtrator *de bonis non* intitled to the Rent recovered by the Executor of the Executor, or a Leaſe made by ſuch firſt Executor.

3. Of an Executor *de ſon tort:* And herein,

1. *What Acts or Degree of Intermeddling will make an Executor* de ſon tort.

Swinb. 448. *Poſt.* 406. Off. of Exec. 171. Godolph. 90.

An Executor *de ſon tort* is a Perſon, who, without any Authority from the Deceaſed or the Ordinary, does ſuch Acts as belong to the Office of an Executor or Adminiſtrator.

5 Co. 33. b. *Read's* Caſe. Off. of Exec. 171. Godolph. 171. Dyer 105, 157. Keilw. 59. Rol. Abr. 918. 2 Leon. 224. 3 Leon. 57. Hob. 49.

There are Variety of Acts which will make a Man Executor *de ſon tort*, ſuch as Poſſeſſing and Converting the Deceaſed's Goods to a Man's own Uſe, paying the Deceaſed's Debts out of his Aſſets, ſuing for and receiving Debts due to him; and it is ſaid in general, that all Acts of Acquiſition, transferring, or poſſeſſing of the Deceaſed's Eſtate, will make an Executor *de ſon tort*, becauſe theſe are the only *Indicia*, by which Creditors can know againſt whom to bring their Actions; and an Adminiſtrator is not liable for the Goods converted by ſuch Executor, till he has recovered them in Damages.

Godolph. 91, 92. Off. of Exec. 174. Rol. Abr. 918.

Alſo a Perſon may be Executor *de ſon tort*, by releaſing Debts due to the Teſtator, by paying Legacies with the Deceaſed's Effects, by entering on a Specific Legacy without the Executor's Aſſent, by paying and diſcharging the Deceaſed's Mortgages with his Money or Goods, by delivering to the Deceaſed's (*a*) Wife more Apparel than are ſuitable for her, or by anſwering as Executor to any Action brought againſt him, or by pleading any other Plea than *Ne unques Executor*.

(*a*) So if the Wife takes more Apparel than are ſuitable to her Degree, this makes her an Executrix *de ſon tort*. Rol. Abr. 918.

10 H. 7. 27. Rol. Abr. 918. Dyer 256.

So if a Perſon is appointed by the Ordinary *ad Colligendum bona defuncti*, though his acting in Obedience to ſuch Authority will not make him an Executor *de ſon tort*; yet if he proceeds further, and ſells *bona peritura*, *&c.* he becomes Executor *de ſon tort*; ſo if the Ordinary had given him expreſs Authority to ſell the Goods, yet this would not free him from being Executor *de ſon tort*, for the Ordinary himſelf cannot give any ſuch Authority.

And by the 43 *Eliz. cap.* 8. it is enacted, "That every Perſon and "Perſons that hereafter ſhall obtain, receive, and have any Goods or "Debts of any Perſon dying inteſtate, or a Releaſe or other Diſcharge "of any Debt or Duty that belonged to the Inteſtate, upon any Fraud, "or without ſuch valuable Conſideration as ſhall amount to the Value "of the ſame Goods or Debts, or near thereabouts (except it be in or "towards Satisfaction of ſome juſt and principal Debt of the Value of "the ſame Goods or Debts, to him owing by the Inteſtate at the Time "of his Deceaſe,) ſhall be charged and chargeable as Executor of his "own Wrong, and ſo far only as all ſuch Goods and Debts coming to "his Hands, or whereof he is releaſed or diſcharged by ſuch Adminiſ-
* Page 388 "trator, will ſatisfy, deducting nevertheleſs to and for himſelf Allow-
"*ance of all juſt, due, and principal Debts, upon good Conſideration,
"without Fraud, owing to him by the Inteſtate at the Time of his Deceaſe,
"and of all other Payments made by him, which lawful Executors or Ad-
"miniſtrators may and ought to have and pay by the Laws and Statutes
"of this Realm."

Godolph. 95. But notwithſtanding this there are ſeveral Acts which a Stranger may do without running the Hazard of making himſelf an Executor *de ſon tort*, ſuch

ſuch as taking Care of the Deceaſed's (*a*) Funeral, feeding his Cattle, taking an Inventory of his Eſtate and Effects, paying or diſcharging his Debts or Legacies with his own proper Money, repairing his Houſes in Decay, providing Neceſſaries for his Children, *&c.* for theſe are to be eſteemed Offices of Kindneſs and Charity, and not ſuch as involve him in an Executorſhip.

(*a*) That the Expences herein muſt be ſuitable to the Deceaſed's Eſtate and Quality. Off. of Exec.

174. But it ſeems, that if the Expences of the Funeral are defrayed out of the Deceaſed's Effects, the Perſon who meddles herein is an Executor *de ſon tort*. Skin. 274. pl. 2. Carth. 104.

Alſo here we muſt obſerve, that regularly there cannot be an Executor *de ſon tort* when there is a rightful Executor, or when Adminiſtration has been duly granted; for if after Probate of the Will, or Adminiſtration granted, a Stranger gets Poſſeſſion of the Deceaſed's Goods, he is a Treſpaſſer to ſuch Executor or Adminiſtrator, and may be ſued as ſuch. 5 Co. 33. Chan. Ca. 33. Salk. 313. pl. 19.

But if a Stranger gets Poſſeſſion of the Deceaſed's Goods before (*b*) Probate of the Will, he may be charged as Executor *de ſon tort*, becauſe the lawful Executor can be no further charged than for the Aſſets that came to his Hands. 5 Co. 33. b. *Read*'s Caſe. (*b*) So if before Adminiſtration granted, a Stranger gets Poſſeſſion of the Deceaſed's Goods, he may be charged as Executor *de ſon tort*, unleſs he delivers the Goods over to the Adminiſtrator before the Action brought, and then he may plead *Plene adminiſtravit*. Salk. 313. pl. 19.

So altho' there be a rightful Executor who adminiſtred, yet if a Stranger takes the Deceaſed's Goods, and, claiming to be Executor, pays Debts or receives Debts, or pays Legacies, or otherwiſe intermeddles as an Executor, he becomes an Executor *de ſon tort*. 5 Co. 34. a.

As to thoſe Things on which a Stranger enters and takes Poſſeſſion, and which will make him an Executor *de ſon tort*, it is now clearly agreed, that a Perſon may be an Executor *de ſon tort*, by entering on a Leaſe or Term for (*c*) Years, eſpecially if according to the old Books he enters in Right of the Deceaſed, and does Acts upon the Land, which belong to the Office of an Executor or Adminiſtrator; as ordering the Deceaſed's Cattle to be fed on the Land, *&c.* but if he enters generally, and does not act as an Executor, by meddling with the Inteſtate's Goods, *&c.* he is then a Diſſeiſor, and not an Executor *de ſon tort*. Moor 126. *Kenrick* and *Burgeſs*. Style 407. 2 Mod. 174. 2 Vent. 242, 272. 2 Vern. 421. 10 Mod. 69, 162. 2 Stra. 1089, 1221.

Swinb. 390. (*c*) So if a Stranger enters into an Eſtate *pur auter Vie*, this makes him an Executor *de ſon tort*, becauſe by the 29 Car. 2. c. 3. ſuch Eſtate is made Aſſets. Carth. 166.

But this Matter will be beſt explained by inſerting the two following modern Reſolutions.

In an Action of Debt in the *Debet* and *Detinet* againſt an Executor upon a Leaſe for Years, it was found by Special Verdict, that the Plaintiff leaſed to *Simon Taylor*, Father of the Defendant, for Years, rendering 180*l. per Annum* Rent; *Simon* died Inteſtate, and the Defendant entered and uſed the Inteſtate's Cattle, and fed them upon the Land for three Months, and that he fed the Cattle with the Inteſtate's Hay upon the Ground, and, three Days before the Rent became due, the Defendant drove the Cattle off the Land, and afterwards took out Adminiſtration of all but this Leaſe; and whether he ſhould be chargeable, or not, for the Rent, was the Queſtion; and all the Court were of Opinion, and ſo gave Judgment, that he ſhould be charged; and in this Caſe theſe Points * were reſolved: *1ſt*, (*d*) That the Action was well enough laid in the *Debet* Paſch. 31. Car. 2. in *C. B.* between *Garth* and *Taylor*.

* Page 389

(*d*) According to the *cont.*

Reſolutions 5 Co 31. Cro. Jac. 238. Bulſt. 22-3. Lord *Rich* and *Frank*. Cro. Jac. 546, 549.

and *Detinet*. 2*dly*, (*c*) That an Executor cannot waive a Term, but ſhall be charged as far as he hath Aſſets, though the Rent be greater than the Value of the Land.† 3*dly*, That Adminiſtration may be granted by the Ordinary for Part, as in this Caſe, Adminiſtration granted, excepting the Leaſe. 4*thly*, (*d*) That if an Executor *de ſon tort* takes out Adminiſtration, this does not purge the Wrong ſo but that a Creditor may charge him as Executor *de ſon tort*. ‡ 5*thly*, An Executor *de ſon tort* of a Term ſhall be chargeable for the Receipt of the Profits till there be a rightful Executor or Adminiſtrator to charge, as in *Read*'s Caſe, 5 *Co.* 34. *a.* after Adminiſtration or Probate, the Stranger that meddles with Goods ſhall not be chargeable as Executor *de ſon tort*, (*e*) unleſs he, pretending and claiming to be Adminiſtrator, pays Debts and does other Things as Executor; now there being no rightful Adminiſtrator of this Term, it being excepted out of the Grant of Adminiſtration, the Defendant, by his Meddling, has charged himſelf as Executor *de ſon tort* thereof.

Cro. Car. 225. *Smith* and *Norfolk*.

(*c*) According to Yelv. 103. *Hawſe* and *Webſter*. Cro. Jac. 549. —Though 'tis ſaid in Bro Tit. Waiver 10. in ſuch a Caſe peradventure he may waive; and ſo is 21 H. 6. 24. b. Bulſt. 22.

(*d*) According to Cro. Eliz. 102. *Stubs* and *Rightwiſe*. (*e*) And ſo is Hob. 49.

† See *poſt*. 394, the laſt Caſe. ‡ See *infra* 390-1.

In an Action of Waſte, the Plaintiffs declared that they made a Leaſe to *J. S.* of a Barn for thirty-one Years, who died Inteſtate, and that the Defendant entered claiming *Terminum prædict'* as Executor, and committed Waſte by pulling down the ſaid Barn; and on Demurrer it was urged for the Defendant, 1*ſt*, That there could not be an Executor *de ſon tort* of a Term, for no Man can qualify his own Wrong, by alledging, when he enters generally, that he took only a particular Eſtate, and therefore muſt be a Diſſeiſor in Fee. 2. Admitting there may be an Executor *de ſon tort* of a Term, yet there is no Privity between the Leſſor and him, to charge him in an Action of Waſte; for at Common Law, and alſo by the Statute of *Glouceſter*, Waſte lies only againſt Tenant by Curteſy, Dower, for Life or Years, neither of which is this Tenant; beſides, in this Action the Place waſted is to be recovered with treble Damages, which will be an Injury to the rightful Adminiſtrator, as alſo to the Creditors of the Deceaſed. As to the firſt Objection, the Court was of Opinion, that there might be an Executor *de ſon tort* of a Term; and as to a Wrong-doer's qualifying his own Wrong, the Difference in theſe Caſes they ſaid was, that where a Perſon enters generally upon Lands of which there is no Term in Being, there he cannot qualify his Wrong, by ſaying that he claims only a particular Eſtate, but muſt be a Diſſeiſor in Fee; ſo where there is a Term in Being, as in this Caſe, he cannot inlarge his Eſtate by claiming a Fee, and it is no Objection, that the Leſſor did not charge him as a Diſſeiſor, when he had it in his Election to charge him either Way; which is the Diſtinction taken in the (*f*) Books. As to the ſecond Objection, it was held, that the Want of Privity was not material, and that ſince the Statute of *Glouceſter*, which is rather a Remedial than a Penal Law, Privity is not requiſite, for Waſte will lie againſt the Lord of a Villein, who enters upon the Land leaſed to the Villein for Life, or Years; it will lie alſo againſt an Occupant, who is a mere Stranger, as well as againſt a Special Occupant, who comes in by the Limitation of the Leſſor. So if Tenant for Life commits Treaſon, and the King grants over the Eſtate, Waſte will lie againſt the Grantee; ſo if a Reverſion eſcheats, Waſte will lie for the Lord; in all which Caſes there is no Privity; and it would be a manifeſt Injury to the Leſſor in this Caſe, if he ſhould be delayed of his Action till Adminiſtration was taken out; and as to the Objection, that this will be an Injury to the rightful Adminiſtrator, the Court held, that the rightful Adminiſtrator might falſify the Recovery; for

3 Lev. 31, 35. Mayor and Commonalty of *Norwich*. v. *John*. 3 Mod. 90. S. C. adjudged for the Plaintiff in *C. B.* and affirmed in *B. R.* 2 Show. Rep. 457.

(*f*) As in 9 H. 6. 20. b. Dyer 134. pl. 6, 14. 114. pl. 18.

for a Recovery againſt one, that has not Right, ſhall not bind him that has, and after Adminiſtration granted he is paramount the Recovery, *viz.* from the Death of the Inteſtate.

* As to the Value of the Things taken by a Stranger, ſo as to make him an Executor *de ſon tort*, it ſeems not to be material, and therefore where an Action was brought againſt ſuch a one, who pleaded *Ne unques Executor*, and it was found that a Bedſtead only came to his Poſſeſſion, he was charged with a Debt of 60 *l.* * Page 390 Noy 69. Goulſ. 116. †

So where on a like Plea it was found, that the Defendant took only a Bible, he was charged with a Debt of a hundred Pounds. Noy 69. *Offley*'s Caſe cited to have been 39 or 40 Eliz.

So where the Jury found, that the Defendant detained *bonam partem bonorum*, and ſold them, though it was objected, that *bona pars* was very uncertain; yet the Court held, that he ſhould be chargeable, for he cannot detain any Part; and if he does, let it be of ever ſo ſmall Value, he is liable as an Executor *de ſon tort*. Cro. Eliz. 472.

But in theſe Caſes, where the Things are of a very inconſiderable Value, it is ſaid that there may be Relief in Equity, as where on a Plea of *Ne unques Executor*, the Plaintiff proved that a Chimney-Back came to the Defendant's Hands, or that the Defendant took Money for a Pot of Ale ſold by the Teſtator; in theſe Caſes the Defendant was relieved in Equity. 2 Vern. 147, 148.

2. *What Acts of an Executor* de ſon tort *are as valid, as if done by a lawful one.*

An Executor *de ſon tort* may do ſeveral Acts which a lawful Executor may do, and which ſhall be as binding as if done by a rightful Executor. Off. of Exec. 179.

Therefore if he pays (*a*) juſt Debts, and an Action is brought againſt him by a Creditor, he may plead *Plene adminiſtravit*. 5 Co. 30. Off. of Exec. 180.

Carth. 104. Sid. 76. (*a*) An Executor *de ſon tort* ſhall be allowed in Equity all ſuch Payments which were incumbent on the Executor, according to the Courſe of Law; but as to Payments made out of Order and Rule, which the Law left the Executor liable to, he ſhall not be allowed them, becauſe to the Prejudice of the Executor. Chan. Ca. 33.——So where a Widow poſſeſſed herſelf of the Perſonal Eſtate as Executrix, under a revoked Will, and paid Debts and Legacies, but had no Notice of the Revocation; and it was held in Equity, that ſhe ſhould be allowed thoſe Payments. Chan. Ca. 126. & *vide* Rol. Abr. 919.

But if an Action of Trover be brought by a rightful Executor or Adminiſtrator againſt an Executor *de ſon tort*, he cannot plead Payment of Debts to the Value, *&c.* or that he hath given the Goods, *&c.* in Satisfaction of the Debts, (*b*) becauſe no Man ought to obtrude himſelf upon the Office of another; but yet upon the General Iſſue pleaded, ſuch Payments ſhall be recouped in Damages. Carth. 104. Skin. 274. pl. 2. (*b*) For this would take from the rightful Executor the Liberty which the Law gives him of preferring one Creditor to another; nay, of preferring himſelf to other Creditors which are in equal Degree with him. Off. of Exec. 181.

Alſo it is clearly agreed, and hath been ſolemnly adjudged, that an Executor *de ſon tort* cannot retain any Part of the Deceaſed's Effects, in Satiſ- 5 Co. 30. *Coulter's* Caſe.

Cro. Eliz. 630. Rol Abr. 922. Moor 527. Brownl. 103. Yelv. 137. Mod. 208. 2 Vern. 147. Prec. Ch. 179. 12 Mod. 441, 471. 2 Stra. 1106. Andr. 328, 356.

faction

faction of a Debt due to himself, either against a Creditor whose Debt may be inferior to his, or against the rightful Executor or Administrator; for if it were permitted every Man to be his own Carver, it would occasion endless Strife and Confusion, and would in Effect be allowing him to take Advantage of his own Wrong. †

† But an Executor *de son tort* of one dying intestate, if he can obtain Administration, before Trial of an Action brought by a Creditor in equal Degree, or inferior, may, on *Plene administravit*, give in Evidence Retainer for his own Debt. See *infra* 391. & Carth. 104.

*Page 391 *3. *How an Executor* de son tort *shall be charged, and how far a subsequent Administration purges the first Wrong.*

(a) 5 Co. 30. Hob. 49. Off. of Exec. (b) Rol. Abr. 919.

(a) An Executor *de son tort* makes himself liable, as far as he hath Assets, to all the Debts due by the Deceased, as also to his (b) Legacies, and subjects himself to the Action of the rightful Executor or Administrator, and may by his false Plea (as if an Action is brought against him by a Creditor, and he pleads *Ne unques Executor*, which is found against him) subject himself to the Payment of the whole Debt, though the Goods which came to his Hands be of ever so small Value. †

‡ Creditors enabled to recover their Debts of Executors and Administrators of Executors in their own Wrong. 30 Car. 2. stat. 1. sect. 7.

Godb. 217. 3 Leon. 198. Cro. Eliz. 102, 365, 565, 810. (c) So if Goods come to the Possession of an Administrator, and his Administration is repealed, he shall be charged as Executor of his own Wrong. Mod. 63.

And though an Executor *de son tort* does afterwards take out Letters of Administration, yet it is still in the Election of a Creditor to charge him as Executor or Administrator; for having (c) once made himself liable to the Action as Executor *de son tort*, he (d) shall never after discharge himself by a Matter *ex post facto*. ‖

(d) And there an Executor *de son tort* cannot plead, that he is an Administrator, though Administration was actually taken out before the Action brought. 2 Vent. 180. & *vide* 5 Mod. 145.

‖ See *ante* 390. n. *et infra*. & Carth. 104.

Rol. Abr. 923. Style 337. Sid. 76. Raym. 58.

But this it is said must be so understood, that the Defendant cannot by this Plea abate the Plaintiff's Writ, by alledging himself Administrator; but that yet to other Purposes a subsequent Administration purges the first Wrong, and hath Relation to the Death of the Party; as if one possesseth himself of the Goods of an Intestate, and pays as much Money as the Goods are worth, and then takes out Letters of Administration; in this Case he may plead *Plene administravit*, and shall retain the Goods in Satisfaction of what he paid.

Moor 126. *Kenrick* and *Burges*.

So where an Executor *de son tort* enters and takes Possession of the Goods, and sells them, and afterwards had taken out Administration, yet the Sale is good by Relation; but if the Intestate was intitled to a Lease for Years in Reversion, and such an Executor *de son tort* had sold the Term, and afterwards had taken out Administration, and then had sold it again to another, the second Vendee must have enjoyed it, because there can be no Executor *de son tort* of a Reversion; besides, no Entry can be made on a Term in Reversion.

Cro. Car. 88. *Whytmore* and *Porter*.

If a Widow takes Possession of her Husband's Goods, and with the Assent and Direction of her Son sells thereof to the Value of 400 *l.* and afterwards the Son takes out Administration and discharges all the Debts of the Intestate, not only to the Value of this 400 *l.* but all the Assets which the Intestate died possessed of, and an Action is brought against her by a Creditor

ditor, ſhe may plead *Plene adminiſtravit*, and ſhall be diſcharged upon this Evidence; for the Action being brought againſt her after Adminiſtration taken out, it is unreaſonable that ſhe ſhould be liable (*a*) both to the Creditor and Adminiſtrator, or that Creditors ſhould have Satisfaction for more than the Party died poſſeſſed of.

(*a*) Where in Trover againſt an Executor *de ſon tort*, at *Niſi prius*, before *North* Ch. Juſt. the Queſtion was, whether Goods having been taken in Execution upon a Judgment obtained againſt the Defendant, by a Creditor of the Deceaſed's, ſhould diſcharge him againſt the Plaintiff, who brought his Action as Adminiſtrator; and the Opinion of the Chief Juſtice was, that this Execution was a good Diſcharge againſt another Creditor that ſhould ſue him, to whom he might plead *Riens inter ſa mains*; but it was no Diſcharge againſt an Adminiſtrator; for Men muſt not be encouraged to meddle with a Perſonal Eſtate without Right; but to prevent this Miſchief, where the Party dies inteſtate, and there is Conteſt about the Adminiſtration, a Man may procure from the Ordinary Letters *ad Colligend.* Vent. 349, 350.

* (C) Of the Manner of appointing an Executor: And herein,

* Page 392

1. By what Words an Executor is conſtituted.

HERE we muſt firſt obſerve, that the Appointing an Executor is an eſſential Part of a Will; for if a Man makes ſeveral Deviſes, *&c.* and appoints no Executor, he dies Inteſtate as to his (*b*) Goods and Chattels; but though ſuch a Signification of the Teſtator's Mind as to the Diſpoſition of his Goods, *&c.* be no more properly to be called a Teſtament, than every Deed, wherein he expreſſes his Mind to grant ſuch and ſuch Things, may be called a Teſtament; yet it is not altogether of no Force and Validity; for ſince there is an Expreſſion of the Teſtator's Mind for the Diſpoſition of his Goods in this or that Manner; ſo far it ſhall be of Effect, that the Diſpoſition ſhall be made according as he hath expreſſed his Mind, and therefore ſhall Adminiſtration be granted to the next of Kin *cum Codicillo annexo*, as it is when a perfect Will is made, and an Executor refuſes. Godolph. 76. Off. of Exec. 3. Noy 12.

(*b*) But as to Land, a Will is good, tho' there be no Executor named, for an Executor hath nothing to do with Lands and Tenements which were not originally Teſtamentary, but are made deviſable by Act of Parliament. Off. of Exec. 3, 4.

On the contrary, the bare Naming an Executor in the Will, without giving any Legacy, or appointing any Thing to be done, is ſufficient to make it a Will, and as a Will it is to be proved, for the Naming of Executors is by Implication a Gift or Donation to them of all the Goods, Chattels, Credits, and Perſonal Eſtate of the Teſtator, and the laying upon them an Obligation to ſatisfy the Teſtator's Debts to the juſt Value of his Goods and Chattels. Godolph. 82. Off. of Exec. 3.

But although the appointing an Executor be an eſſential Part of a Will; yet it is not at all neceſſary, that the Teſtator ſhould make Uſe of the Word *Executor* in conſtituting him, for any Words which ſhew his Intention, that ſuch a one ſhould be Executor, are ſufficient for a Man's Will, being ſuppoſed his laſt Act, and made when he is *Inops concilii*, is to receive a favourable Interpretation. Off. of Exec. 8. Godolph. 82-3. Dyer 90.

Therefore if the Teſtator ſays, that he commits all his Goods to the Adminiſtration, or to the Diſpoſition of *A. B.* in this Caſe *A. B.* is as effectually made Executor, as if the Teſtator had made Uſe of the Word *Executor*; ſo if the Teſtator appoints that *A. B.* ſhould diſpoſe of the Godolph. 83.

Goods in his Cuſtody, he is thereby made Executor of thoſe Goods; or if he ſays, *I make* A. B. *Lord of all my Goods*, or *I leave all my Goods to him*, or *I make* A. B. *Legatary of all my Goods*, or *I leave the Reſidue of my Goods to him.*

Godolph. 83. So if the Teſtator ſaith, *I Will that* A. B. *be my Executor if* C. D. *will not*; in this Caſe *C. D.* is appointed Executor, and may if he pleaſes be admitted to the Executorſhip, and exclude *A. B.*†

† *Sed qu.* if *A. B.* ſhould not be firſt cited, and refuſe?

Godolph. 83. So if the Teſtator, ſuppoſing his Child, his Brother, or his Kinſman to be dead, ſays thus in his Will, *Foraſmuch as my Child, my Brother*, &c. *is dead, I make* A. B. *my Executor*; in this Caſe, if the Perſon, whom the Teſtator thought dead, be alive, he ſhall be Executor.

Godolph. 83. Alſo if the Teſtator, being aſked by another, whether he doth make *A. B.* his Executor, doth anſwer, *Yea, I do*, or *what elſe*, or *why not?* or, *whom elſe ſhould I make Executor?* or, *I cannot deny it*, or other Words to that Purpoſe, *animo Teſtandi*, this amounts to an Aſſignation of *A. B.* Executor.

* Page 393 Godolph. 84. * So if the Teſtator doth make *A. B.* or *C. D.* his Executors; in this Caſe they ſhall both of them be Executors, for *or* ſhall be here conſtrued *and*, rather than the Party for this Incertainty ſhould be ſaid to die Inteſtate.

21 H. 6. 6. Off. of Exec. 9. Rol. Abr. 914. But if *A.* be made an Executor, and *B.* a Co-adjutor, without more, he is not by this an Executor with *A.* nor hath ſuch Co-adjutor or Overſeer any Power to adminiſter, or to intermeddle otherwiſe than to counſel, perſuade and adviſe.

Godolph. 76. It is ſaid, that an Appointing him Executor, who is named in ſuch a Note left with *C. D.* is not a ſufficient making of him an Executor at all; but according to *Godolph.* this muſt be underſtood, that it is no ſufficient Appointing of an Executor to make it a written Will, becauſe the Appointing an Executor is left out of the Will; but ſurely it will be a good nuncupative Will, if not a good written Will; for why ſhould not ſuch an Appointment be good in caſe where the Teſtator had made a Diſpoſition by Writing, as well as if he appoint an Executor by Word of Mouth, where he hath made Diſpoſition by Writing of his Goods and Chattels?

Godolph. 78. If one appoint my Executor to be his Executor, and die, if the Will be not void for Incertainty; yet he is dead Inteſtate until I die, and die Teſtate; but if I die Inteſtate, then he is dead Inteſtate alſo.

Godolph. 85. If there be Demonſtration in a Will, that is only added as *Deſcriptio Perſonæ*, and that is falſe; yet if the Perſon be well enough known with it, that is ſufficient; as if the Teſtator appoints his Son *Thomas*, who was lately married, to be his Executor, that is well enough, though he be not married.

2. Of appointing an Executor abſolutely, or upon Condition.

Off. of Exec. 10. Godolph. 40. Any Word in a Will, that ſuſpends the Aſſignation of an Executor in Expectation of ſome future Events, makes the Executorſhip conditional; but if the Condition be contrary to the former Part of the Will, it is void; as if one makes his two Executors, provided that one ſhall not adminiſter, this is (*a*) void.

(*a*) But a *Proviſo* that one ſhall not meddle during the others's Life is good; and by this they ſhall be Executors ſucceſſively, and not jointly. Off. of Exec. 13.

A *Con-*

A *Condition* ought properly to relate to ſomething in Contingency, that may, or may not be; for if it be ſubject to no Contingency either in Subſtance or Circumſtance, it is no Condition; as if *A.* makes *B.* his Executor, upon Condition the Sun riſe ten Days after his Death, he is Executor abſolutely, for there is no Contingency to ſuſpend his being ſo. So if the Teſtator make *A.* his Executor, upon Condition the Teſtator's Wife and Daughter be alive at the Time of the Death of the Teſtator, and he never had any Daughter, the Will is abſolute, for there is nothing poſſibly to overthrow it; and in ſuch Caſe, where there is nothing to be a Contingency, the Adding of a Condition can be interpreted nothing but the making an illicitous Grant. So captious Conditions, that are contrary to the Diſpoſitions made, are void, becauſe they cannot be ſuppoſed to be made with any other Deſign, than that a Man ſhould avoid his own Grant. Godolph. 43.

Neceſſary Conditions, either in reſpect of Fact or Law, are of no Manner of Force; for it is in vain to require that which muſt neceſſarily be; impoſſible Conditions in Reſpect of Law, Perſons, Nature or Contrariety, are in themſelves void, and therefore neither hinder an Executorſhip. Godolph. 44.

* If an Executor is appointed upon Condition that he gives Security before ſuch a Day to perform the Will, or before he takes upon him the Adminiſtration, he muſt in thoſe Caſes perform the Condition before he is compleat Executor. *Page 394 Off. of Exec. 11.

But in Caſe of arbitrary Conditions, the Executor hath Time, during his Life, to perform the Condition in, and may enjoy the Executorſhip in the mean Time, unleſs the Judge appoints a Time for him to perform the Condition in; but if the Judge appoints Time and Place, and the Executor do it not, then is the Condition (*a*) broken, and the Perſon inteſtate, and ſo Adminiſtration is to be granted to the next of Kin. Godolph. 43, 78.

(*a*) But tho' the Executorſhip be determined, yet all Acts done by ſuch an Executor in purſuance of his Office, before ſuch Condition broken, are good. Godolph. 77.

3. Of appointing a temporary Executor, as for a limited Time, during the Abſence of *J. S. &c.*

The Time may be limited when the Executorſhip ſhall begin, and that either certainly or with Reference to Contingency; for by our Laws it is lawful for a Teſtator to appoint his Executor, either from a certain Time, or until a certain Time, and in the mean Time Adminiſtration may be committed to the next of Kin, or to the Widow; and the Acts done by ſuch Adminiſtrator cannot be (*b*) avoided by the Executor afterwards; and in this Senſe the ſame Perſon may be ſaid to die partly Teſtate, and partly Inteſtate, which by the Strictneſs of the Civil Law, is not allowable. Godolph. 77.

(*b*) Hob. 265-6.

So a Perſon may appoint, that *J. S.* ſhall be Executor till his Son comes of Age, or for any limited Time he pleaſes. Off. of Exec. 10.

4. Of

4. Of appointing an Executor with a limited Power, as to administer Part of the Estate.

Off. of Exec. 12. Godolph. 78. Rol. Abr. 914.

The Testator may limit and divide the Power of his Executors in the following Manner: 1*st*, He may make *A.* his Executor for his Plate and Houshold-stuff, *B.* for his Sheep and Cattle, *C.* for his Leases and Estates by Extent, and *D.* for the Debts due to him; or, 2*dly*, He may appoint *A.* Executor for his Goods in the County of *S. B.* for his Goods in the County of *N.* and *C.* for his Goods in the County of *H.*

Off. of Exec. 13.

And though several Executors are appointed with separate and distinct Powers, yet is the Will but one Will, and needs only one Probate.

Salk. 927. pl. 6.

But if a Person is made Executor without any Limitation or Restriction, he cannot take out Administration for Part, but must renounce the Executorship *in toto*, or not at all.

Yelv. 103. Cro Jac. 549. 5 Co. *Hargrave's* Case. Mod 185. Salk. 297. pl. 6. *Post.* 441, 443.

Therefore if an Executor has a Term, and the Premisses are of less Value than the Rent reserved thereon; in an Action brought against him in the *Debet* and *Detinet*, he must plead specially, that he has no Assets, and that the Land is of less Value than the Rent, and demand Judgment, if he ought to be charged in the *Detinet tantum*; and this will free him from being charged *de bonis propriis*; for otherwise the Premisses shall be presumed to be of greater Value than the Rent. ‡

‡ See *ante* 389.

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* Page 395 * (D) **Of appointing Co-executors:** And herein,

1. What Acts done by any one of them shall be as valid as if done by them all.

Godolph. 134. Off. of Exec. 95. Rol Abr. 924.

IF a Man appoints several Executors, they are esteemed in Law but as (*a*) one Person, representing the Testator, and therefore the Acts done by any one of them, which relate either to the Delivery, Gift, Sale, Payment, Possession or Release of the Testator's Goods, are deemed the Acts of all, for they have a joint and entire Authority over the Whole.

(*a*) Therefore all of them shall have but one Essoin, either before Appearance or after, because their Testator himself, whose Person they represent, could have no more. Godolph. 135.

Dyer. 23. b. pl. 146. Cro Eliz. 347.

Hence it hath been adjudged, that if the Testator dies possessed of a Lease for Years, and having made two Executors, one of them grants all his Interest to a Stranger, that the whole Term passes, for each had an (*b*) intire Authority and Interest different from other Jointenants.

(*b*) So if one Executor releases a Debt, it is good, and shall bind the Rest. 21 H. 7. 25. b. Dyer 23. b. *in Margine.*—— So if one Executor surrenders a Term. 28 H. 6. 3. Dyer 23. b. *in Margine.*——So if one acknowledges a Judgment on an Action. 17 E 3. 66. Dyer 23. b. *in Margine.* † ——So if on a *Quid juris clamat* one of them attorns, it shall bind them all.

† See *infra* Div. 2.

And for this Reaſon it is held, that if one Executor grants or releaſes his Intereſt in the Teſtator's Eſtate to the other, that nothing paſſes thereby, becauſe each was poſſeſſed of the Whole before. Godolph. 134.

Alſo it hath been adjudged, that if an Obligee makes two Executors, and dies, and one of them delivers the Obligation to a Stranger in Satisfaction of a Debt due from himſelf, and dies, that though the Debt does not paſs by the Aſſignment, being a Choſe in Action, and not properly aſſignable; yet by this Delivery the Party hath ſuch an Intereſt in the Paper and Wax, that he may juſtify the Detainer in an Action of Detinue brought againſt him by the ſurviving Executor. 2 Rol. Abr. 46. *Kelſick* and *Nicholſon*. Dyer 23. b. *in Margine*. S. C. Cro. Eliz. 478. pl. 8. and 496. pl. 15. S. C.

adjudged by three Judges againſt one. ——— [*Qu.* As to this Determination, for the Obligation was only Evidence of the Debt, and as the Debt was not aſſignable, being a Choſe in Action, and only a mere *Delivery*, what Intereſt could paſs?]

2. Where they muſt anſwer for each other's Acts, and what Remedy the one hath againſt the other.

It is clearly agreed, that one Executor ſhall not be charged with the Wrong or *Devaſtavit* of his Companion, and ſhall be no farther liable than for the Aſſets which came to his Hands; and therefore where an (*a*) Action was brought againſt two Executors, and the Jury found that the two and another were made Executors, and that the third waſted the Aſſets to the Amount of 600*l.* and died, and that only 16*l.* came to the Hands of the two others; the Court held, that they ſhould be chargeable for no more than the 16*l.* for that it was the Teſtator's Folly to truſt ſuch a Perſon, which muſt not turn to the Prejudice of the other Executors. Godolph. 134. Off. of Exec. 100. (*a*) Cro. Eliz. 318. *Hargthorp* and *Millſorth* adjudged.

Alſo it hath been held in Chancery, that if there be two Executors, and they join in a Receipt, and one only receives the Money, as to Creditors, who are to have the utmoſt Benefit of Law, each is liable for the Whole, though one Executor alone might give a Diſcharge, and the joining of the other was unneceſſary; but as to Legatees, and thoſe claiming Diſtribution, who have no Remedy but in Equity, the Receipt of one Exe-*cutor ſhall not charge the other, for the joining in the Receipt is only Matter of Form, the ſubſtantial Part is the actual Receiving, and this only is regarded in Conſcience. Salk. 318. pl. 26. *per Harcourt* Chan. * Page 396

If *A.* deviſes Legacies, and makes *B.* and *C.* his Executors, and *B.* makes *C.* and *D.* his Executors, and dies, and they poſſeſs themſelves of the Eſtate of *A.* they may be both charged in Equity; for though in Point of Law the Executorſhip ſurvived to *C.* and *D.* is not privy, yet the Eſtate of *A.* in (*b*) whoſe Hands ſoever, ought to be liable. Chan. Ca. 57. (*b*) That a Creditor may follow the Teſtator's Eſtate, into whoſe Hands ſoever it comes, notwithſtanding any Aſſignment of it by the Executor. 2 Vern. 75.

One Executor (*c*) cannot regularly ſue another of his Co-executors touching any Thing relating to their Teſtator's Will, or that is within the Power, Intereſt, Duty or Office of an Executor. Off. of Exec. 99. Godolph. 135. (*c*) But may in Equity, and compel him to account for a Moiety, &c. yet *vide* Sid. 33.

But if the Reſidue of the Perſonal Eſtate, after Debts and Legacies, be deviſed to both the Executors, one of them may ſue the other in the Spiritual Court for a Moiety, for this is in the Nature of a Gift or Legacy to him, Off. of Exec. 99. Godolph. 135.

him, and he may bring Treſpaſs againſt the other Executor, if he takes it out of his Poſſeſſion, or Detinue * if he detains it from him.

* *Qu.* As to Detinue, if a Partition has not been made, ſo as to diſtinguiſh the Plaintiff's Share?

3. Where they muſt jointly ſue and be ſued; and therein of Summons and Severance.§

§ See *ante*. 381. n.

Godolph 134. Off. of Exec. 95.

As Executors in repreſenting the Teſtator make but one Perſon, they are all regularly to ſue and be ſued.

Lev. 161. *Swallow* and *Emberſon*. Sid. 242.

But if Debt be brought againſt an Executor, and he pleads that *J. S.* is Co-executor with him, and that he is not named in the Writ, without averring that *J. S.* had adminiſtred, the Plea will be ill; for although, when an Executor ſues, the Defendant may plead another Executor not named, without ſhewing that the other hath adminiſtred, becauſe he cannot know, whether the other hath adminiſtred or not; yet when an Executor is ſued, if he pleads another Executor not named, he ought to go farther and ſay, that he has adminiſtred, for that lies in his own Conuſance.

Carth. 61.

Alſo if an Action be brought againſt one Executor, where there are more, if that one Executor doth not plead the Matter in Abatement, but plead to the Action, he ſhall never have the Advantage of ſuch a Plea afterwards.

Salk. 3. pl. 6. *Brookes* and *Stroud*.

If two Executors ſue, and ſet forth themſelves to be Executors, and that they proved the Will,† but upon the Probate ſet forth it appears that one proved the Will, and the Defendant pleads this in Abatement, a *Reſpondeas Ouſter* will be awarded, for both have the Right in them; and he that did not prove may come in when he pleaſes, but cannot refuſe during the Life of him that has proved; after he may, if one die the other ſhall go on.

† It is not neceſſary to ſay they prove the Will, but it is ſufficient for them to declare generally as Executors, and make a Profert of the Letters Teſtamentary, and the Defendant muſt plead to the Action: If the Probate is called for on the Trial, it will thereby appear that the Plaintiffs are Executors, named ſuch by the Teſtator himſelf.

Cro.Car.420. 2 Rol. Abr. 98. Off. of Exec. 96, 104.

If a Man appoints two Executors, there ſhall be Summons and Severance, becauſe one of the Executors may releaſe, yet ſuch a Releaſe is a *Devaſtavit* in him; but if he will not proceed at Law, it is no *Devaſtavit* in him, and therefore, both Executors being only Truſtees for the Perſon deceaſed, they ſhall not be compelled to go on together; but if one refuſes, the other may bring his Action in the Name of both, and have Summons and Severance; for otherwiſe each Co-executor might, by Colluſion with the Debtor, and not proceeding, keep the other from recovering Aſſets, and not create a *Devaſtavit* in himſelf; but after ſuch Summons and Severance he does not proceed for a Moiety, but as Repreſentative of the Teſtator proceeds for the Whole the Teſtator was intitled to, and ſhall have Judgment only in his own Name.

* Page 397 Cro.Eliz.652. Co. Lit. 139.

* Therefore if there be two Executors, and they bring an Action of Debt, and one of them is ſummoned and ſevered, and the ſevered Perſon dies, the Writ ſhall not (*a*) abate.

(*a*) Not being a Party, he could not ſue out Execution if he was alive. Off. of Ex. 105.

Salk. 312. pl. 17. *per Holt* C. J. 2 Ld. Raym. 870. ‡ Seldom uſed.

If Debt be brought againſt ſeveral Executors, and one appears, and the other makes Default upon the Grand Diſtreſs, ‡ the Court may proceed againſt him that appears; and if the Plaintiff recover, Judgment ſhall be againſt all the Executors for the Goods of the Teſtator; and the 25 *E.* 3. *ſt.* 5.

ſt. 5. cap. 17. which gives a *Capias* in Debt, has been always conſtrued within the Equity of the 9 *E.* 3. *ſt.* 1. *c.* 3. ſo that if there be ſeveral Executors Defendants, and a *Cepi* is returned as to one, and a *Non eſt inventus* as to the Reſt, the Plaintiff ſhall proceed againſt him that appears, and ſhall have Judgment againſt all; for the Default upon a *Capias* is the ſame as upon the grand Diſtreſs. *Ergo* Error muſt be brought by all.

If one Executor hath the Poſſeſſion of the Teſtator's Goods, which are taken from him, (*a*) both muſt join in an Action of (*b*) Treſpaſs; for the Poſſeſſion of one is the Poſſeſſion of the other; and if one only ſhould bring the Action, and the other ſhould releaſe it, ſuch Releaſe would be good.

(*a*) 19 H. 6. 65. 16 H. 7. 4. 3 Leon. 209. S. P. *per Coke* but in Godolph. 134.

and Off. of Exec. 104. it is ſaid, that if Goods be taken out of the Poſſeſſion of one Executor, he alone may maintain an Action for the ſame, and that without naming himſelf Executor, for which is cited 38 E. 3 9.

(*b*) But if one Executor alone ſells the Goods of the Teſtator, he alone may maintain an Action of Debt for the Money. Godolph. 135. Off of Exec. 104.

It is ſaid that Executors, when ſued, cannot plead diſtinct Pleas, becauſe they repreſent but one Perſon, who could have but one Plea, if he was living; but it is ſaid to be holden by others, that Executors may plead diſtinct Pleas, and that ſhall be tried which is (*c*) beſt for the Teſtator, and moſt peremptory to ſettle the Controverſy. †

Off. of Exec. 98. Godolph. 136.

(*c*) So if two Executors have Judgment, and the one prays a *Capias*, and the other a *Fieri facias*, the *Capias* ſhall be awarded as beſt for the Teſtator. Hob. 61. cited as the Opinion of *Cotiſmore* in 7 H. 6. 6. ‖

† By 4 Ann. *c.* 16. *ſ.* 4. Defendants may plead ſeveral Pleas, by Leave of the Court, ſo that they may all plead the ſame Pleas, and thereby avoid the Doubt in the Text.

‖ The Execution muſt be ſued in the Name of both, according to the Judgment.

(E) Of the Probate of Wills, and Granting Adminiſtation: And herein,

1. To whom the Probate of Wills and Granting of Adminiſtration did originally belong.

IT appears to have been a Matter of great Controverſy, to whom the Probate of Wills and Granting Adminiſtration did originally belong, and whether theſe were Matters intirely of Eccleſiaſtical Cognizance; (*d*) but it ſeems to be now the better Opinion, that the Probate of Teſtaments did not originally belong to the Eccleſiaſtical Juriſdiction, but

(*d*) *Linwood* 174. *Verbo Approbatis* ſays, That the Juriſdiction of the Eccleſiaſtical Courts touching teſtamentary Matters, is by the Cuſtom of *England*, and not by the Eccleſiaſtical Law.——*Wilkins* 78. *Lamb. Saxon Laws* 64. make it appear, that the Biſhop and Sheriff ſat together in the County Courts; and by the *Saxon* Laws, which they give us, it plainly appears, that the Probate of Teſtaments was in the County Courts.——*Seld. Eadmerus* 197. gives us the Charter of *William the Conqueror*, which firſt ſeparated the Eccleſiaſtical Court from the Civil; but this Charter does not mention Matters teſtamentary, or the Probate of Wills, to be of Eccleſiaſtical Conuſance, but only ſays, that the Crimes, that were to be proſecuted *pro ſalute animæ*, were to be of that Conuſance.—And therefore, according to *Seld. Eadmerus* 168. the Eccleſiaſtical Juriſdiction did not prevail herein till the Time of Rich. 2. at which Time the Clergy got the King to publiſh the Law of *William the Conqueror*, and confirm the ſame, and

* Page 398 and that no Matters of Eccleſiaſtical Conuſance ſhould be tranſacted in the County Court; this is the Charter of 2 Rich. 2. *Membrano* 12 No. 5. and is mentioned in *Selden's Eadmerus* 168.—From henceforward the Clergy had the whole Juriſdiction of Wills, becauſe the County-Court could not receive the Probate, and the King's Court could not intermeddle with it, becauſe by a Charter in *Hen.* I.'s Reign, the King's Tenants, who owed ſuit to it, were enabled to diſpoſe of their Perſonal Eſtate for the Good of their Souls, and of this the Clergy were thought to be the propereſt Perſons to take Care. Plow. 179, in the Caſe of *Greys* and *Fox*.——Hence in Fitz. Abr. Tit. Teſtament 148. it is ſaid by *Fairfax*, that it was but of late the Church had the Probate of Wills, and he ſuppoſes that it was given to them by ſome Act of Parliament.—And in the 11 H. 7. *Fineux* aſſerts, that the Probate of Wills did not belong to the Spiritual Court by the Eccleſiaſtical Law, but came to them by Cuſtom and Uſage:—and with theſe Opinions my Lord *Coke* agrees in *Henſlow's* Caſe, 9 Co. 38. and on theſe Foundations concludes, that when the Will is proved in the Eccleſiaſtical Court, the Court has executed its Authority, but the Executors are to ſue in the Temporal Courts to get in the Eſtate of the Deceaſed.

* but to the reſpective Lords of Manors where the Teſtator died, as all other Matters did.

Raym. 405. 406. Sid. 359. *Noell* and *Wells*. Lev. 235. Vaugh. 207. Show. 293. See Salk. 36. pl. 1. Comb. 185. 12 Mod. 9. Holt. 305. pl. 4. Hard. 131.

But however it might have been formerly, it is now certain, that the Spiritual Court is the only Court, except as herein after excepted, that has Juriſdiction of the Probate of Wills, and, as incident to ſuch Juriſdiction, hath Power to determine all thoſe Matters that are neceſſary to the Authenticating of them. Hence it hath been adjudged, that if the Seal of the Ordinary appears to the Probate, it cannot be ſuggeſted or given in Evidence in the Common Law Courts, that the Will was forged *, or that the Teſtator was *Non compos*, or that another Perſon was Executor; but it may be given in Evidence, that the Seal was forged, or the Will repealed, or that there were *Bona notabilia*, becauſe theſe are not in Contradiction to the Real Seal of the Court, but admit the Seal and avoid it.

2 Rol. Abr. 299. Carth. 143.

* That is as to Chattels, or perſonal Eſtate; for with reſpect to real Eſtate, if any Queſtion ariſes, the original Will muſt be produced, and not the Probate, which can't authenticate the Will as to real Eſtate; and in ſuch Caſe the Validity of the Will, may be called in Queſtion, and Forgery, Inſanity of the Teſtator, or any other Matter that avoids the Will, may be given in Evidence.

Skin. 299. pl. 2. Salk. 36. pl. 1.

But if the Spiritual Court do admit a Will, but yet will not give the Probate thereof to the Executor, becauſe he cannot give Security for a juſt Adminiſtration, the Temporal Courts will grant (*a*) a *Mandamus*; for tho' they are to determine whether there be a Will or not, yet if there be a Will, the Executor has a Temporal Right, and they cannot put any Terms on him but what are mentioned in the Will.

(*a*) So if they refuſe Adminiſtration to the next of Kin. 5 Mod. 374. unleſs it be controverted by Will alledged in Spiritual Court. ||

|| The Statutes 31 Ed. 3. *ſt.* 1. *c.* 11. 21 H. 8. *c.* 5. *ſ.* 3, 4. and 4 Ann *c.* 16. *ſ.* 26. direct to whom Adminiſtration ſhall be committed. See *poſt* 401-414.

Rol. Abr. 906. Raym. 497. Salk. 37. pl. 3.

As to the Diſpoſition of Inteſtates Eſtates and granting Adminiſtration, it is plain, that by the (*b*) Common Law, and before the Statute of *Weſtm.* 2. *cap.* 19. the Ordinary hath the abſolute Diſpoſal of Inteſtates Eſtates.

(*b*) But my Lord *Coke* thinks that this was granted them by ſome particular Conſtitutions, and therefore ſays, that antiently the Kings of *England*, by their proper Officers, *ſolebant Capere bona inteſtatorum in manus ſuas*, 9 Co. 36. &c. in *Henſlow's* Caſe. 3 Mod. 24.

And therefore, if a Man died Inteſtate, neither his Wife, Child, or next of Kin had any Right to a Share of his Eſtate, but the Ordinary was to diſtribute it according to his Conſcience to pious Uſes; and ſometimes the Wife and Children might be amongſt the Number of thoſe whom he appointed to receive it; but however, the Law truſted him with the ſole Diſpoſition. 2 Inſt. 399. Plow. 277. 3 Mod. 59. Ld. Raym. 86, 363.

The firſt Statute, that abridged the Power of the Ordinary herein, was the Statute of *Weſtm.* 2. or 13 *E.* 1. *cap.* 19. by which it is enacted, "That "where a Man dies Inteſtate, and in Debt, and the Goods come to the "Ordinary to be diſpoſed, he, *de cætero*, ſhall ſatisfy the Debts, ſo far as "the Goods extend, in ſuch Sort as the Executors of ſuch Perſons ſhould "have done in Caſe he had made a Will." 5 Mod. 247. Comb. 378. Comy. Rep 5. pl. 3. Will. Rep. 7. pl. 2.

Before this Statute, no Action lay againſt the Ordinary at the Suit of a Creditor, where the Party died Inteſtate, nor could the Ordinary maintain an Action againſt the Debtor of the Inteſtate; but, if he had ſeiſed the Goods, he might bring Treſpaſs againſt any one who took them out of his Poſſeſſion. Rol. Abr. 906. 8 Co. 135. Raym. 497. but for the Alterations herein by ſeveral Acts of Parliament, *vide infra* Letter F. 413.

2. Of the King's Juriſdiction in Granting the Probate of Wills and Adminiſtration. * Page 399

As all Juriſdiction flows from the King, ſo he is ſaid to be the ſupreme Ordinary in this Kingdom; and therefore where an Action of Debt was brought by an Adminiſtrator, and the Plaintiff declared of Letters of Adminiſtration granted to him *per Carolum Regem*, without ſaying *debito modo*, yet this was held good on Demurrer, becauſe the King hath univerſal Juriſdiction here. Allen 53. *Hobſon* and *Wills*; for this *vide* Prerogative.

But it is ſaid, that if a Perſon dies inteſtate, and without Kindred, though the uſual Courſe is to procure the King's Letters Patent, and then the Ordinary admits the Patentee to Adminiſtration; yet that this is not *de jure*, but rather out of Reſpect; for the Ordinary might originally have diſpoſed of Inteſtate's Eſtates to pious Uſes; and the Inſtance of ſome Lords of Manors having a Juriſdiction herein, is not a Proof to the contrary; they originally, and not the King, had Right to grant Adminiſtration. Salk. 37. pl. 3.

3. Of the Archbiſhop's Juriſdiction; and therein of *bona notabilia*.

If a Perſon dies, having Goods in ſeveral (*a*) Dioceſes, the Probate of his Will, as alſo the Granting Adminiſtration to him, belongs to the Archbiſhop of the Province in which the Goods are. Off. of Ex. 44. Rol. Abr. 908. Dyer 305.

(*a*) So where a Man dies inteſtate, having Lands in divers Peculiars, the Granting Adminiſtration does not belong to the Ordinary of the Dioceſe, but to the Metropolitan of the Province; for they are excepted out of the Ordinary's Juriſdiction. Lev. 78. *per Twiſden* and *Windham*, & *vide* Cro. Eliz. 719. granted by Peculiar.

So if a Perſon dies inteſtate beyond Sea, and hath Goods here, though but in one Dioceſe, yet the Archbiſhop is to grant Adminiſtration. Rol. Abr. 908.

So if a Man dies in one Dioceſe, not having any Goods there, but had *bona notabilia* in another Dioceſe, this is (*b*) ſufficient to intitle the Archbiſhop Rol. Abr. 909.

(*b*) By a Canon 1 Jac. 1. c. 92. if a Man dies on a Journey, the Goods, which he had at that Time with him, ſhall not cauſe his Teſtament or Adminiſtration to be liable to the Prerogative Court. Godolph. 71.

to grant Administration, becauſe the Ordinary where he dies is by Law to take as great Care of the Inteſtate and his Goods, as the other Ordinary where the Goods are.

2 Lev. 86. Hard. 216. Salk. 39. pl. 8. So if a Man dies having *bona notabilia* in the ſeveral Provinces of *Canterbury* and *York*, the Archbiſhop of each Province ſhall grant Adminiſtration according to the *bona notabilia* in their reſpective Provinces, being two ſupreme Juriſdictions, and neither can act in the other.

Dyer 305. S. P. *per Hale.* So if a Man dies inteſtate, having *bona notabilia* in *England* and *Ireland*, ſeveral Adminiſtrations ſhall be granted, *viz.* by the Archbiſhop of *Canterbury*, for the Goods in his Province, and by the Archbiſhop of *Dublin*, for the Goods in his; but this by (*c*) *Roll* muſt be underſtood, where the Party hath *bona notabilia* in each of their Provinces; for otherwiſe it ought to be granted by the Ordinary where the Goods are, and not by the Archbiſhop.

(*c*) Rol. Abr. 908.

If the Archbiſhop commits Adminiſtration, though there be no *bona notabilia*, yet ſuch Adminiſtration is not void, but only voidable, and ſhall ſtand till it is remedied by Complaint of the Inferior Ordinary; but if the Inferior Ordinary commits Adminiſtration, and the Superior alſo, ſuppoſing * Page 400 * that there are *bona notabilia*, if there are none, then the Firſt by the Inferior is good; if there are, it is abſolutely void.

5 Co. 30. Hob. 185. 8 Co. 135. Metropolitan Cro. Eliz. 6, 283, 456. Lev. 305. 7 Mod. 146. Godolph. 70. S. P. becauſe the hath Juriſdiction in all Places within his Province.

4 Inſt. 335. The Probate of every Biſhop's Will, though he had Goods but in his own Juriſdiction, belongs to the Archbiſhop of the ſame Province.

1. *Of what Value the Goods and Effects muſt be, that will make* bona notabilia.

For theſe *vide* Rol. Abr. 909. Off. of Exec. 44. Godolph. 70. There appears to have been formerly Diverſity of Opinions as to the Value of the Goods, which was neceſſary to make *bona notabilia*; ſome holding 10 *l.* neceſſary, ſome 5 *l.* others 40 *s.* and even by others a Penny was thought ſufficient to make *bona notabilia.*

Rol. Abr. 909. 4 Inſt. 335. Off. of Exec. 45. But it is now ſettled as eſtabliſhed by the 92 Canon of *Jac.* 1. that Goods amounting to the Value of 5 *l.* make *bona notabilia.*

4 Inſt. 335. But by the ſaid Canon it is provided, that this ſhall not prejudice the Juriſdiction of thoſe Dioceſes, where, by Compoſition or Cuſtom, *bona notabilia* are valued at a greater Sum, as it is in *London*, where by Compoſition *bona notabilia* are to be to the Value of 10 *l.*

Godolph. 69. It is not neceſſary that the Deceaſed ſhould have Goods to the Value of 5 *l.* in each of the ſeveral Dioceſes where his Goods are diſperſed; but if he hath Goods in any one Dioceſe amounting to 5 *l.* beſides that in which he died, theſe make *bona notabilia*.

Godolph. 69. But if his Goods in the Dioceſe where he died amount to 10 *l.* or more, yet if he hath not Goods to the Value of 5 *l.* in ſome other Dioceſe, theſe will not be *bona notabilia.*

2. *Of the Nature of ſuch Goods as will make* bona notabilia, *and how far it is neceſſary they ſhould be in ſeveral Dioceſes.*

Rol. Abr. 909. Godolph. 71. If a Man hath Goods in one Dioceſe to the Value of 5 *l.* and a Leaſe for Years of that Value in another, theſe make *bona notabilia*, though a Leaſe

Leaſe or Term for Years, according to the Civil Law, is not properly *Bonum*, nor a Thing (*a*) moveable, yet it is a Chattel, and as ſuch muſt be pleaded.

(*a*) But in Caſe Lands be deviſed to Executors for Payment of Debts and Legacies, theſe, though they become Aſſets, will not make *bona notabilia*. Off. of Exec. 46.

Debts due to the Deceaſed make *bona notabilia*, as well as Goods in Poſſeſſion; but if there be a Bond of the Penalty of 5*l.* for Payment of a leſſer Sum, and the ſame is forfeited; though according to the ſtrict Rules of Law the whole Penalty is forfeited, yet this does not make *bona notabilia*. Godolph. 70. Off. of Exec. 46.

Debts due to the Deceaſed make *bona notabilia*, be they ever ſo deſperate or difficult to be recovered, and therefore it (*b*) ſeems that a Debt due from the King, for which there is no Remedy but by Petition, makes *bona notabilia*.

(*b*) Off. of Exec. 46. left a *Quære*.

As to Debts making *bona notabilia*, we muſt further obſerve a Diſtinction the Law makes between Debts by Bond or Specialty, and Debts by Simple Contract, *viz.* (*c*) that Debts by Specialty are eſteemed the Deceaſed's Goods in that Dioceſe where the Securities happen to be at the * Time of his Death, though they were entered into in another, or though the Debtor or Creditor, at the Time of entering into them, lived in a different Dioceſe. * Page 401

Godolph. 70, 71. Off. of Exec. 46. Rol. Abr. 909. Dyer 305.

(*c*) Therefore where a Man died in *Lancaſhire*, which is within the Dioceſe of the Biſhop of *Cheſter*, and had a Bond in *London*, it was adjudged that Adminiſtration as to this Bond ought not to be granted by the Biſhop of *Cheſter*, but by the Biſhop of the Dioceſe where the Bond was. Cro. Eliz. 472. *Byron* and *Byron*.

But as to Debts by Simple Contract, they, by our Law, follow the Perſon of the Debtor, and are eſteemed the Deceaſed's Goods in that Dioceſe where the Debtor reſided at the Time of the Creditor's Death. Godolph. 70. Off. of Exec. 46.

On this Diſtinction it hath been held, that a Judgment obtained in any of the Courts of *Weſtminſter* made *bona notabilia*, though the Action upon which it was obtained was laid in *Dorſetſhire*, becauſe the Record was at *Weſtminſter*. Carth. 149. 3 Mod 324, S. C. *Gold* and *Strode*. Salk. 40.

pl. 9. 2 Salk. 679. pl. 7. 2 Ld. Raym. 854. and 6 Mod. 134. *Adams* and *Savage*, S. P. adjudged, where an Adminiſtrator brought a *Scire facias* againſt the Tertenants of *Savage*, on a Judgment obtained by his Inteſtate in *B. R.* and ſhewed as his Title that Adminiſtration was granted to him by the Archdeacon of *Dorſet*, though the Defendant, without taking Advantage hereof, pleaded over; yet the Court abated the Writ *ex Officio*, for they held that they were obliged to take Notice, that the Place where they ſat was not within the Juriſdiction of the Archdeacon of *Dorſet*; but that if the Plaintiff had not been thus particular, but had declared on an Adminiſtration generally, † and the Defendant taken no Advantage of it, it had been well enough. See Ld. Raym. 856. 8 Mod. 244. 11 Mod. 223. pl. 18. 12 Mod 537, 617. Will. 44, 752. pl. 218. 766. pl. 220. 3 Will. 349. pl. 92. 351, 370. Comyn 17. pl. 9. 2 Barnes Notes C. P. 142. Stra. 412 2 Stra 716, 781. Barnard. B. R. 29. 2 Ld. Raym. 854, 1253, 1510. 2 Stra. 847. Barnard. K. B. 223. Fitzgib. 110. See Salk. 40. pl. 9. 2 Salk. 679. pl. 7. 680. 6 Mod. 134, 199, 226.

† *Qu.* If it had *been* in an *Original Action* how he was to make Profert of the Letters of Adminiſtration without ſhewing who granted them?—The Omiſſion of a Profert would be bad on a ſpecial Demurrer, notwithſtanding it's aided on a general Demurrer by 4 & 5 Ann. *c.* 16. *vide* Hob. 233. 1 Vent. 222. 1 Sid. 98.——In a *Scire facias* it may not be neceſſary to make a particular Profert. See Cro. El. 592.

But if an Adminiſtrator takes out Adminiſtration by an Inferior Ordinary, and on a *Scire facias* has Judgment to have Execution on a Judgment obtained

Carth. 148. 3 Mod. 324. the above Authorities. *Gold* and *Strode* adjudged.

tained by his Inteſtate in *B. R.* and thereupon a *Capias ad ſatisfaciendum* iſſues, on which the Defendant is taken, and the Sheriff ſuffers him to eſcape; in an Action againſt the Sheriff he cannot take Advantage of this Error, for the Court had Juriſdiction over the Cauſe, and the Judgment was only erroneous, but not void.

Carth. 373. *Yeomans and Bradſhaw.* Comb. 392. S. C. adjudged, and the Plaintiff's Writ ſhould abate.

If a Merchant in *London* draws a Bill of Exchange on his Correſpondent in *Newcaſtle* in favour of *J. S.* and the Bill is refuſed, and *J. S.* dies Inteſtate, his Adminiſtrator, on Letters of Adminiſtration taken out in *Durham*, cannot bring an Action on the Cuſtom of Merchants againſt the Drawer and lay the ſame in *London*, for a Bill of Exchange is not equal to Bond or Specialty, which are the Deceaſed's Goods, where they happen to be at his Death, but is a Simple Contract Debt which follows the Perſon of the Debtor, and makes *bona notabilia* where he reſides.

With Regard to the following Perſons, the Law is altered by the 4 *Ann. c.* 16. *ſ.* 26. which reciting, "That great Trouble is frequently occaſioned "to the Widows and Orphans of Perſons dying Inteſtate to Monies, or "Wages due for Work done in her Majeſty's Yards and Docks, by Diſ"putes happening about the Authority of granting Probate of the Wills "and Letters of Adminiſtration of the Goods and Chattels of ſuch Per"ſons; for preventing of ſuch unneceſſary Trouble and Expence, it is "enacted, That the Power of granting Probates of the Wills and Letters "of Adminiſtration of the Goods and Chattels of ſuch Perſon and Perſons "reſpectively is, and is hereby declared to be, in the Ordinary of "the Dioceſe, or ſuch other Perſons to whom the ordinary Power of Pro"bate of Wills, or granting Letters of Adminiſtration, do belong, where "ſuch Perſon or Perſons ſhall reſpectively die; and that the Salary, Wages, "or Pay due to ſuch Perſon or Perſons from the Queen's Majeſty, her "Heirs or Succeſſors, for Work done in any of the Yards or Docks, ſhall "not be taken or deemed to be *bona notabilia*, whereby to found the "Juriſdiction of the Prerogative Court."

4. Of the Probate of Wills, and Granting Adminiſtration by the Biſhop of the Dioceſe.

Godolph. 58. See Gilb. Eq. Rep. 203. * Page 402

The Ordinary hath regularly the Probate of Wills and Granting of Adminiſtration of every Perſon dying within his Dioceſe; this Juriſdiction * he may either exerciſe himſelf, or it may be done by his Official, for it is but a miniſterial Act, and no ways concerns the Biſhop as Biſhop in his Spiritual Capacity, and therefore he may do the Thing by another, for originally the Probate of Wills did not belong to the Eccleſiaſtical Judges.

Godb. 33. *Carter* and *Croſs.* 6 Mod. 145. S. P. *per Holt*, Ch. Juſt. Ld. Raym. 562, 856.

This Power of granting Adminiſtration is annexed to the Perſon of the Biſhop, and therefore if a Biſhop of *Ireland* happens to be in *England*, he may grant Adminiſtration here of any Thing within his Dioceſe in *Ireland.*

Rol. Abr. 908. If a Biſhoprick be vacant, the Dean and Chapter are to grant Adminiſtration.

5. Of

5. Of the Probate of Wills, and Granting Administration, where the Party dies within some peculiar Jurisdiction.

If a Person dies within some peculiar Jurisdiction, the Probate of his Will, as also the Granting of Administration, belongs to the Judge of such Peculiar, which is founded upon a Supposition of an original Composition between him and the Ordinary of the Diocese for that Purpose. ‖

4 Inst. 338. Salk. 40. pl. 10.

‖ See as to *Bona notabilia*, *ante* 400. Div. 2.

These Peculiars are either Regal, Archiepiscopal, Episcopal, or Archidiaconal, in each of which the Owner of (*a*) common Right hath Power to grant Administration.

Salk 41. 6 Mod. 241.

(*a*) Where Administration was granted by a rural Dean, the Goods of the Deceased not amounting to more than 40 *l.* 5 Mod. 424.

6. Of the Jurisdiction of some Lords of Manors in the Probate of Wills.

Although it be regularly true, that at present the Spiritual Court is the only Court that has Jurisdiction in the Probate of Wills and Granting Administration; yet from this general Rule must be excepted all (*b*) Courts-Baron that have had Probate of Wills Time out of Mind, and have always continued that Usage.

(*b*) Such as that in the Manor of *Mansfield*, 43. says, He and those in *Cowle* and *Caversham* in *Oxfordshire*, which the Author of Off. of Exec. himself kept.

This Jurisdiction can only be claimed by Prescription, and therefore a Person who has Administration granted to him by a Lord of a Manor declares, That *per* A. B. *Dominum Manerii cui Administrationis commissio de Jure pertinet per consuetudinem infra Maner. præd. a tempore cujus contrarii memoria hominum non existit usitat. & approbat. debito modo commissa fuit.*

Thom. Entr. 342. Salk. 41.

7. Of the Jurisdiction of some Mayors in respect of the Burgesses within such a Place.

By Custom the Probate of Wills belongs to the Mayors of some Boroughs in respect of the Burgesses, as to Lands devileable in such Boroughs; but as to Goods the same Will may also be proved before the Ordinary,

Off. of Exec. 45. Godolph. 58.

For the Custom of *London* in Relation to Orphans, &c. *vide* Tit. *Custom of London.*

* Page 403 * 8. The Form of Proving a Will and taking out Administration, and therein of Entering a *Caveat*.

Godolph. 60. The Judge may, *ex officio*, or at the Instance of the Party interested, call the Executor to prove the Will; some say he may be cited at the Instance of any Person, to know whether the Party instancing hath any Legacy left him, or not.

Godolph. 58, 59. If the Executor appears not to prove the Will upon the Ordinary's Process, but stands in Contempt, he is excommunicable; but if he appears and makes Oath, that the Testator had *bona notabilia* in divers Dioceses, or within some peculiar Jurisdiction than that wherein he died, he is to be dismissed to prove the Will in the Archbishop's Court, and to exhibit the same under Seal within forty Days next after.

Godolph. 63. Also the Ordinary or Metropolitan, as the Case shall require, may sequester the Testator's Goods until the Executor proves the Will.

Godolph. 61, 62. If it be uncertain whether the Testator be dead or alive, it must be left to the Discretion of the Judge, whether he thinks him so, or not; and if there be good presumptive Evidence in Law to think him dead, then he must prove the Will; as if he be beyond Sea in remote Parts, and it's common and constant Fame, that he is dead, especially if the Executor of such Person be honest, and the Goods are *bona peritura*, and the Testament itself in Favour of Children, or *ad pios usus*.

Godolph. 61. The Time of Proving a Will is left to the Discretion of the Judge, according as the Circumstance of the Case shall require or admit; but regularly it ought to be insinuated within four Months after the Testator's Death.

Godolph. 62. Testaments may be proved either in common Form, as where there is no Contest about the Will; but the Executor presenting the Will before the Judge, without citing the Parties interested, doth depose the same to be the true, whole, and last Will of the Testator, and thereupon the Judge does allow the Will, and fixes his Seal and Probate to it.

Godolph. 62. Or a Will may be proved in Form of Law, as when it is exhibited before the Judge in Presence of the Parties interested, as the Widow and next of Kin, and then the Proof examined and fully heard, and at last allowed.

Godolph. 62. The Difference between the two Probates is this; where a Will is proved in common Form, it was, at any Time afterwards within thirty Years, to be questioned and called in Debate, which it cannot be in case it be proved in Form of Law.

Godolph. 61. If the Executor refuses to prove the Will, or if there be a Will and no Executor named, the Ordinary is to commit Administration *cum Testamento annexo* to some proper Person, from whom he may take Bond for a faithful Administration; but in case there be no Will, then he is to grant Administration to the next of Kin ‡ of the Deceased; and in case of their Refusal, he may grant it to a Creditor, or any other Person desiring the same; and if no Body will take Administration, the Ordinary may grant Letters *ad Colligend' bona defunct.*'

‡ See the Statutes 31 Ed. 3. st. 1. c. 11. & 21 H. 8. c. 5 s. 3, 4. See also the Stat. 4 Ann. c. 16. s. 26. *ante* 401. and *post*. 414.

If there be a testamentary Disposition without an Executor, the Party, in whose Favour the Disposition was made, must cite the next of Kin before he can have Administration.

It

It is usual when there is a Contest about a Will, or when the Right of Administration comes in Question, to enter a *Caveat* in the Spiritual Court, which by their Law is said to stand in Force for (*a*) three Months. Godolph. 258. Golds. 119.

(*a*) As said by Dr. *Talbot* in his Argument of the Case of *Hutchins* and *Glover*. 2 Rol. Rep. 6. Cro. Jac. 463-4.

* But it is said that our Law takes no Notice of a *Caveat*, and that it is but a mere cautionary Act done by a Stranger, to prevent the Ordinary from doing any Wrong, and that therefore, if Administration be granted pending a *Caveat*, this is valid in our Law, though by the Law in the Spiritual Court, it may be such an Irregularity as will be sufficient to repeal it. * Page 404 Rol. Rep 191. Cro. Jac. 463. 2 Rol. Rep. 6.

In the Case of one *Offley*, where Administration was granted to him pending a *Caveat*, and no Notice taken of it, or of the Party that entered it, and for this Cause there was Citation to have this Administration repealed; and on a Motion for a Prohibition in Behalf of *Offley*, it was urged, that the Spiritual Court having once granted Administration, they had executed their Authority, and have no Power over the Administrator afterwards, and a *Caveat* is only for private Information of the Judge, but does not suspend their Jurisdiction; it is *concilium*, but not *præceptum*; no Countenance was ever given to it by the Law; that to give them Liberty to repeal Administration for this Cause, were to give it them in all Cases, and then all the Inconveniences of compelling Distribution will follow, for they may leave out some Formality on Purpose to preserve a Power over the Administrator, or they may make it Cause of Repeal, because Administration is granted to a Child already preferred, or the like; and by the 21 *H.* 8. *c.* 5. they have an Election, which when it is once made, no Man can complain; for none have any Right or Title precedent; and for these Reasons a Prohibition was granted; but on another Day, on Motion for a Consultation, the Court said, that to take from the Spiritual Court all Power of examining the Formality of Granting Letters of Administration, would occasion undue Catching of Administrations, and confound and destroy all their Forms and Course of Proceedings, which are in some Cases necessary; and it was not the Intention of the Statute to alter the Course of Granting Administrations, and to establish irregular Administrations, but only to direct the Ordinary, and to streighten the Liberty they took upon them before; and for the Matter of the *Caveat*, we know not what Weight and Regard it may have in their Law; it may be essentially necessary, that where there is a Contest and Competition, both Parties should be heard before any Thing be done, or the *Caveat* dismissed; they have a Rule, that no Administration should be granted within fourteen Days, that no Party may be surprized, and we have known an Administration granted against this Rule repealed, though no Body else could pretend any Right; but the same Day a new Administration has been granted to the same Party, and in these Kind of Questions Creditors are concerned; and it may be very mischievous to throw off and slight all their Forms; wherefore the Court would advise, and according to the Report of this Case, in 1 *Lev. Moreton* and *Windham*, at another Day, were for discharging the Rule for a Prohibition; and they held, that granting Administration, pending a *Caveat*, was sufficient Cause to revoke, and that was like a *Supersedeas* in our Law, which made a Judgment given afterwards erroneous; but *Kelynge* and *Twisden* held, that the *Caveat* was of no Force to hinder the Grant of the Administration; for it is not a judicial Act of the Court, but only an Entry of a *Memorandum* by a Clerk in Court, for the Giving of Caution; and being no Judgment or Record of the Court, the Court of *B. R.* are as proper Judges of the Force and Effect of it as the Spiritual Courts, and are likewise to see, Lev. 186. *Offley* and *Best*. Sid 293. and 2 Keb. 63, 72. S. C.

that they grant Administration according as they are impowered by the Statutes; and the Court being thus divided, there could be no Rule for discharging the Prohibition.

*Page 405

* 9. Of the Executor's Refusal.

2 Show. Rep. 252. This being a private Office of Trust named by the Testator, and not the Law, he may refuse, but cannot assign the Office.

Off. of Exec. 36-7. Godolph. 140. Vaugh. 144. If the Executor refuses to appear upon the Ordinary's Summons, he is punishable for a Contempt; but yet he cannot be compelled to accept the Executorship, whether he will or not.

Rol. Abr. 907. Plow. 281. And therefore if an Executor refuses before the Ordinary to take upon him the Executorship, the Ordinary may grant Administration *cum Testamento annexo* to another Person; and he can never afterwards be permitted to prove the Will.

Vent. 335. But if the Executor appears and takes the usual Oath before the Surrogate, and afterwards refuses before the Ordinary, yet Administration cannot be granted to another; for having once taken the Oath, he has made his Election, and cannot afterwards refuse the Executorship; and if the Ordinary will not admit him, a *Mandamus* will lie, tho' on Oath taken before a Surrogate, the Ecclesiastical Court have no further Authority.

Off. of Exec. 37. In Case the Ordinary himself is made Executor, he may refuse before the Commissary.

Off. of Exec. 37. But an Executor cannot refuse by any Act *in Pais*, as by declaring, that he would not accept the Executorship, but it must be done by some (*a*) Act entered and recorded in the Spiritual Court, and before the Ordinary.

(*a*) But where *Bacon* Lord Keeper, *Catlin* Ch. Just. and the Master of the *Rolls*, were made Executors, and they wrote a Letter to the Ordinary, signifying that they could not attend the Executorship, and desiring him to commit Administration to the next of Kin of the Deceased, which being recorded, it was held a sufficient Refusal. Cro. Eliz. 92. Off. of Exec. 37. Owen 44. Moor 272. Leon. 135. S. C. and that no Executor named could act after, but an Executor may pray Time to consider if he will act, and Ordinary may give and grant Letters *ad Colligendum* in the *Interim*, but not Administration.

Godolph. 141. 2 Jon. 72. 2 Mod. 146. Vent. 303. 2 Lev. 182. When an Executor hath once administered, he cannot afterwards refuse to prove the Will, because by the Administration he accepts the Executorship upon him, and so hath made his Choice; therefore in that Case the Ordinary ought to compel him to accept the Executorship, and prove the Will.

Rol. Abr. 907. Off. of Exec. 40, 41. Yet it is said, that if the Judge, knowing that one hath administered, will, notwithstanding, accept his Refusal, and commits Administration, that is good, for the Spiritual Judge is the proper Judge of the Matter; but after Refusal and Administration granted to another, the Executor may not recede from it, and go back to prove the Will and assume the Executorship.

Off. of Exec. 40, 41. But if Administration be committed only because the Executor did not upon Process or Summons appear to prove the Will, the Executor may at any Time after come in and prove the Will.

Off. of Exec. 40, 41. If after the Executor hath refused, and the Ordinary hath committed Administration, it appears to the Ordinary that the Executor had administered before, and so determined his Election, he may revoke the Letters of Administration, and enforce the Executor to prove the Will.

If

If an Executor hath once adminiſtered, though he afterwards refuſed before the Ordinary, yet it ſeems he ſtill continues liable to the Creditors, for the Plea is *Ne unq' Executor, ne unq' Adminiſt' come Executor.* Leon. 154-5. Off. of Exec. 40, 41.

If there are ſeveral Executors, and they all refuſe before the Ordinary, he may grant Adminiſtration with the Will annexed. Rol. Abr. 907.

But if there are ſeveral Executors, and ſome of them renounce before the Ordinary, and the Reſt prove the Will, by (*a*) our Law they who renounced may, at any Time afterwards, come in and adminiſter, having the Right in them; and tho' they never acted during the Life of their Companions, yet may they come in and take upon them the Execution of the Will after their Death, and ſhall be preferred before any Executor made by their Companions, becauſe, as the Will is proved, the Ordinary has no Authority to take the Refuſal, and Probate by one Executor intitles all the Executors to ſue. 5 Co. 28. 9 Co. 36. Moor 373. Dyer 160. Hard. 111. 7 Mod. 39. (*a*) Salk. 311. pl. 15. S. P. Where it is ſaid, that the Civilians held, That by their Law a Renunciation was peremptory.

* 10. What Acts amount to an Adminiſtration, ſo that the Party cannot afterwards refuſe. * Page 406

It hath been already obſerved, that if an Executor once adminiſters, he cannot afterwards refuſe to prove the Will, becauſe by the Adminiſtration he has made his Choice, and ſubjected himſelf to the Actions of the Teſtator's Creditors. Off. of Exec. 38. Mod. 213. 2 Will. Rep. 145. 3 Will. Rep. 251, 337. See 12 Mod. 441, 471.

Therefore it is neceſſary to conſider what Acts will amount to an Adminiſtration, and here we may lay down two general Rules: *1ſt*, That whatever the Executor does with Relation to the Goods and Effects of the Teſtator, which ſhews an Intention in him to take upon him the Executorſhip, will regularly amount to an Adminiſtration. *2dly*, That whatever Acts will make a Man liable as an Executor *de ſon tort*, will be deemed an Election of the Executorſhip. Rol. Abr. 917.

Hence it hath been adjudged, that if the Executor takes Poſſeſſion of the Teſtator's Goods, and converts them to his own Uſe, or diſpoſes of them to others, that this is an Adminiſtration. Rol. Abr. 917. Dyer 166. Off. of Exec. 39.

So if he takes the Goods of a Stranger, under an Apprehenſion that they belonged to the Teſtator, and adminiſters them, this amounts to an Adminiſtration. Rol. Abr. 917.

As where the Teſtator being Tenant at Will of certain Goods, his Executor ſeiſes the Goods, ſuppoſing them to belong to the Teſtator, with an Intent to adminiſter; and it was held, that his Intention appearing, this made him Executor in Law. Rol. Abr. 917.

But if an Executor ſeiſes the Teſtator's Goods, claiming a Property in them himſelf, tho' afterwards it appears that he had no Right, yet this will not make him Executor; for the Claim of Property ſhews a different View and Intention in him, than that of adminiſtring as Executor.

If an Executor receives Debts due to the Teſtator, and eſpecially if he gives Acquittances for ſuch Debts, this amounts to an Election of the Executorſhip. Moor 14. And. 11. Rol. Abr. 917.

So if he releaſes a Debt due to the Teſtator. Rol. Abr. 918.

Rol.Abr.917. So if there are two Executors, and one of them hath a Specifick Legacy deviſed to him, and he takes Poſſeſſion of it, without the Conſent of his Co-Executor, this amounts to an Adminiſtration; for a Deviſee cannot take a Perſonal Chattel deviſed to him without the Aſſent of the Executor.

II. Of bringing in an Inventory, and Accounting.

Godolph. 150. Swinb. 401. An Inventory is a full and juſt Deſcription of all the Perſonal Eſtate and Effects which belonged to the Deceaſed, and which by the Civil Law, and alſo by the Statutes of this Realm, Executors and Adminiſtrators are obliged to make, and preſent the ſame to the proper Eccleſiaſtical Judge.

Godolph. 150. The Practice of exhibiting an Inventory was introduced from a Rule in the Civil Law, which ſubjected the Heir to the Payment of his Anceſtor's Debts; which proving very prejudicial to him, as ſuch Debts often amounted to more than the Value of the Inheritance which deſcended to him, it was ordained, that if the Heir would exhibit a true In-
* Page 407 * ventory of all the Goods and Chattels of the Deceaſed, he ſhould be no farther chargeable than to the Value of the Inventory; and ſo much Strictneſs was required by that Law in making an Inventory, that if the Heir neglected it for a Year or more, he was obliged to pay all the Debts and Legacies, though he had not ſufficient of the Teſtator's Eſtate to do it.

Swin. 401. Godolph. 351. The Reaſon of an Inventory with us at this Day, is for the Benefit of Creditors and Legatees, and therefore every Executor is compellable to bring in an Inventory, at the Diſcretion of the Ordinary; and if he preſumes to adminiſter without bringing in ſuch Inventory, he is puniſhable in the Spiritual Court.

But as this Matter of bringing in an Inventory and accounting is enjoined and directed by ſeveral Acts of Parliament, we ſhall here take Notice, and in the firſt Place inſert thoſe Clauſes of the Statutes which are relative to this Matter. By the 31 *E.* 3. *cap.* 9. "Adminiſtrators ſhall be accountable to "the Ordinaries as Executors be in the Caſe of Teſtaments."

By the 21 *H.* 8. *cap.* 5. *par.* 4. it is enacted, "That the Executor and "Executors named by the Teſtator or Perſon deceaſed, or ſuch other Perſon "or Perſons to whom Adminiſtration ſhall be committed, where any Perſon "dieth Inteſtate, or by way of Inteſtate, calling or taking to him or them "ſuch Perſon or Perſons, two at the leaſt, to whom the ſaid Perſon ſo "dying was indebted, or made any Legacy; and upon their Refuſal or Ab-"ſence, two other honeſt Perſons, being next of Kin to the Perſon ſo dying, "and in their Default or Abſence, two other honeſt Perſons; and in their "Preſence, and by their Diſcretions, ſhall make or cauſe to be made a true "and perfect Inventory of all the Goods, Wares, Merchandizes, as well "moveable as not moveable, whatſoever, that were of the Perſon ſo de-"ceaſed, and the ſame ſhall cauſe to be indented; whereof the one Part "ſhall be by the ſaid Executor or Executors, Adminiſtrator or Adminiſ-"trators, upon his or their Oath or Oaths, to be taken before the Biſhops, "Ordinaries, their Officials or Commiſſaries, or other Perſons, having "Power to take Probate of Teſtaments, upon the *Holy Evangeliſts*, to be "good and true, and the ſame one Part indented ſhall preſent and deliver "into the Keeping of the ſaid Biſhop, Ordinary or Ordinaries, or other "Perſon having Power to take Probate of Teſtaments; and the other "Part thereof to remain with the ſaid Executor or Executors, Adminiſ-"trator or Adminiſtrators; and that no Biſhop, Ordinary, or other what-"ſoever Perſon having Authority to take Probate of Teſtament or Teſta-

" ments, refuſe to take any ſuch Inventory or Inventories to him or them " preſented or tendered, to be delivered as aforeſaid, under the Penalty " of 10*l.*"

By the 22 & 23 *Car.* 2. *cap.* 10.‡ it is enacted, " That all Perſons im- " powered to grant Adminiſtration, ſhall, of the reſpective Perſon or " Perſons to whom any Adminiſtration is to be committed, take ſuffi- " cient Bonds, with two or more able Sureties, Reſpect being had to the " Value of the Eſtate, in the Name of the Ordinary, with the Condition " in Form and Manner following: *The Condition of this Obligation is ſuch,* " *That if the within bounden* A. B. *Adminiſtrator of all and ſingular the* " *Goods, Chattels, and Credits of* C. D. *deceaſed, do make, or cauſe to be* " *made, a true and perfect Inventory of all and ſingular the Goods, Chattels,* " *and Credits of the ſaid Deceaſed, which have or ſhall come to the Hands,* " *Poſſeſſion, or Knowledge of him the ſaid* A. B. *or into the Hands and* " *Poſſeſſion of any other Perſon or Perſons for him, and the ſame ſo made* " *do exhibit, or cauſe to be exhibited into the Regiſtry of Court, at* " *or before the Day of next enſuing, and the ſame* " *Goods, Chattels, and Credits, and all other the Goods, Chattels, and Credits* " *of the ſaid Deceaſed, at the Time of his Death, which at any Time after* " *ſhall come to the Hands or Poſſeſſion of the ſaid* A. B. *or into the Hands* " *and Poſſeſſion of any other Perſon or Perſons for him, do well and truly* " * *adminiſter according to Law; and further, do make, or cauſe to be made,* * Page 408 " *a true and juſt Account of his ſaid Adminiſtration, at or before the* " *Day of And all the Reſt and Reſidue of the ſaid Goods,* " *Chattels and Credits, which ſhall be found remaining upon the ſaid Admi-* " *niſtrator's Account, the ſame being firſt examined and allowed of by the Judge* " *or Judges for the Time being, by his or their Decree or Sentence, purſuant to* " *the true Intent and Meaning of this Act, ſhall limit and appoint; and if it* " *ſhall hereafter appear, that any Laſt Will or Teſtament was made by the ſaid* " *Deceaſed, and the Executor or Executors therein named do exhibit the ſame* " *into the ſaid Court, making Requeſt to have it allowed and approved accord-* " *ingly, if the ſaid* A. B. *within bounden, being thereunto required, do render* " *and deliver the ſaid Letters of Adminiſtration (Approbation of ſuch Teſta-* " *ment being firſt had and made) in the ſaid Court, then this Obligation to be* " *void and of none Effect, or elſe to remain in full Force and Virtue*; which " Bonds are hereby declared and enacted to be Good to all Intents and " Purpoſes, and pleadable in any Courts of Juſtice; and alſo that the " ſaid Ordinaries and Judges reſpectively ſhall and may, and are enabled " to proceed to call ſuch Adminiſtrators to account, for and touching " the Goods of any Perſon dying inteſtate; and upon Hearing and due " Conſideration thereof, to order and make juſt and equal Diſtribu- " tion, *&c.*"

‡ See the Part of this Statute which directs Diſtribution. *Poſt.* 427.

But by the 1 *Jac.* 2. *cap.* 17. it is provided, " That no Adminiſtrator " ſhall be cited to any of the Courts to render an Account of the Perſonal " Eſtate of his Inteſtate (otherwiſe than by an Inventory or Inventories " thereof) unleſs it be at the Inſtance or Proſecution of ſome Perſon or " Perſons, in Behalf of a Minor, or having a Demand out of ſuch Per- " ſonal Eſtate, as a Creditor or next of Kin."

Per Holt C. J. even before this Statute, the Ordinary could not *ex officio* cite an Adminiſtrator to account; ſo that really this Statute has no Effect at all, for the Law was ſo before. Salk. 316.

The Inventory is to contain, in ſeparate and diſtinct Articles, all the (*a*) Goods, Chattels and Credits, or (*b*) Debts due to the Deceaſed, and the Prices at which they were valued.

Godolph. 152.

(*a*) And by Swinb. 407. the Order heretofore uſed, was firſt to Inventory and Praiſe the moveable Goods, ſuch as Houſhold-ſtuff, Corn, Cattle, *&c.* then the Immoveable, as Chattels Real, or Leaſes of Lands, and after the Debts due to the Teſtator, which Order, he ſays, is obſerved to this Day. (*b*) That, on a Plea of *Plene adminiſtravit*, all ſeparate Debts

But

Godolph. 152. But such Things as are fixed to the Freehold, and belong to the Heir, as Glass-windows, Wainscot, Fish in a Pond, and Doves in a Pigeon-house, are not to be put into the Inventory.

Godolph. 153. 403. So the Wife's *Parapbernalia*, or such Apparel as is suitable to her Degree and Quality, need not be put in the Inventory, for they survive to her, and are not esteemed Part of the Husband's Personal Estate.

Swinb. 405. By the Ecclesiastical Law, the Time of making and exhibiting an Inventory is left to the Discretion of the Ordinary, who may require it to be done (*c*) sooner or later, according to the Distance the Goods lie from the Executor, and other Circumstances.

(*c*) And according to Godolph. 150. the making an Inventory is to be begun within thirty Days after opening the Testament, and Notice thereof to the Executor, and is to be finished within sixty Days after, unless the Executor and the Testator's Goods, or the greatest Part thereof, be far remote and distant from each other, in which Case the Law doth allow one Year from the Time of the Testator's Death for the making thereof; and during this Time no Suit is to be commenced against the Executor in the Ecclesiastical Court; and in *Godolph.* 225. it is said, that an Executor is to have a competent Time to account, which Time is a Twelve-month.

And as an Explanation to the Manner of bringing in an Inventory and Accounting, and the Necessity thereof, and how these are construed and * Page 409 required by the Common Law Courts, I shall here insert the following Case:

Hill. 6 Ann. Archbishop of *Cant.* v. *Willis.* Salk. 251. pl. 3. In Debt upon an Administration-Bond, and *Oyer* prayed of the Condition, Defendant pleads, 1*st*, That he did exhibit an Inventory by the Time. 2*dly*, That he had administered all according to Law. 3*dly*, That he was not cited to bring in his Accounts, so that no Decree was made concerning them. Plaintiff replies, That the Intestate was bound in a Bond of so much, *&c.* to *J. S.* for Payment of such a Sum, and that *J. S.* had brought an Action of Debt upon that Bond against the Defendant, and had got Judgment; and though divers Goods to the Value of that Debt came to the Defendant's Hands, yet he had not paid it, but had converted them. Defendant makes a frivolous Rejoinder, and upon that the Plaintiff demurs; and the Question made upon the Case is, if the Defendant, the Administrator is bound to bring in his Accounts before the Ordinary in the Ecclesiastical Court, by the Time specified in the Condition of the Bond, not being cited or summoned thereto; and *Holt* Ch. Just. in pronouncing the Opinion of the Court said, That they were all unanimous, that he was obliged to account tho' not cited or summoned; and he said first, that an Executor or Administrator is obliged to account is very plain, by the 31 *E.* 3. *st.* 1. *c.* 11. at the End of the Statute, where they are made accountable to the Ordinary, as Executors be in Case of Testament, and tho' the Ordinary had no Power to oblige them to account upon Oath; yet if they were sued in Chancery by any Creditor for the Discovery of Assets, there they were obliged to account upon Oath, and the Ordinary could not relieve then. *Noy* 78. 2 *Inst.* 600. but that the Account given in before the Ordinary should be looked into, and unravelled. 2*dly*, if a Legatee comes to sue for his Legacy, he may unravel the Account given in before the Ordinary, because he cited them into the Spiritual Court, and has no Remedy elsewhere for his Legacy; but if the Executor or Administrator will pay the Legacy, then he cannot unravel their Accounts, because when the Legacy

For the Ordinary could not dispute the *Item*, or require Proof of their Truft, as in *Noy* was attempted, but the Creditor may sue at Common Law, and then Payment will be tried by Common Law Proof, even by one Witness

Debts mentioned in the Inventory shall be accounted Assets in the Executors Hands; for it is as much as to say, That they may be had for demanding, unless the Demand and Refusal be proved. Salk. 296. pl. 3. ruled upon Evidence by *Holt*. C. J. See *infra* 417.

Legacy is paid, this is the End of their Suit; as in *Raym.* 470. *Boon*'s Caſe. As to the principal Point, this Statute 22 & 23 *Car.* 2. *c.* 10. was made to make the Wife and next of Kin as Legatees, after all Debts paid, and they are to ſue for their Legacies or Shares in the Eccleſiaſtical Court; for the Law was defective before, in that the Ordinary had no Power to compel a Diſtribution, becauſe the Adminiſtrator had the ſame Power as the Executor; and after Adminiſtration committed, the Ordinary's Power was at an End, and he had nothing more to do with the Goods of the Inteſtate; but now this Statute was made to aſcertain and ſettle a Diſtribution, and the Wife and next of Kin may compel the Adminiſtrator to make ſuch Diviſion and Diſtribution, and he is bound at his Peril to account by the Time limited; and if not done, he muſt ſhew ſome Reaſons wherefore it was not done; as that no Court was then held, &c. or ſome other Matter which rendered it impoſſible to account by that Time; and it appears by *Co. Ent.* 128. that the Condition of Adminiſtration-Bonds before this Statute was, that he ſhould account when thereunto required; not *ex officio*; but now the Act of Parliament enjoins him to account peremptorily before ſuch a Time, and therefore he is bound at his Peril to do it; and in all Caſes where a Man is bound in a Bond to do a Thing, he is bound at his Peril to do it; as if a Man is bound in a Bond, with Condition to pay Money at ſuch a Time and Place, although the Obligee does not come there at the Time, ſo as that he cannot pay it; yet if the Obligor is not there ready to pay it, and does not ſtay there till the laſt Inſtant or Sun-ſet, he forfeits his Bond, and he muſt plead that he was there and ſtaid till Sun-ſet, and had the Money ready, and that nobody came there to receive it; and if a Requeſt be to be made, he muſt be there ready to be requeſted; and he took a Difference between Rent payable by Reſervation only, and when a Bond is given for it; for in Caſe of the Bond he forfeits it, if he be not there ready to pay it, though no Demand be made, * *Hob.* 8. *Baker* and *Spain*. Suppoſe one is bound in a Bond conditioned to do a Thing, which without the Concurrence of the Obligee cannot be done, as to levy a Fine in *C. B.* in *Oct. Hill.* if no Writ of Covenant be ſued out, yet he is bound to be there at the Time ready to levy it, and muſt plead ſo, and that no Writ of Covenant was ſued out; ſo here, if he could not account, becauſe no Court was holden, he ought to have pleaded it, for he ought to have done all in his Power; but it is moſt certain the Eccleſiaſtical Courts are always open, and the Statute makes no Alteration as to the Accounts. But then he made another Point of the Caſe, and ordered Counſel to ſpeak to it the next Term; the Point was this, The Bar, which ſays, he was never cited to account, is ill, becauſe he ought to have accounted at his Peril, without any Citation; but then this leaves Room for an Implication, that he may have accounted, though not cited; for he only ſays, he was not cited to account, and then the Replication, which aſſigns for Breach, Non-payment of ſuch a Debt is ill, and does not maintain the Declaration as to the not accounting; and the Meaning of the Statute was not, that he ſhould pay all Debts *ex Officio*, but as the Creditors called him to pay them, and then whether the Plaintiff ſhall have Judgment upon the inſufficient Bar of the Defendant, or whether by his Replication it appears he has no Cauſe of Action, and ſo cannot have Judgment, is a Point fit to be argued, and cited 1 *Lutw.* 182: 8 Co. 120. Dr. *Bonham*'s Caſe, and 130. *Turner*'s Caſe.

*Page 410

12. Where Administration unduly obtained may be revoked or repealed.

Cro. Car. 62. *Fotherbie's* Case. Rol. Abr. 303. Style 10. 6 Co. 18. Cro. Eliz. 459. Moor. 396.

It seems to have been formerly holden in some Cases, that if the Ordinary once granted Administration, he could not afterwards revoke or repeal it; for having one executed his Power, he had nothing further to do in the Affair.

Sid. 179. Sir *George Sands*'s Case. Keb. 683. and Raym. 93. S. C. in which last Book a further Reason seems to be given, *viz.* that our Law is to determine who is the next of Kin within this Statute, and that by our Law the Father is next of Kin to his Child, *vide* 3 *Co.* in *Ratcliff*'s Case, and Bro. Tit. *Administration* 47. But 3 *Salk.* 22. *Feme Covert* died intestate; Administration granted to her next of Kin; Husband sues for a Repeal; Prohibition denied, for Ordinary could not grant Administration to any but the Husband.

Hence in Sir *George Sands*'s Case, where a Prohibition was prayed, because Sir *George* had the Administration of his Son's Goods granted to him; and since that a Woman, pretending she was his Wife, sued to have the Administration repealed, and a Prohibition was granted; for though the Statute says, the Ordinary may grant Administration to the Wife or next of Kin; yet when he has granted it to the next of Kin, as the Father is, he has executed his Power, and his Hands are closed, and he cannot repeal it.

Latch. 67. Dyer 372. Sid. 280. Lev. 157. Keb. 846, 854. 2 Keb. 63, 72. Sid. 293, 370. Lev. 186. 2 Lev. 55.

But notwithstanding these Opinions, it is now agreed, that the Ordinary may revoke or set aside an Administration granted to the next of Kin, and that for several Causes; as if they forge or suppress a Will, if they come too hastily to take out Administration within the fourteen Days, if they go beyond Sea, become *Non compos*, or if they take out Administration without Security to account and exhibit Inventories, or if there be a Residuary Legatee; and may in General, for any Fraud used in obtaining it; for it would be absurd to allow a Court Jurisdiction herein, and at the same Time deprive them of the Liberty of vacating and setting aside an Act of their own, which was obtained from them by Deceit and Imposition.

* Page 411

* 13. How far a Repeal makes all mesne Acts void.

Plow. 277. *Greysbrook* and *Fox*. 2 Lev. 182. 2 Jon. 72. Vent. 303. (*a*) And therefore if an Executor sells a Term, and afterwards refuses before the Ordinary, and Administration is granted to *J. S.* who likewise sells this Term to another, the first Vendee shall have it. 2 Lev. 183. said *aguendo*.

If the Testator makes a Will and appoints an Executor, and the Ordinary, without taking Notice of any such Will, grants Administration to *J. S.* and afterwards the Executor comes in and proves the Will, such Executor shall regularly avoid all mesne Acts done by the Administrator; for the Executor, by being made such, had an (*a*) Interest, which the Ordinary could not deprive him of.

Plow. 279. *Peckham*'s Case. 4 Eliz. cited in *Greysbrook* and *Fox*.

But if the Ordinary grants Administration, and after there appears to be an Executor, if the Administrator pays Debts, Legacies, or Funerals,

which

which the Executor ought to have paid, in Treſpaſs againſt him by the Executor, he ſhall *(b)* recoup ſo much in Damages.

(*b*) So it was held in Equity, where a Widow poſſeſſed herſelf of the Perſonal Eſtate as Executrix under a revoked Will, and paid Debts and Legacies, but had no Notice of the Revocation, that ſhe ſhould be allowed thoſe Payments, but ordered the Leaſes ſhe had made to be ſet aſide. Chan. Ca. 126.

If the Teſtator makes a Will, and thereof appoints *A.* Executor, and afterwards makes a ſecond Will, and thereof appoints *B.* Executor, and *A.* has the Probate of the firſt Will granted to him, by virtue of which a Debtor to the Teſtator pays him a Debt without Notice of any ſecond Will, and has a Releaſe from him; yet, upon *B.*'s proving the ſecond Will, and Repeal of the Probate of the firſt, he may compel the Debtor to pay the Money over again; for though this be a particular Hardſhip, yet the Inconveniency would be much greater, to allow the Ordinary to make any other Executor than whom the Teſtator had made.

Rol. Abr. 919. 16 Car. 1. in *B. R.* between *Greves* and *Weigham*; ſaid to be adjudged by the Advice of all the Judges in Serjeants Inn, in an Action brought by *B.* againſt ſuch Creditor.

But in a Caſe where the Plaintiffs, as Executors, had a Judgment againſt the Defendant, and then there was a Suit in the Spiritual Court before the ſame Judge, who granted Letters of Adminiſtration to the Plaintiff to repeal them; and the Defendant therefore prayed that Execution might not go out againſt him till the Matters in the Spiritual Court ſhould be determined; but the Court denied it, for this Reaſon, that if a Debtor pay Money on a Judgment and Execution to one who is Executor *de facto*, having a Probate under the Seal of a Prerogative Court, he ſhall never be forced to pay it again; and here the Suit to repeal the Adminiſtration being before the ſame Judge who granted it, can have no Influence only from the Time of the Judgment of Repeal; but *(c)* if it had been before the Delegates by way of Appeal, it might be otherwiſe.

Hill. 25 & 26 Car. 2. between *Digby* and *Hollis* v. *Wray* in *B. R.*

(*c*) That an Appeal ſuſpends the former Sentence, but a Citation is in Nature of a new Suit, and has no Effect till there be Judgment on it. 6 Co. 18. b. Lev. 158. Raym. 224. 2 Lev. 90. S. P.

It is clear, that if the Ordinary grants Adminiſtration to *(d)* a Stranger, and he is cited by the next of Kin to have it repealed, pending which Suit the Adminiſtrator *(e)* ſells the Goods, and then the Adminiſtration is repealed; that in this Caſe the Sale is good, for the Adminiſtrator acted under a lawful Authority, which veſted the abſolute Property of the Goods in him; and though the Sale had been fraudulent, yet it could not be avoided by the ſecond Adminiſtrator; but as to Creditors it may, by the 13 *Eliz. cap.* 5.

* Page 412 6 Co. 18. b. *Packman*'s Caſe. Cro. Eliz. 459. Moor 396.

S. C. (*d*) So if Adminiſtration be committed to a Creditor, and after repealed at the Suit of the next of Kin, he ſhall retain againſt the rightful Adminiſtrator; and his Diſpoſal of the Goods, even pending the Citation, till Sentence of Repeal, ſtands good. Salk. 38. pl. 6. Ld. Raym. 684. Com. Rep. 96. pl 65. *per Holt* Ch. Juſt. (*e*) But where an Adminiſtrator releaſed to a Creditor, and after the Adminiſtration was revoked, and the Releaſe held void. Brown. 51.

So in Debt for Rent, where on the Pleadings the Caſe was, Leſſee for Years dies inteſtate, and Adminiſtration was granted of his Goods to *A.* who aſſigns this Term to *B.* who aſſigns to *C.* who ſurrenders to the Reverſioner; afterwards a third Perſon cites the Adminiſtrator before the Ordinary to repeal the Adminiſtration, who confirms the ſame; then the third Perſon appeals from that Sentence to the Dean of the Arches, where the Sentence is avoided, and Adminiſtration granted to the Appellant; and whether this Avoidance of the Sentence ſhould avoid all Acts done by the

Raym. 224. *Syms* and *Syms* 2 Lev. 90. S. C. by the Name of *Semaine* and *Semaine*.

Administrator before the Action; and it was resolved, according to the above Case, that it should not.

Yelv. 83. *Barnehurst* and Sir *Charles Yelverton.* Brownl. 91. S. C. *Ante* 387.

But after the Administration is repealed, the Authority of the Administrator is determined, and therefore if he obtains Judgment in an Action of Debt on a Bond due to the Intestate, and then the Administration is repealed, he cannot proceed to execute that Judgment; if he doth, the Party will be discharged upon a Motion, because the Execution *erronice emanavit*, for he had no Authority but by virtue of a Commission from the Ordinary, and when that was determined, his Authority ceased.

2 Saund. 137. *Turner* and *Davies.* Mod. 62. 2 Keb. 668. S. C. See Fitzgib. 202, 257. 10 Mod. 21, 389. Vern. 25. Cas. 20. Comyns 150. pl. 102. 2 Will. Rep. 576. pl. 188. 3 Will. Rep. 81, 88, 89.

So in an *Audita Querela*, the Plaintiff says, that *E. P.* died intestate, and that *Davies*, the now Defendant, had administered his Goods, and that some of the Money came to the Plaintiff, and that *Davies*, as Administrator, brought Trover and Conversion for the Money, and had Judgment to recover, and before Execution sued, the Administration was repealed and granted to another, and that notwithstanding he threatens to take the now Plaintiff in Execution, upon which there is a Demurrer; and the Question was, whether, seeing the Trover was for a Wrong done in the Administrator's Time, and for which he might have declared in his own Name, without naming himself Administrator, and shall pay Costs if it goes against him, whether he shall not take out Execution after the Administration is repealed; and the whole Court held, that he could not; for tho' it be a Wrong done to the Administrator, yet when the Money is recovered, it is Assets, and the second Administrator must be put to another Action, to recover it out of his Hands, which is a Circuity the Law will not allow.

14. What Things an Executor may do before Probate of the Will.

Off. of Exec. 33. Godolph. 144. Rol. Abr. 917. 5 Co. 27. Co. Lit. 292.

An Executor derives all his Interest from the (*a*) Will; and as it is that which gives him a Right, so there are several Acts which he may do, and which will be valid; though done before Probate; for though the Spiritual Court may compel him to come in and prove the Will, or renounce the Executorship; yet this is only looked upon as (*b*) a Ceremony, which he may comply with after several Acts done by him.

(*a*) But an Administrator derives his whole Authority from the Ordinary, and therefore can do no Act, unless he has Letters of Administration granted to him. Salk. 303. Skin. 87. pl. 5. (*b*) That, however, proving the Will is necessary, because thereupon an Inventory is to be exhibited, and other Acts to be done, which are for the Benefit of Executors and Legatees. Hutt. 30.

Off. of Exec. 33. Godolph. 144. 2 And. 151. Plow. 277. * Page 413

Therefore an Executor, before Probate, may possess himself of the Testator's Goods, and may enter into the House of the Heir (if not locked) and take Specialties and other Securities for Money due to the Testator.

* So an Executor, before Probate, may pay Debts and Legacies, receive Debts, make Acquittances and (*c*) Releases of Debts due to the Testator, and take Releases and Acquittances of Debts owing by the Testator.

Off. of Exec. 33-4. 5 Co. 28.

(*c*) Where a Release given by an Executor for a particular Purpose, tho' it contained general Words, yet it was held to extend only to the Things intended to be released, *vide* 2 Lev. 214. *Morris* and *Wilford*, 2 Mod. 108. 2 Jon. 104. 2 Show. 46. pl. 32. 3 Keb. 814. 840. S. C. Eq. Abr. 241. Vern. 32. 2 Vern. 114, 136, 522, 563. 2 Ld. Raym. 1306. 2 Will. Rep. 332 3 Will. Rep. 330, 381. pl. 105. 132 pl. 30. 316, 321. Pre. Chanc. 49, 173, 540, 544. 10 Mod. 165, 171, 254, 255, 324, 423, 425. 12 Mod. 153.

Also

Alſo an Executor, before Probate, may ſell, give away or diſpoſe, as he thinks proper, of the Goods and Chattels of the Teſtator. Off. of Exec. 34.

So an Executor, before Probate, may aſſent to a Legacy, and ſuch Aſſent ſhall veſt the Intereſt in the Legatee. Off. of Exec. 34.

So if a Bond be made payable to the Teſtator, with a certain Penalty, that it ſhall be paid by ſuch a Day, and the Teſtator dies before the Day, the Principal Sum muſt be paid his Executor by the Day, although he did not prove the Will by that Day; otherwiſe the Penalty is forfeited.* Off. of Exec. 34.

* But now the Penalty is ſaved by bringing Principal, Intereſt, and Coſts, into Court, by 4 *Ann. c.* 16. *ſ.* 13.

Upon this Foundation, that it is the Will which veſts an Intereſt in the Executor, it is clearly agreed, that an Executor may, before Probate, commence an Action in Right of the Teſtator, but he cannot declare before Probate; † for without producing his Letters Teſtamentary he cannot aſſert his Right in Court; but as ſoon as he has theſe, the Impediment is (*a*) removed *ab initio*. Rol. Abr. 917. Raym. 481. Salk. 302. S. P. admitted, Comb. 371.

(*a*) But if *A.* be arreſted at the Suit of an Executor, before Probate of the Will, and after pays Money to a Stranger, and continues two Months in Priſon, the Arreſt *quoad* the Stranger is illegal, and *A.* ſhall not be adjudged a Bankrupt from that Time, ſo as to avoid the Payment made to the Stranger; for though the Arreſt, as to the Executor and Party is lawful; yet it is good only by Relation, but no ſuch Relation ſhall prejudice a third Perſon. 3 Lev. 57. *Duncomb* and *Walter*, Raym. 479. Vent. 370. S. C. Skin. 22. pl. 22, 87. pl. 5. S. C.

† *Qu.* If he may not declare generally making a Profert of the Letters Teſtamentary, tho' he has not obtained Probate; for, if *Oyer* is demanded, it can only ſtay the Suit, till Probate obtained.

Alſo an Executor, before Probate of the Will, may maintain Treſpaſs, (*b*) Trover, or Detinue for the Goods of the Teſtator, and declare as of his own Poſſeſſion. Off. of Exec. 35. 8 Co. 144. Yelv. 33, 83, 125. Cro. Car. 208, 227. Salk 302.

(*b*) May maintain Trover in his own Name before the Seiſure of the Goods or Probate of the Will. Carth. 154. *per Curiam*.

So an Executor may avow for Rent, where a Reverſion for Years comes to him from his Teſtator. Salk. 302.

So if an Executor be intitled to the next Preſentation to a Church which becomes void, and he grants it to another, the Grantee may maintain a *Quare Impedit* for it, without producing the Probate of the Will; for the Executor himſelf, before Probate, might have maintained this Action on his own Poſſeſſion. Off. of Exec. 35.

(F) What Perſons are intitled to Adminiſtration.

BEfore the Statute of *Weſt.* 2. *cap.* 19. the Ordinary had the abſolute Diſpoſal of Inteſtates Eſtates; and as that Statute firſt ſubjected them Raym. 497.

153, 291, 411, 496, 527, 528, 573, 611, 613. Fitzgib. 78. Caſ. Temp. Talb. 217, *&c.* 226, 240. Str. 70, 440 Andr. 246. 2 Stra. 1028. 2 Barnard. K. B. 183. Caſ. Temp. Hardw. 165. See Andr. 110. Ld. Raym. 263, 678, 708. Salk. 298. pl. 10. Carth. 426. Comb. 444, 449. Salk. 311. pl. 16.

them to an Action at the Suit of Creditors; ſo from thence they found, as my Lord *North* obſerves, that what was before very beneficial to them began to be very troubleſome, which obliged them to put the Ad-
* Page 414 * niſtration into other Hands, taking Security to ſave them harmleſs from Suits.

2 Inſt. 397. Co. Lit. 133. Rol. Abr. 906. But this Metod did not intirely free them from the Trouble they had before; for ſuch Perſons, being looked upon as Servants or Attornies to the Ordinaries, could not ſue for, nor gather in the Inteſtate's Eſtate.

But they were eaſed herein by the Statute 31 *E.* 3. *cap.* 11. which enacts, "In Caſe where a Man dieth Inteſtate, the Ordinaries ſhall de-
" pute the next and moſt lawful Friends of the dead Perſon Inteſtate
" to adminiſter his Goods, which Deputies ſhall have an Action to demand
" and recover, as Executors, the Debts due to the ſaid Perſon Inteſtate in
" the King's Court, for to adminiſter and diſpend for the Soul of the
" Dead, and ſhall anſwer alſo in the King's Court to others to whom the
" ſaid dead Perſon was holden and bound, in the ſame Manner as Executors
" ſhall anſwer, and they ſhall be accountable to the Ordinaries, as Executors
" be in Caſe of Teſtament."

And by the 21 *H.* 8. *cap.* 5. it is enacted, "That the Ordinary ſhall
" grant Adminiſtration to the Widow, or next of Kin of the Perſon de-
" ceaſed, or to both."

Raym. 498. Hereupon the Common Law was to judge who were the beſt Friends; and therefore if there were Huſband or Wife; in Default of them, Son or Daughter; in Default of them, or their Children, Father or Mother; in Default of them, Brothers or Siſters; in Default of them, or their Children, Uncles or Aunts, the Ordinary was compellable to grant Adminiſtration to them in their ſeveral Orders.

Raym. 498. But as they had a Liberty by the Statute of granting Adminiſtration to the Wife or next of Kin, ſo alſo had they a Liberty, where there were ſeveral in an equal Degree of Kindred, to prefer whom they pleaſed, which Liberty they made Uſe of on Pretence of avoiding Confuſion, and was a Matter of great Advantage to their Juriſdiction; for hereby they choſe him that was moſt obſequious to them; and when they called him to account, upon Pretence of beſtowing the Overplus for the Good of the Deceaſed's Soul (a Device in thoſe Popiſh Times to make Profit for the Clergy) they diſpoſed of the Overplus as their own.

(*a*) Hob. 191. Cro. Car. 62. Jon. 228. Hob. 83. Sid. 179. But it came afterwards to be ſolemnly (*a*) reſolved, That the Ordinary, after Adminiſtration granted by him, could not compel the Adminiſtrator to make Diſtribution; but it being very unreaſonable that one Perſon ſhould run away with the whole Perſonal Eſtate, though there were ſeveral others in equal Degree of Kindred with him; this Miſchief was remedied by the 22 & 23 *Car.* 2. *c.* 10. which allows all thoſe, who are in equal Degree, to come in for a Diſtributive Share, though one only, or though a Creditor or Stranger takes out Adminiſtration.

4 Co. 51. b. *Ognel's* Caſe. Rol. Abr. 910. Cro. Car. 106. Mod. 231. Show. 351. Raym. 93. Sid. 409. It ſeems to have been always holden, that the Huſband was intitled to Adminiſtration as beſt Friend to his Wife, within the Words of the Statute 31 *E.* 3. *ſt.* 1. *c.* 11. but there being ſome Doubt, whether ſince the Statute of 22 & 23 *Car.* 2. *c.* 10. he was not obliged to make Diſtribution amongſt the Reſt of her Kindred, it was thought proper to ſettle this Matter by a ſub-ſequent Law.

And accordingly by the 29 *Car.* 2. *cap.* 3. *par.* 25. it is enacted, "That
" neither the ſaid Statute 22 & 23 *Car.* 2. *c.* 10. nor any Thing therein
" contained, ſhall be conſtrued to extend to the Eſtates of Feme Coverts
" that ſhall die Inteſtate, but that their Huſbands may de mand and have
Ad-

" Administration of their Rights, Credits, and other Personal Estates, and " recover and enjoy the same as they might have done before the Making " of the said Act."

* Also since the Statute 22 & 23 *Car.* 2. *c.* 10. the Ordinary may grant Administration to the Wife or next of Kin, at his Election, but then she must have her distributive Share; also the Ordinary may grant Administration *quoad* Part to the Wife, and as to the other Part to the next of Kin; in which Case neither can complain, since the Ordinary need not have granted any Part of the Administration to the Party complaining. * Page 415 Sid. 179. Raym. 93. Show. 351. Salk. 36 pl. 2. 3 Danv. 407. pl. 1. Holt 42. pl. 1.

If there be Grandfather, Father and Son, and the Father dies intestate, the Son shall have the Administration, and not the Grandfather, tho' they be both in equal Degree, as to Nearness of Kindred. 2 Vern. 125. said *arguendo*.

(G) In what (a) Manner the Ordinary may grant Administration, and herein of granting it to one or more, or for a particular Thing.

(a) Whether a Person's giving Security and an Entry in the Registry of the Administration, be sufficient without taking out Letters of Administration, *vide* Show. 406, &c.

THere hath been some (b) Doubt whether the Ordinary could grant Administration to one during the Absence of the Person appointed Executor. The Reasons offered against it were, that his Authority herein was intirely regulated by the Statutes, which mention no such Administrator; that Creditors would be put to great Hardships, in being obliged at their Peril to take Notice of the Return of such absent Person, which determining the Authority of the Administrator would put them under a Necessity of commencing their Actions a new, which would be great Delay and Expence to them; but notwithstanding these Reasons, it is now clearly (c) agreed, that the Ordinary may grant Administration during the Absence of another, and that for the same Reasons, for which he may grant Administration during the Nonage of an Infant Executor, or one intitled to Administration; for without this Power the Inconveniency to Creditors would be much greater, in that there would be no Person against whom they could commence their Actions, nor any one to take Care of the Deceased's Estate or Effects.

(b) 4 Mod. 14, 15.

(c) 5 Co. 9. Sid. 185. Keb. 682. and by 1 Rol. Abr. 908. if the Person intitled to Administration be outlawed, in Prison, or beyond Sea, the Ordinary may grant Administration to another, for which is cited 34 H. 6. 14. S. P. admitted. & *vide* Salk. 42. pl. 11. See 3 Salk. 23. 2 Ld. Raym. 1071. 6 Mod. 304. Lutw. 342.

Also there appears to have been some Doubt whether the Ordinary could grant Administration *pendente lite* of a Will; and in *Moor* it is said *Semble per Cur.* that he could not. (*Vide infra.*) Moor 666. *Robin's* Case, but in 2 Show. 69. it seems to be taken for granted, that there may be an Administrator *pendente lite* of a Will; for there the Question was, Whether such an Administrator was liable to an Action, and there said to be clearly agreed, that he was, for that he was fully Administrator for the Time. (*Vide infra.*)

And in *Carth.* it is reported as the Opinion of the Court, that Administration *pendente lite* concerning a Will, is utterly void, and a Difference there taken, where there is a Controversy in the Spiritual Court concerning the Right of Administration, and where it is concerning a Will; for in Carth. 153. *Frederick* and *Hook*.

the first Case an Administration granted *pendente lite* is good; but it is otherwise where the Controversy is concerning a Will, for he who comes in under a Will shall avoid all that which an Administrator can do. (*Vide infra.*)

Mich. 1731. between *Wollaston* and *Walker*. 2 Will. Rep. 576. pl. 188.

But this Matter came fully to be considered in a late Case, in which it was determined, that the Ordinary may grant Administration *pendente lite* of a Will, and that it depended on the same Reasons by which he is enabled to grant Administration *durante minoritate* or *absentia*.

Fitzgib. 202. Barnard. K. B. 423. See Andr. 666.

*Page 416 2 Vern. 514. *Adams* and *Buckland*.

* The Ordinary may grant Administration to two, or more, and if one of them dies, yet the Administration does not cease; for it is not like a Letter of Attorney to two, where by the Death of one, the Authority ceases; but it is rather an Office, and Administrators are enabled to bring Actions in their own Names, for they come in the Place of Executors, and therefore the Office survives.

Rol. Abr. 908. Salk. 36. pl. 2.

Also the Ordinary may grant Administration as to a particular Thing or Place to one, and so of another Part of the Intestate's Estate to another; but he cannot grant several Administrations for one and the same Thing; as if the Intestate leaves a Bond-Debt of 100 *l.* or a Horse, *&c.* for these Things being intire Things, it would be absurd, that two Persons should have a Right to them.

(H) What shall be deemed the Testator's Personal Estate, or Assets in the Hands of the Executor: And herein,

1. What shall be such an Interest vested in the Testator, as shall go to his Executors.

Off. of Exec. 52. Godolph. 180.

ALL the Personal Estate whereof the Testator died possessed, whether it consists in Chattels Real, as Leases for Years, Mortgages, *&c.* or Chattels Personal, as Houshold Goods, Money, Cattle, *&c.* the first of which the Civil Law distinguishes by the Name of immoveable Goods, the latter into moveable, belong to the Executors, and are (*a*) Assets in their Hands for Payment of the Testator's Debts and Legacies.

(*a*) For Assets in the Hands of the Heir, *vide* Tit. Heir and Ancestor.

Off. of Exec. 57, 58.

And as the Executor represents the Testator as to his Personal Estate, therefore, let the Value of the Thing be ever so inconsiderable, yet the Executor shall have the same Interest as the Testator had in it; as if the Testator had Dogs, Ferrets, *&c.* they belong to the Executor; and if taken from him, the Law gives him the same Remedy that the Testator had.

Off. of Exec. 95. *vide* Tit. Master and Servant.

Also he hath the same Interest in an Apprentice that the Testator had, and shall be bound according to his Testator's Covenant, to provide for such Apprentice, *&c.*

Off. of Exec. 56.

So of a Debtor in Execution at the Suit of the Testator, he has an Interest in the Body, which is a Pledge for the Debt, and the Prisoner cannot be discharged without the Concurrence of the Executor.

And as the Law lays the Burden of performing the Teſtator's Will on the Executor, and for that Purpoſe gives him the Perſonal Eſtate; ſo it ſuppoſes and veſts the Intereſt in him before he has actually reduced the Goods to his Poſſeſſion, and therefore all the Teſtator's Perſonal Eſtate, how remote ſoever ſituated, is (*a*) Aſſets in the Hands of the Executor.

Off. of Exec. 65. Rol Abr. 921. Hob. 265.

(*a*) And therefore where the Jury found Aſſets in *Ireland*, it was held Surpluſage, and that if the Executor hath Goods in any Part of the World, he ſhall be charged with them. 6 Co. 47. a.—But if an Executor lives in *London*, and his Teſtator hath Goods in *Briſtol*, though the Executor hath ſuch an immediate Poſſeſſion of thoſe Goods, that he may maintain Trover for them in his own Name, and the Damages recovered ſhall be Aſſets in his Hands; yet if he doth not recover ſo much as the Goods are really worth (if there be no Default in him) he ſhall anſwer for no more than he recovers; and if the Goods are periſhable, and are impaired, without any Default in him, either to preſerve them, or to ſell them at the full Value, he ſhall not anſwer for the firſt Value, but may give that Matter in Evidence to diſcharge himſelf; but if he neglects to ſell the Goods at a good Price, and afterwards they are taken from him, there the Value of the Goods ſhall be Aſſets in his Hands. 6 Mod. 181. ruled on Evidence by *Holt* Ch. Juſt.

* But Debts due to the Teſtator, whether by Bond, Statute, Judgment, the Arrears of Rent, *&c.* are not Aſſets till they are recovered by the Executor, but only Choſes in Action; yet if Executor releaſes the Debt, he releaſes the Action, and is anſwerable to the Value.

* Page 417 Off. of Exec. 65. Owen 36.

Alſo as to Chattels Real, ſuch as an Intereſt for Years in Advowſons, Commons, Fairs, Houſes, Lands, Markets, theſe, though they go to the Executor, yet is not the Poſſeſſion in him till he has actually entered; but a Leaſe for Years of Tithes is deemed to be in the actual Poſſeſſion of the Executor, becauſe of this there can be no Entry.

Off. of Exec. 60.

And as the Executor's Intereſt veſts immediately upon the Death of the Teſtator, ſo it hath been always holden, that an Executor or Adminiſtrator may bring Treſpaſs for Goods taken away after the Teſtator's Death, though before Probate or Adminiſtration granted, and that their Intereſt ſhall have Relation to the Time of his Deceaſe.

Dyer 110. 5 Co. 88. Off. of Exec. 49. Comb. 451.

But the abſolute Property of the Goods muſt have been veſted in the Teſtator, ſo as to intitle the Executors, or to make them Aſſets in their Hands; and therefore if the Teſtator takes a Bond for another in Truſt, and dies, this is not Aſſets in the Hands of his Executor; ſo if the Obligee aſſigns over a Bond, and (*b*) covenants not to revoke, and dies, that Bond is not Aſſets in the Hands of the Executor of the Obligee.

Salk. 79. pl. 1. *Deering* and *Torrington*.

(*b*) Where Goods remain Aſſets notwithſtanding a fraudulent Bill of Sale of them. Cro. Eliz. 405. [And as to Creditors ſee *ſtat.* 13 *El. c.* 5. *& ante* 411, 412.]

So where an Executor pleaded, that he had *riens in ſes mains*, but certain Goods diſtrained and impounded; and it was adjudged, that they were not Aſſets to charge him.

Cro. Eliz. 23.

The Teſtator pawned his Goods, and the Executor redeemed them with his own Money, and retained them till he was ſatisfied; and it was adjudged, That he might retain them, the Property being altered by Payment to the Value, and that they were not Aſſets.

Keilw. 63.

2. How far Debts due to the Teſtator are Aſſets.

All Debts due to the Teſtator, whether by Judgment, Statute, Recognizance, Mortgage, Bond, *&c.* are Aſſets, but the Executor is not to be charged with them till he has received the Money.

Off. of Exec. 65. Rol. Abr. 920. Owen 36.

Off. of Exec. 65. Rol. Abr. 920.

So if the Executor, in Right of the Teſtator, recovers any (*a*) Damages for any Treſpaſs † done to the Goods of the Teſtator, or for the Breach of any (*b*) Covenant or Contract made with the Teſtator; all ſuch Damages thus recovered ſhall be Aſſets in the Hands of the Executor.

(*a*) So Money recovered by him, by Decree in a Court of Equity, ſhall be Aſſets. Moor 858. Brownl. 76. 2 Chan. Ca. 152.

(*b*) Though the Covenant founded in the Realty, as for not aſſuring of Lands, *&c.* yet if it was broken in the Teſtator's Life-time, the Executor ſhall have the Action. Off of Exec. 65.

† See 4 E. 3. *c.* 7. *poſt.* 439.

Off. of Exec. 71.

So if the Executor, in Right of the Teſtator, is intitled to a Writ of Error, Attaint, Deceit, *Audita Querela*, *Identitate nominis*, whatſoever is regained by any of theſe Ways, as unduly loſt by the Teſtator, ſhall be Aſſets.

Hob. 66. Godb. 29. And. 138. Cro. Eliz. 43. 4 Leon. 102.

But though Debts, *&c.* due to the Teſtator, are not Aſſets till recovered, yet if the Executor gives (*c*) a Releaſe or Acquittance for any ſuch Debt, he ſhall be charged in the ſame Manner as if he had received the Money.

(*c*) Where an Executor loſt a Bond due to the Teſtator, and Creditor having recovered Judgment againſt him, the Queſtion came to be in Equity, Whether the Executor was obliged to make good the Debt to the Teſtator's Eſtate; and it being urged, that the Loſs of the Bond was not a Loſs of the Debt, becauſe the ſame ſtill ſubſiſted, and might be recovered *in Equity*, and that it would be hard in this Caſe to charge the Executor, when in Truth the Obligor was inſolvent; the Court directed the Executor to proſecute a Suit againſt the Obligor, and reſpited the Judgment obtained by the Teſtator's Creditor in the mean Time. 2 Vern. 299.

*Page 418 Off. of Exec. 71. 3 Leon. 51.

* So if the Executor ſubmits to Arbitration, the Debts or Damages which he is intitled to in Right of his Teſtator, and the Arbitrators award a Releaſe or Diſcharge thereof, this being his own voluntary Act ſhall charge him in the ſame Manner as if he had received the Money.

Vent. 111. *Horſam* and *Turget*. Lev. 306. and 2 Keb. 716, 731, 741. S. C. ‡ Qu. If this is Law? By ſuch Means, if the Cuſtom was good, Creditors would be their own Carvers, and ſimple Contract Creditors might be paid, when Specialty and Judgment Creditors would loſe their Debts. *Vide Fiſher*, Adminiſtratrix, v. *Lane* and others, in C. P. 12 Geo. 3. 3 Wills. 297.

If the Plaintiff as Executor, and the Defendant ſubmit all Controverſies relating to the Teſtator's Eſtate to Arbitration, and the Arbitrators award, that the Defendant ſhall pay the Executor 300 *l.* and there is a Cuſtom of foreign Attachments in *London*, that if a Suit be commenced againſt the Executor of any Perſon, any Debt, which was due to the Teſtator *tempore mortis ſuæ*, might be attached; ‡ yet this 300 *l.* although it be Aſſets, and ſhall charge the Executor, ſhall not be within the Cuſtom; for it was not the Teſtator's at the Time of his Death, and all Cuſtoms are to be conſtrued ſtrictly.

3. What ſhall be deemed the Teſtator's Perſonal Eſtate, and therein what Things ſhall go to the Heir, and not to the Executor.

Off. of Exec. 53. Godolph. 120. Dyer 283.

The more general Diviſion of the Teſtator's Eſtate is into Chattels Real and Perſonal, or Things immoveable and moveable, according to the Civil Law; the moveable Goods are again divided into Things animate and inanimate; of the firſt are all the Teſtator's Horſes, Cows, Sheep, Fowls, *&c.* which clearly belong to the Executor; the inanimate Things are all the Teſtator's Money, Houſhold-ſtuff, Implements and Utenſils,

Hay

Hay, Carts, Ploughs, Coaches, &c. and these also belong to the Executor.

Chattels Real, or Things immoveable, are such as are annexed to and favour of the Freehold and Inheritance, such as an Interest for Years in Houses, Lands, Advowsons, Commons, Fairs, Markets, the Interest in a Ward, in an Estate by Statute Staple, Merchant, or *Elegit*, and Mortgages; and these also regularly go to the Executor. Off. of Exec. 53. Godolph. 120.

But here it will be necessary to inquire more particularly into the Nature of those Things, which, from the different Rules of Law that govern the Real and Personal Property, will make some Things belong to the Heir, and others to the Executor.

If the King by an Attainder of Felony is intitled to the *Annum, diem & vastum*, which is a Power of taking the Profits of the Offender's Lands for a Year, and also of committing Waste in Houses and cutting down Trees, and he grants this to a Man and his Heirs; yet it shall go to the Executors of the Grantee, for this is but a (*a*) Chattel. Off. of Exec. 54.

(*a*) So if a Man, possessed of a Term for Years, devises it to another and his Heirs, or Heirs Male of his Body; this being but a Chattel shall go to his Executors. 10 Co. 47. Yelv. 73. ‡

‡ See *Fearne*'s Essay on Contingent Remainders, &c. 342, &c. 3d. Edit.

So if a Man, possessed of a Term for one Hundred Years, makes a Lease for fifty Years, reserving Rent to him and his Heirs, this Rent determines upon his Death, for the Heir cannot have it, because he cannot succeed in the Estate, being a Chattel Interest, to which the Rent, if it continues after the Life of the Lessor, must belong, and the Executors cannot have it, because there are no (*b*) Words to carry it to them. Vent. 161.

(*b*) But if a Termor of 100 Years shall have the Rent after the Death of the Lessor; for here the Rent is made to continue *during the Term*. Vent. 161.—So if *A.* grants a Rent-charge to *B.* for forty Years, with a Clause of Distress to *B.* and his Heirs, *during the Term*; the Executor of *B.* may distrain for it during the Term; for the Distress is expressly given *during the Term*, and therefore must belong to the Executor, who has a Right to the Rent-charge, being a *Chattel Interest*. Cro. Eliz. 644. *Darrell* and *Wilson*.

*If a Person were Guardian in Chivalry or Knight's Service, and died, the Ward went to the Executor; for this being an Interest by Reason of Tenure did not determine by the Guardian's Death, and therefore went as a Chattel to the Executor; but if a Guardian in (*c*) Socage died, the Ward went neither to the Heir nor Executor; but if the Infant was of the Age of Fourteen, he was allowed to chuse his Guardian; and if under, the next of Kin, to whom the Inheritance could not come, was to be Guardian. * Page 419 Off. of Exec. 52. *vide* Tit. Guardian.

(*c*) That a Guardianship pursuant to the Statute 12 Car. 2. c. 24. cannot be assigned, neither shall it go to Executors or Administrators, being a Personal Trust. Vaugh. 180.

If a Person purchases the next Presentation to a Church, and dies before it becomes void; this, as a Chattel, shall go to the Executor, and not to the Heir. Godolph. 121. Off. of Exec. 54.

So if there be Tenant in Tail, and the Church happens to become vacant in his Life-time, and he dies before he hath presented, his Executor, and not the Issue in Tail, shall present to this Turn. Godolph. 123.

But where the Case was, that a Parson of the Church of *D.* purchased the Inheritance of the Advowson to him and his Heirs, and died; and the Question was, Whether the Executors of the Parson, or the Heir should present; and it was resolved, that the Heir should present, and not the Executors, 3 Lev. 47. *Holt* and the Bishop of *Winchester*.

Executors, and that it ſhould deſcend to the Heir, and be conſolidated to the Fee, by the ſame Reaſon that it may be (*a*) deviſed over; for where the Law makes a Diviſion of an Eſtate, it is either in Grants, *ut res magis valeat* or elſe in Favour to ancient Rights, as where one Jointenant deviſes, the Deviſe is void, and the Survivorſhip ſhall hold Place, notwithſtanding the Deviſe; and if in this Caſe there muſt be a Conſtruction to divide the Eſtate, it ought to be in Favour of the Heir, it being no Injury to the Executors; for the Church being void, it is not Aſſets in their Hands.

(*a*) Where a Parſon, who had the Inheritance of the Advowſon, deviſed the Advowſon in Fee to a Stranger; and it was reſolved, that the Deviſee ſhould have the next Avoidance. Cro. Jac. 371. *Pinchon* and *Harris*.

Co. Lit. 47. a. 143. Rol. Abr. 447. 2 Saund. 367. Hard. 95.

If a Man *ſeiſed in Fee* makes a Gift in Tail, Leaſe for Life or Years, reſerving Rent, this Rent, as incident to the Reverſion, ſhall go to the Heir, and not to the Executor; for ſince, during the Continuance of the particular Eſtate, the Reverſioner loſes the Profits of the Land, the Rent ought to be paid to him as a Compenſation for the Loſs.

Cro. Car 207. *Drake* and *Munday*.

Therefore if *A.* covenants and grants with *B.* that he ſhall have and enjoy Black-acre for ſix Years, and *B.* covenants to pay to *A.* his Heirs, Executors and Adminiſtrators, an annual Rent during the Term; this, being a good Reſervation of a Rent, ſhall, upon the Death of *A.* be paid to his Heir, who has the Reverſion as a Retribution for the Profits of the Land, which he cannot enjoy during the Term; and the Executors of *A.* ſhall never have any Thing by virtue of the Covenant, though it is in expreſs Words granted to *A.* and his Executors.

Co Lit 47. a. 2 Rol. Abr. 450.

So if *A.* being *ſeiſed in fee*, makes a Leaſe, reſerving Rent to him and his Executors and Aſſigns, and dies, this Rent is determined; for the Executors cannot have it, being Strangers to the Reverſion, which is an Inheritance, and therefore, being never to enjoy the Profits of the Land after the Expiration of the Term, can never have a Right to a Retribution or Compenſation for them.

Latch. 99, 100. *Sury* and *Brown*. 2 Rol. Abr. 451 S C ill reported to the contrary, but Vent 163 S. C. cited, and admitted to be Law.

But if a Man ſeiſed in Fee makes a Leaſe for Years, reſerving Rent to him and his Aſſigns during the Term, this Reſervation ſhall not determine by the Death of the Leſſor, but the Rent ſhall go to his Heir†; for tho' there be no Mention of the Heirs in the Reſervation, yet there are Words that evidently declare the Intention of the Leſſor, that the Payment of the Rent ſhall be of equal Duration with the Leaſe, the Leſſor having expreſsly provided, that it ſhall be paid during the Term, and conſequently the Rent muſt be carried over to the Heir, who comes into * the Inheritance after the Death of the Leſſor, and would have ſucceeded in the Poſſeſſion of the the Eſtate, if no Leaſe had been made; and if the Leſſor aſſigns over his Reverſion, the Aſſignee ſhall have the Rent as incident to it, becauſe the Rent is to continue during the Term, and therefore muſt follow the Reverſion, ſince the Leſſor made no particular Diſpoſition of it ſeparate from the Reverſion.

* Page 420

† For he is the Aſſignee in Law of the Leſſor.

(*b*) *Sacheverel* and *Frogate*, reported in Vent. 161, 162. 2 Saund. 367. Raym. 213. 2 Lev. 13. and therefore the Caſe in Cro. Eliz. 217.

So if a Leaſe be made for Years, reſerving Rent during the Term to the Leſſor, his Executors and Aſſigns; this, by a late (*b*) Reſolution, ſhall not determine upon the Death of the Leſſor, but ſhall go to the Heir, becauſe the Reſervation being to the Leſſor and his Aſſigns, during the Term (for the Words, Executors and Adminiſtrators, are void, the Leſſor having the Inheritance) ſuch expreſs Words evidently diſcover the Intent of the Contract, and that the Leſſee agreed and bound himſelf to the Payment of the Rent during the Continuance of the Deviſe.

Richmond and *Butcher* to the contrary is not Law, *& vide* 5 Co. 115. a.

But though Rent, as incident to the Reverſion, ſhall go therewith, and be payable to the Heir, yet the Arrearages, which incurred and became payable in the Life-time of the Teſtator, ſhall go to the Executor as Part of his Perſonal Eſtate. Godolph. 121. Off. of Exec. 53, 54.

But if a Leaſe be made, reſerving Rent at *Michaelmas*, or ten Days after, if the Rent is not paid at *Michaelmas*, and before the ten Days are expired the Leſſor dies, the Heir, and not the Executor, ſhall have the Rent; for though it was in the Election of the Leſſee to pay the Rent at *Michaelmas*, yet the ten Days after are the true legal Term, ſo that the Rent was not legally due before that Time, and therefore no Chattel; ſo if the Leſſor dies on the Day on which the Rent is to be paid after Sun-ſet, and before Mid-night, the Heir, and not the Executor, ſhall have the Rent; for it is not due till the utmoſt Limit of the Day, which ends not till twelve o'Clock, though the Time for demanding it for Conveniency be a convenient Time before the Sun ſets. ‖ 10 Co. 127. Cro. Jac. 309-10. Cro. Eliz. 575. Moor, pl. 1012. Yelv. 167.

‖ At the Death of Tenant for Life, a proportionable Part of the Rent ſhall be paid to the Executors. 11 Geo. 2. c. 19. ſ. 15.

As to *Things fixed to the Freehold* or *Parcel thereof*, how they may become Chattels and go to the Executor, or are to be conſidered as Part of the Inheritance, and to deſcend to the Heir, it is neceſſary to obſerve,

That though the Thing be a Chattel in itſelf, yet if it cannot be removed or ſevered without Prejudice to the Inheritance, there it ſhall deſcend and belong to the Heir, and not to the Executor. Rol. Abr. 919. Off. of Exec. 62.

As if a Man erects a Furnace in the Middle of a Floor, though it doth not depend upon any Wall; yet it goes to the Heir with the Land, and not to the Executor as a Chattel, for it is to be eſteemed (*b*) Parcel of the Houſe, there placed on Purpoſe by the Anceſtor, to deſcend as the Law would carry it. 21 H. 7. 26, 27. Keilw. 88.

(*b*) But if a Perſon, who hath a particular Intereſt in the Houſe, doth annex any Thing to the ſame for the Benefit of his own Trade, he may diſunite during the Continuance of that Intereſt, if it may be done without any Deſtruction or Diſadvantage to the Freehold; and therefore if a Dyer, being a Termor for Years, erects a Furnace in the Middle of the Floor, not affixed to any Wall, he may take it down during his Term, becauſe ſuch Trader erects for the Uſe of his Trade, and is Owner both of the Floor and the Furnace, and it may be diſunited and altered without Prejudice to the Landlord. 20 H. 7. 13. 21 H. 7. 27. Owen 70, 71.—But if he doth not take it down during the Term, it goes to him in Reverſion, becauſe he is not Maſter of both thoſe Things that are to receive Alteration. 21 H. 7. 27. Owen 70. Off. of Exec. 61.

The ſame Law of Coppers, Leads, Fats for Dyers or Brewers, Pales, Poſts, Rails, Windows, whether of Glaſs, or otherwiſe, Benches, Wainſcots, Doors, Locks, Keys, Milſtones, Anvils, *&c.* for theſe being fixed to the Freehold are not Chattels, but Parcel of the Freehold. Off. of Exec. 62. 4 Co. 63, 64.

And though Pictures and Looking-glaſſes are eſteemed Part of the Perſonal Eſtate, yet if they are put up inſtead of Wainſcot, or where otherwiſe Wainſcot would have been put, they ſhall go to the Heir; for the Houſe ought not to come to the Heir maimed and diſfigured. * Page 421 2 Vern. 508. ſo ruled in Equity.

As to the Timber Trees, they originally belong to the Soil by Right of Acceſſion; yet if a Man ſells the Timber-Trees on his Soil, the Executors of the Vendor ſhall have them, and not his Heir; ſo if a Man ſells his Land reſerving the Timber-Trees, they remain by particular Contract as a Chattel in him, diſtinct from the Soil, and ſhall go to his Executors. 4 Co. 62. Off. of Exec. 60.

And as the Trees, unleſs ſevered, belong to the Heir, ſo does the Fruit which they bear, as Apples, Pears, *&c.* belong to the Heir; alſo Graſs growing, though fit to be mowed down for Hay, ſhall, with the Land, deſcend to the Heir. Off. of Exec. 59. Godolph. 122.

Off. of Exec. 59. But Corn, though growing, as alſo every Thing elſe of that Kind which is produced annually by Labour and Cultivation, ſhall go to the Executor, and not to the Heir, as Hops, Saffron, Hemp, &c.

Off. of Exec. 60. Alſo if an Inheritor of Tithes dies after the Tithes are ſet out, they go to his Executor, and not to his Heir.

Off. of Exec. 62, 63. But though the Things which require Labour and Cultivation, and are of annual Produce, regularly belong to the Executor; yet Roots of all Kinds, ſuch as Parſnips, Turnips, Skerrets, &c. belong to the Heir, for theſe cannot be come at without digging up the Earth, which muſt neceſſarily be a Spoil and Injury to the Inheritance.

Off. of Exec. 63. And therefore the *Office of Executor* ſays, that the Executor muſt content himſelf with thoſe Things whoſe Fruit is above Ground, ſuch as Melons of all Kinds; but as for Artichokes, tho' the Fruit be above the Ground, yet he thinks that they have not ſuch yearly Setting and Manurance as ſhould ſever them in Intereſt from the Soil, and that therefore they ſhall go with it to the Heir.

Co. Lit. 8. Off. of Exec. 57. Swinb. 403. If a Man hath Fiſh in his Pond, and die, they go to his Heir, for they are conſidered as the Profits thereof, and therefore deſcend with the Pond to the Heir.

Co. Lit. 8. But if a Man has Fiſh in his Trunk or Net, they go to the Executor, for they are ſevered from the Soil, and Felony may be committed in Stealing of them.

Off. of Exec. 57. So Doves in a Pigeon-houſe do, together with the Houſe, deſcend to the Heir; but the young ones, that are not able to fly out, belong to the Executor.

Off. of Exec. 57. So Deer, Conies, Pheaſants or Partridges, if tame, or kept alive in any Room, Cage, or like Receptacle, as Pheaſants and Partridges often are, ſhall go to the Executor; ſo Hawks reclaimed ſhall, as Chattels Perſonal, go to the Executor.

Rol. Abr. 919. Off. of Exec. 63, 64. As to Charters and Writings relating to the Freehold and Inheritance, they follow the Intereſt of the Land, and belong to the Heir; but as to thoſe Deeds and Writings which relate to Terms for Years, Goods, Chattels or Debts, they belong to the Executor.

4. What Things ſhall go to the Wife of the Deceaſed, and not to the Executor.

Doct. & Stud. Dial. 1 cap. 7. Co. Lit. 351. Sid. 111. The Law looks upon Huſband and Wife as one Perſon, and therefore will not regularly allow the Wife to have any Property ſeparate and diſtinct from the Huſband. Hence all the Perſonal Eſtate, as Money, Goods, &c. which were the Wife's, and in her actual Poſſeſſion at the Marriage, are actually veſted in the Huſband; ſo that of theſe he may make any Diſpoſition in his Life-time, without her Conſent, or may by Will deviſe them, and ſhall, without any ſuch Diſpoſition, go to the Exe- * Page 422 * cutors or Adminiſtrators of the Huſband, and not to the Wife, though ſhe ſurvive him.

Co. Lit. 46. b. 351. Rol. Abr. 342. But Chattels Real, ſuch as Leaſes for Years, Eſtates by Statute Merchant, Staple, *Elegit*, &c. though of theſe he may alone diſpoſe, forfeit, or they may be extended for his Debts; yet if he makes no (*a*) Diſpoſition

(*a*) But if the Huſband makes a Leaſe of Part of the Wife's *Term*, reſerving Rent, the Rent ſhall go to the Executors of the Huſband; for as he had a Power in his Life-time to diſpoſe of the Whole, ſo he might have diſpoſed of any Part of it Poph. 5, 97. Co. Lit. 300. 8 Co. 97. Vent. 259. —— And what ſhall be ſaid a Diſpoſition by him, ſo as to bar the Wife, *vide* Tit. *Baron and Feme*, Letter (C)

of them in his Life-time, they ſurvive to the Wife, and ſhall not go to the Executors of the Huſband.

So of *Choſes in Action*, as Debts due to the Wife by Obligation, *&c.* though theſe are likewiſe ſo far veſted in the Huſband, that during the Coverture he may reduce them into Poſſeſſion; yet if he dies before any Alteration made by him, they belong to the Wife, and not to the Executors of the Huſband. Co. Lit. 351. 3 Mod. 186.

As to the Wife's *Paraphernalia*, which ſurvive to her, and go not to the Executors of the Huſband; theſe by the Civil Law are defined *Bona quæ Mulier ultra Dotem adfert*, and are underſtood to be not only her neceſſary Apparel, but alſo ſuch Jewels and other Ornaments as are ſuitable to her Degree and Quality; of theſe, by the Civil Law, the Wife had ſuch an abſolute Property, that ſhe might diſpoſe of them *in Vita Mariti invito Marito*, nor could the Huſband deviſe them by Will from her, nor were they liable to his Debts or Legacies. Godolph. 130. Swinb. 403. Cro. Car. 344.

But herein our Law differs, and prohibits the Wife from making any Diſpoſition of them in the Life-time of the Huſband; alſo our Law diſtinguiſhes between Things of Ornament and mere (*a*) Neceſſity, and as to Matters of Ornament, ſubjects them to the Huſband's Debts, and even allows the Huſband Power to diſpoſe of them by Will. Rol. Abr. 911. Cro. Car. 343.

(*a*) If the Huſband delivers his Wife a Piece of Cloth to make her a Garment and dies; although it is not made up in the Life-time of the Huſband yet the Wife ſhall have it, and not the Executor of the Huſband, becauſe it was delivered to her for this Purpoſe: but againſt a Creditor of her Huſband, ſhe ſhall not have more Apparel than is convenient for her. Rol. Abr. 911. *Harwell* and *Harwell*.

And therefore where the Daughter of an Earl, who was married to Sir *John Davies* (the King's Serjeant at Law), uſually wore a Diamond Chain, Value 370 *l.* and Sir *John* deviſed the Uſe of his Jewels to his Wife, during her Widowhood, ſhe giving Security to leave the ſame to his Daughter, at the Day of her Death or ſecond Marriage, which ſhould firſt happen; the Widow marrying again, it was held by two Judges againſt Two, that theſe being Matters of Ornament, the Huſband had a Power of diſpoſing of them by Will, and conſequently that the Limitation annexed to them in the preſent Caſe was good; but they ſeemed to admit, that if the Huſband had made no Diſpoſition of them, and there had been no (*a*) Creditors of the Huſband, that they ſhould have belonged to the Wife; but the other two Judges held, that there was no other Way of determining what ought to be accounted the Wife's *Paraphernalia*, or Matters of Ornament or Neceſſity, but by the Diſcretion of the Judges; and that if theſe were Things ſuitable to her Degree and Quality Cro. Car 343. Lord *Haſtings*. ver. Sir *Archibald Douglaſs*, Jon. 332. and Rol. Abr. 911. S. C. 2 Vern. 245-6. S. C. cited, where the Huſband deviſed the Wife's Jewels, being of great Value, to the Wife for Life, the Remainder to his Son; and the Wife made no Election to claim them as her *Paraphernalia*, and held that her Adminiſtrator cannot make this Claim; and there ſaid, that although where the Huſband dies Inteſtate, or without diſpoſing of the Wife's Jewels by Will, the Wife may claim them if there are no Creditors, yet ſhe cannot againſt a Diſpoſition of them by Will by her Huſband. (*a*) As in Trover againſt the Viſcounteſs of *Bindon*, for ſeveral Jewels of conſiderable Value; ſhe, as to all, except a Chain and Bracelets, not exceeding the Value of 160 *l.* pleaded Not guilty, and as to that ſhe pleaded, that ſhe was the Wife of Viſcount *Bindon*, and that ſhe uſually wore thoſe Jewels as Ornaments of her Body; and averred, that the Executors had Aſſets to ſatisfy his Funeral, and all his Debts and Legacies, beſides theſe Jewels; and on Demurrer ‡ ſhe had Judgment. Moor 213. pl. 354. 2 Leon. 166. S. C.—Where the Wife's *Paraphernalia* being Superfluities and Ornaments were in Equity held liable to the Huſband's Debts, *vide Preced Chan.* 295-6. a good Caſe—But where the Wife's Jewels and Plate being bought with her own Pin-money, and the Value not amounting

‡ *Qu.* If ſuch ſpecial Matter might not be given in Evidence on the general Iſſue, and if ſuch Plea would not be bad on ſpecial Demurrer aſſigning for Cauſe that the Plea amounted only to the general Iſſue?

* Page 423 amounting to more than 500 *l.* which was eſteemed but little in reſpect of the Huſband's Eſtate, were held not to be liable, Preced. in Chan. 27.

* Quality, and uſually worn by her as Ornaments of her Perſon, that the Huſband could not deviſe them from her.

2 Vern. 83. Alſo it has been held, that if a Woman by Marriage Articles agrees that ſhe ſhall have no Part of the Perſonal Eſtate but what the Huſband gives her by his Will, that this bars her of her *Paraphernalia*.

5. Where after Debts and Legacies paid the Executors ſhall have the Surplus to themſelves, and are not to be Truſtees for the next of Kin.

Off. of Exec. 4. By Law the very naming an Executor is a Diſpoſition to him of all the Teſtator's Perſonal Eſtate; for he comes *in Loco Teſtatoris*, and is chargeable with his Debts and Legacies as far as he has Aſſets; and therefore, the Law gives him the whole Perſonal Eſtate; the Surplus of which, after he has executed his Truſt by Payment of Debts and Legacies, belongs to himſelf, as a Recompence for his Labour and Trouble.

Vern. 473. 2 Vern. 676. Abr. Eq. 243. But though the Executor be intitled to the Surplus of the Perſonal Eſtate undiſpoſed of, yet if there be any Fraud in obtaining the Executorſhip, or if it appears manifeſtly to have been the Intention of the Teſtator, that the Executor ſhould not have the Surplus to his own Uſe, a Court of (*a*) Equity may decree ſuch Executor a Truſtee for the next of Kin to the Teſtator, and that the Surplus ſhall go according to the Statute of Diſtributions.

(*a*) But if the Eccleſiaſtical Courts go about to compel an Executor to diſtribute the Reſidue of the Perſonal Eſtate, a Prohibition will be granted; for they have no Juriſdiction to compel a Diſtribution amongſt the next of Kin, but where the Party dies inteſtate. 5 Mod. 247. *Petit* and *Smith*. See Comyns 3. pl. 3. Ld. Raym. 86. Comb. 378. Will. Rep. 7. pl. 2.

Vern. 473. *Foſter* and *Munt*, decreed Mich. 1687. *per* Lord Chancellor *Jefferies*. 2 Vern. 64. And this it is ſaid was firſt done in the Caſe of *Foſter* and *Munt*, where the Teſtator deviſed particular Legacies to his Children and Grandchildren, and 10 *l.* a-piece to *A.* and *B.* whom he made Executors, for their (*b*) Care and Pains; the Surplus of the Perſonal Eſtate, being 5000 *l.* and upwards, the Queſtion was, Whether the Surplus ſhould be a Truſt for the Children, or go to the Executors; and it was decreed a Truſt for the Children.

S. C. cited, and ſaid to have been affirmed in the Houſe of Lords. (*b*) 2 Vern. 676. S. C. cited, that the Words Care and Pains implied a Truſt for the Children.

For which *vide* 2 Vern. 148, 361, 648, 676. Since this there have been ſeveral Caſes, where from the Intention of the Teſtator, in making Strangers Executors, and giving them Legacies, they have been decreed Truſtees for the next of Kin, and compelled to make Diſtribution accordingly.

Abr. Eq. 244-5. Hill. 1697. Lord *Briſtol* and *Hungerford*. 3 Will. Rep. 194. As where *A.* deviſed Lands to be ſold for Payment of his Debts, *and wills, that the Surplus ſhould be deemed Part of his Perſonal Eſtate, and go to his Executors*; and gives to his Executors 100 *l.* a-piece as a Legacy; and the Queſtion was, Whether the Executors ſhould have the Surplus to their own Uſe, or ſhould diſtribute according to the Statute of Diſtributions. For the Executors it was inſiſted, that the Surplus ſhould be Part of his Perſonal Eſtate, and go to them; and that he meant it them in their own Uſe; and his giving them a Legacy of 100 *l.* a-piece cannot alter the Caſe; for the Surplus perhaps might be nothing, and therefore

therefore he gave them the 100*l.* that they might at all Events be ſure of ſomething, and not to exclude them from the Benefit of the Surplus; and this being a Deviſe of the Surplus, after Debts and Legacies paid, cannot be a Truſt in them; for then all their Truſt is performed when Debts and Legacies are paid. On the other Side it was ſaid, that the Words in the Will, that *the Surplus ſhould be Part of his Perſonal Eſtate, and go to his Executors*, were only intended *to exclude the Heir*, who elſe would have it; and *not to give any greater Intereſt to his Executors than they would have had otherwiſe*; and of this Opinion was my Lord Chancellor, and decreed accordingly, and affirmed in Parliament. * Page 424

But as this Conſtruction has been made purely on the Intention of the Teſtator, ſo ſuch Intention muſt appear exceeding plain; otherwiſe the Rule of Law is to take Place; as where a Man deviſed his Library of Books to *A.* (except ten Books, ſuch as his Wife ſhould chooſe; as Plays, Romances, Sermons, but not Law Books) and made her Executrix; and it was held that ſhe ſhould not by this Deviſe be excluded from the Benefit of the Surplus of the Perſonal Eſtate. Abr. Eq. 245. Trin. 1704. *Griffith* and *Rogers*. Pre. Ch. 231.

So where *A.* was Executrix to *B.* her former Huſband, and after married *C.* who by his Will in 1686 deviſed to his Wife the Plate and Goods ſhe brought him in Marriage, and two Silver Salvers in Lieu of Plate that had been exchanged away, and made her Executrix and died, leaving a Daughter by a former Wife, and his Wife *enſeint* of a Daughter; and there being no Deviſe of the Surplus of the Perſonal Eſtate, the Queſtion was, Whether ſhe ſhould take it as Executrix to her own Uſe, or liable to Diſtribution; and my Lord Keeper decreed the Surplus to the Wife, as well for that this Will was made before the Caſe of *Foſter* and *Munt*, as alſo for that in this Caſe nothing is deviſed to the Wife but what was her own before; and as ſhe was Executrix to her former Huſband; but principally becauſe, where a Wife is made Executrix, it is to be preſumed ſhe was not made ſo to have barely an Office of Trouble, but of Benefit to take the Surplus. 2 Vern. 675. Hill. 1711. *Bale* and *Smith*.

So where *A.* poſſeſſed of a long Term for Years, by Will deviſed it to his Wife for Life, and after her Death to the Child ſhe was then *enſeint* with; and if ſuch Child died before it came to twenty-one, then he deviſed one third Part of the ſaid Term to his Wife, her Executors and Adminiſtrators; and the other two thirds to other Perſons, and made his Wife Executrix of his Will, and died; and a Bill was brought againſt her by the next of Kin to the Teſtator, to have an Account and Diſtribution of the Surplus of his Perſonal Eſtate, not deviſed by the Will; and two Queſtions were made; 1ſt, Whether the Deviſe to the Wife of one third Part of the Term was good, becauſe it happened ſhe was not then *enſeint* at all, and ſo the Contingency upon which the Deviſe to her was to take Place never happened; the other Queſtion was, whether this Term, being Part of the Perſonal Eſtate, and expreſsly deviſed to her for Life, with ſuch other contingent Intereſt on the Death of the ſuppoſed *enſeint* Child before twenty-one, ſhould ſhut her out from the Surplus of the Perſonal Eſtate, which belonged to her as Executrix; and ſo the Surplus go in a Courſe of Adminiſtration to be diſtributed among the next of Kin. As to the firſt Point, my Lord Keeper delivered his Opinion, that though the Wife was not *enſeint* at the Time of the Will, yet the Deviſe to her of ſuch third Part of the Term was good; and as to the other Point, diſmiſſed the Plaintiff's Bill, and ſo let in the Executrix to the Surplus of the Perſonal Eſtate, notwithſtanding the Deviſe to her of Part as aforeſaid. Abr. Eq. 245. Mich. 1711. *Jones* and *Weſtcomb*.

So where the Teſtator, being poſſeſſed of a Perſonal Eſtate to the Value of about 2000*l.* and being taken ill, makes his Will in Writing the very Day before his Death; and thereby deviſes ſeveral Legacies to his Relations; and amongſt the Reſt gives the Plaintiff his Siſter about 1000*l.* Hill. 1716. *Batchelor* and *Searle*. 2 Vern. 736. Abr. Eq 246. S. C.

Gilb. Rep. 125.

1000 *l.* and gives 70 *l.* to Mr. *Searle* and his Wife, and their four Children, to buy them Mourning; and gives to his dear and moſt eſteemed Friend Mrs. *Sarah Searle* (one of the Daughters of Mr. *Searle*, to whom he had made his Addreſſes in Way of Marriage) 500 *l.* and gives his * Horſe and Furniture to one of the Defendants by his Chriſtian Name and Surname; and his Clothes to be diſpoſed of by his Executors; and then concludes, as to the 700 *l.* I am intitled to in the *South-Sea* Company, and the Reſt of my Perſonal Eſtate, I will that the ſame ſhall be ſold for the Payment of my Debts and Legacies; and I make Mr. *John* and Mr. *Thomas Searle* my Executors, and dies: The Executors were two of the Children of Mr. *Searle*, and intitled to their Proportion of the 70 *l.* deviſed for Mourning; and one of them to the Horſe and Furniture; but were no ways related to the Teſtator. The Surplus of the Perſonal Eſtate came to about 600 *l.* and the Bill was brought againſt the Executors to have an Account thereof, and that it might be paid to the Plaintiff, whoſe Wife was the only Siſter and next of Kin to the Teſtator; and for the Plaintiff it was inſiſted, that the Executors were mere Strangers, no ways related to the Teſtator; and that they had particular Legacies left them for Mourning out of the 70 *l.* and one of them had a Horſe and Furniture expreſly deviſed to him, and therefore it was not reaſonable that they ſhould go away with the Surplus of the Perſonal Eſtate. On the other Side it was inſiſted, that the Defendants being Executors, they repreſented the Teſtator, that they ſtood in his Place, and were intitled to whatever he left undiſpoſed of; that this was the ancient Law for many Ages, and therefore the legal Title being in them, they ought not to be defeated of it without a manifeſt Intention of the Teſtator to the contrary; that there appeared no ſuch Intent in the Will, for they are not named either by the Chriſtian Name or Surname, or ſo much as by the Name of their Office till the very Cloſe of the Will; nay it was in Proof, that the Teſtator did not ſo much as conſider whom he ſhould make his Executors till he had diſpoſed of all the Legacies; that the giving one of them his Horſe and Furniture was only to exclude the other, who by being Executor with him would have been equally intitled to it, and could not be counted a Legacy to ſhut them out of the Surplus, ſince it rather regarded the other Executor than the Plaintiff the next of Kin; that they had it fully in Proof, that the Teſtator being aſked, Whether he would not give his Siſter more? anſwered, he would not; that being aſked Who ſhould have the Surplus? he ſaid his Will ſhould ſtand as it was, and that he had a very great Regard for the Defendant's Family, and was to have married their Siſter; and that theſe Proofs being in Affirmance of the Diſpoſition the Law made for the Executors might be read; and that ſeveral Reſolutions ſince the Caſe of *Foſter* and *Munt* had pared away the Authority of that Caſe; and therefore prayed that the Bill may be diſmiſſed. My Lord Chancellor was clearly of Opinion, that the Proofs being in Affirmance of the Diſpoſition ought to be read; and ſaid, that they were ſo full as to make an End of this Caſe; that without a ſtrong and violent Implication, the Executors ought not to be defeated of the *Reſiduum*; that here was no ſuch Implication in this Will, but rather the contrary; that to make Senſe of the laſt Clauſe, it muſt be conſtrued a Deviſe of the *South-Sea* Stock, and the Reſt of the Perſonal Eſtate to his Executors; for it immediately follows, and I make *John* and *Thomas Searle* my Executors; which could have no Relation to the Direction for Sale, unleſs by giving them the Surplus which ſhould ariſe by Sale; and as there appeared no ſtrong or violent Implication to induce any other Conſtruction, he could not give into ſo great a Change of the Law, but muſt decree for the Executors; and accordingly did ſo.

* Page 425

And as this Doctrine of making the Executor a Truſtee for the next of Kin ſubſiſts only by the Notions of a Court of Equity, which by Implication, and contrary to the Rules of Law, gives the *Reſiduum* to the next of * Kin; ſo the Executors have been admitted by Parol Evidence to ſhew, that the Teſtator intended the *Reſiduum* for them, which has been thought reaſonable, being only to rebut an Equity, and ouſt an Implication ariſing from the Rule of Equity.

* Page 426 *Vide* 2 Vern. 252. The Caſe of the Counteſs and Earl of *Gainſborough*. Ab. Eq. 230. S. C. and 2 Vern. 648, 736. and the Caſe of *Selwin* and *Brown*, Tit. *Evidence*, Letter (G). 311.

As where one not of Kin, but a Stranger, was made Executor, and had conſiderable Legacies given him; although it was decreed by Sir *Peter King*, in the Mayor's Court, in Favour of the Teſtator's two Brothers, that the Surplus ſhould be diſtributed; yet, upon an Appeal to the Houſe of Peers, that Decree was reverſed, not barely as it ſtood upon the Will, but that Parol Proof ought to be received in Favour of the Executor's Title, conſiſtent with the Will; and the Proof being full, as to the Teſtator's frequent Declarations, that his Executor, though a Stranger, ſhould have the Surplus, it was decreed accordingly. Abr. Eq. 245. *Littlebury* and *Buckley*.

So in the Caſe of *Hatton* and *Hatton*, where the Wife was made Executrix, and a conſiderable Legacy deviſed to her; yet the Proof being ſtrong, that the Teſtator intended the Surplus to her own Uſe, the ſame was decreed accordingly, both at the *Rolls* and in *Chancery*. Hil. 6 Geo. 2 *Hatton* and *Hatton*. See 2 Str. 865. Fitzgib. 126.

But where *A.* being poſſeſſed of a conſiderable Perſonal Eſtate, made his Will, and thereby deviſed ſeveral Legacies, but gave none to his Executor; and the Queſtion was, Whether Parol Evidence ought to be admitted, to prove that the Teſtator did not intend that the Executor ſhould have the Reſidue of his Perſonal Eſtate, but that the ſame ſhould go according to the Statute of Diſtributions; and it was held clearly, that no ſuch Evidence could be admitted, for that this would not be to admit Evidence to ouſt an Implication, but was to admit Evidence to contradict the Rule of Law, and what appeared on the Face of the Will. Hil. 6 Geo. 2. Lady *Oſborne* ver. *Villiers*.

(I) How the Perſonal Eſtate, after Debts paid, is to be diſtributed, when the Party dies Inteſtate; and herein of the Share the Husband or Wife are intitled to, and of the aſcending, deſcending and collateral Line, and Admiſſion of the Half-Blood, and where the Diſtribution ſhall be per Stirpes, and not per Capita.

IT hath been already obſerved, that before the Statute 22 & 23 *Car.* 2. *c.* 10. the Eccleſiaſtical Courts had no Juriſdiction to compel Diſtribution of Inteſtates Eſtates; for though by the 31 *E.* 3. *ſt.* 1. *c.* 11. and And. 410, 414 Cro. Car. 62, 201.

Jon. 228. Style 456. Hob. 83, 191. Lev. 233. Carter 125. Raym. 499.

and 21 *H.* 8. *c.* 5. they had Authority to grant Administration to the Widow or next of Kin; yet, having once granted it, they had executed their Authority; and the Administrator, coming in the Place of the Executor, had the whole Personal Estate of the Intestate, after Debts.

Yet after it had been solemnly adjudged in the Common Law Courts, that the Ecclesiastical Courts could not compel a Distribution, it seems that they had a Method there, when they were under Deliberation, whether they would grant Administration to the Wife or next of Kin, and to which of the next of Kin; they used to treat with the Parties, and consider what Sum the Overplus was like to amount to; and how that ought, by their

* Page 427 * Rules, to be distributed, and they would prefer him to the Administration, that would before-hand perform such Distribution by Payment of Money, and by giving Securities to Persons to whom it was appointed.

Raym. 499.

But because it was found very inconvenient for any Administrator to pay before he received, for it was hard for him to know what he might undertake before he had Possession, and the Judge could not have a perfect Knowledge of the true Value of the Overplus, to guide him in the Measure of his Distribution till after the Administration ended, and the Account of the Estate taken; (*a*) to remedy these Inconveniences, and to compel a just and equal Distribution of the Estates of Intestates,

(*a*) My Lord *North* observes, that though public Inconveniences were urged to the Parliament by the Civilians, yet they had another Reason to desire that those Methods might be changed; for the allotting Distributions in this Manner was but a barren Jurisdiction that could not be drawn out in Length; all Disputes were ended *uno flatu* without Appeal, and the Accounts of Administrators were never contested, when there was no Adversary concerned to demand a Share in the Overplus upon taking them. Raym. 499.

By the 22 & 23 *Car.* 2. *cap.* 10. it is enacted, "That all Ordinaries "and Ecclesiastical Judges, upon granting Administration of Persons dying "intestate, must take Bond of the Administrator, with two or more Sure- "ties, with Condition that the Administrator shall make a true and perfect "Inventory of all the Goods and Chattels of the Deceased, and exhibit it "into the Registry of the Ordinary's Court by such a Day; and that the "said Ordinaries and Judges respectively shall and may, and are enabled to "proceed and call such Administrators to account for and touching the "Goods of any Person dying intestate, and, upon Hearing and due Con- "sideration thereof, to order and make equal and just Distribution of what "remaineth clear (after all Debts, Funerals, and just Expences of every "Sort, first allowed and deducted) amongst the Wife and Children, or "Childrens Children, if any such be, or otherwise to the next of Kindred "to the dead Person, in equal Degree, or legally representing their "Stocks, *pro suo cuique Jure*, according to the Laws in such Cases, and "the Rules and Limitation hereafter set down; and the same Distribu- "tions to decree and settle, and to compel such Administrators to ob- "serve and pay the same, by the due Course of his Majesty's Ecclesiasti- "cal Laws.

"Provided always, That all Ordinaries, and every other Person, who "by this Act is enabled to make Distribution of the Surplus of the Estate "of any Person dying intestate, shall distribute the Surplusage of such "Estate or Estates, in Manner and Form following, that is to say, one "third Part of the said Surplusage to the Wife of the Intestate, and all the "Residue by equal Portions to and amongst the Children of such Persons "dying intestate, and such Persons as legally represent such Children, in "case any of the said Children be then dead, other than such Child or "Children (not being Heir at Law) who shall have any Estate by the "Settlement of the Intestate, or shall be advanced by the Intestate in his "Life-time, by Portion or Portions equal to the Share, which shall by "such Distribution be allotted to the other Children, to whom such Distri-

" bution is to be made; and in caſe any Child, other than the Heir at
" Law, who ſhall have any Eſtate by Settlement from the ſaid Inteſtate, or
" ſhall be advanced by the ſaid Inteſtate in his Life-time, by Portion not
" equal to the Share which will be due to the other Children by ſuch
" Diſtribution as aforeſaid, then ſo much of the Surpluſage of the Eſtate of
" ſuch Inteſtate to be diſtributed to ſuch Child or Children as ſhall have any
" Land by Settlement from the Inteſtate, or were advanced in the Life-
" time of the Inteſtate, as ſhall make the Eſtate of all the ſaid Children to
" be equal, as near as can be eſtimated; but the Heir at Law, notwith-
" ſtanding any Land that he ſhall have by Deſcent, or otherwiſe from the
" * Inteſtate, is to have an equal Part in the Diſtribution with the Reſt of * Page 428
" the Children, without any Conſideration of the Value of the Land which
" he hath by Deſcent, or otherwiſe, from the Inteſtate.

" And in caſe there be no Children, nor any legal Repreſentatives of
" them, then one Moiety of the ſaid Eſtate to be allotted to the Wife of
" the ſaid Inteſtate, the Reſidue of the ſaid Eſtate to be diſtributed equally
" to every of the next of Kindred of the Inteſtate, who are in equal Degree,
" and thoſe who legally repreſent them.

" Provided that there be no Repreſentations admitted among Collaterals
" after Brothers and Siſters Children; and in caſe there be no Wife, then
" all the ſaid Eſtate to be diſtributed equally to and amongſt the Children;
" and in caſe there be no Child, then to the next of Kindred in equal
" Degree of or unto the Inteſtate, and their legal Repreſentatives as afore-
" ſaid, and in no other Manner whatſoever.

" Provided alſo, To the end that a due Regard be had to Creditors,
" that no ſuch Diſtribution of the Goods of any Perſon dying inteſtate be
" made till after one Year be fully expired after the Inteſtate's Death, and
" that ſuch and every one, to whom any Diſtribution or Share ſhall be
" allowed, ſhall give Bond, with ſufficient Sureties, in the ſaid Courts,
" that if any Debt or Debts truly owing by the Inteſtate ſhall be afterwards
" ſued for and recovered, or otherwiſe duly made to appear, that then,
" and in every ſuch Caſe, he or ſhe ſhall reſpectively refund and pay back
" to the Adminiſtrator, his or her rateable Part of that Debt or Debts,
" and of the Coſts of Suit and Charges of the Adminiſtrator, by reaſon
" of ſuch Debt, out of the Part and Share ſo as aforeſaid allotted to
" him or her, thereby to enable the ſaid Adminiſtrator to pay and ſa-
" tisfy the ſaid Debt or Debts ſo diſcovered after the Diſtribution made as
" aforeſaid.

" Provided always, That in all Caſes where the Ordinary hath uſed here-
" tofore to grant Adminiſtration *cum Teſtamento annexo*, he ſhall continue ſo
" to do, and the Will of the Deceaſed in ſuch Teſtament expreſſed ſhall be
" performed and obſerved in ſuch Manner as it ſhould have been if this Act
" had never been made.

" Provided alſo, that nothing herein ſhall extend to or prejudice the
" Cuſtoms of *London* and *York*.

In the Conſtruction of this Statute it was doubted, whether the Huſband was intitled to Adminiſtration to his Wife, as before, ſo as not to be obliged to diſtribute the Perſonal Eſtate amongſt the Reſt of Kin to the Wife; by the 29 *Car.* 2. *cap.* 3. *par.* 35. it is enacted, " That this Statute ſhall not
" extend to the Eſtates of Feme Coverts who die inteſtate, but that the
" Huſband may demand and have Adminiſtration of their Rights, Credits,
" and other Perſonal Eſtates, and recover and enjoy the ſame, as they
" might have done before the making of the ſaid Act." 2 Mod. 20.

Alſo to (*a*) explain and aſcertain what Share the Mother was intitled to upon the Death of a Child, where the Father was dead, by the 1 *Jac.* 2. *cap.* 17. it is enacted, " That if after the Death of the Father any of the
" Children die inteſtate, without Wife or Children living, the Mother,

(*a*) The Reaſon of making the Act was, becauſe the Mother might marry, and

carry all away to another Husband,

" every Brother and Sister, and their Representatives, shall have an equal " Share with her."

but the Father surviving is intitled to the whole Personal Estate. Salk. 251. pl. 2. Will. Rep, 48, 49. Ld. Raym. 684. Comyn. Rep. 96. pl. 65.

Also in the Construction of this Statute for distributing Intestates Estates, the following Opinions have been holden:

*Page 429

Raym. 496. *Carter* and *Crawly*, a good Argument of Lord Chief Justice *North*'s on this Head.

1. That the Clause which says, that there shall be no Representations among Collaterals beyond Brothers and Sisters Children, must be intended Brothers and Sisters of the Intestate, and not to admit Representation when the Distribution happens to fall out amongst Brothers and Sisters, though remote Relations to the Intestate; for the Intestate is the Subject of the Act, it is his Estate, his Wife, his Children, and by the same Reason his Brother's Children, for he is equally the Correlative to all. †

2 Show. 286. pl. 282. S. P. Salk. 250. pl. 1. S. P. *Pett* and *Pett* determined, 2 Vern. 168, 233. See Ld. Raym 571. Will Rep. 25. pl. 51, 594, 595, 627, 3 Salk. 138. pl. 3. 12 Mod. 409. Comyns Rep. 87. pl. 56. Abr. Eq. 249. S. P determined.

† Therefore in the Case of *Pett* and *Pett*, 1 Salk. 250, it is said, If a Brother of the Intestate hath a Grandson, and a Sister has a Son, or Daughter, the Grandson shall not have Distribution with the Son, or Daughter, of the Sister. *Vide* 1 Ld. Raym. 571. S. C.

Mod. 109. 2 Mod. 204. 2 Jon. 93. Vent. 316 2 Lev. 173. *Smith* and *Tracey*.

2. On that Clause of the Statute, which directs the Distribution to every of the next of Kindred of the Intestate, who are in equal Degree, it hath been adjudged in several Books, that a Brother or Sister of the Half-Blood shall come in for a Share with one of the Whole Blood, being as near akin to the Intestate.

2 Vent. 317. Show. Parl. Cases 108. Vern. 437. 2 Vern. 124. Carth. 51. S. P. adjudged. Show. 1, 2. S. P. Comb. 112. Clift. 243. Holt 258. pl. 2.

Walsh versus *Walsh*. Eq. Cas. Abr. 249. pl. 7. Prec. Ch. 54. pl. 53.

3. That where the Statute says, that Distribution shall be amongst Representatives of Persons deceased *pro suo cuique jure*, by which it is meant, that Distribution shall be *per Stirpes* and not *per Capita*; so that if the Father has two Sons, and one of them dies in his Life-time, leaving three Children, and the Father dies Intestate, the surviving Son shall have half the Personal Estate, and the other Moiety shall be equally divided amongst the Children of the dead Son; yet it hath been holden, that if *A.* has three Brothers, and one dies leaving three Children, another two, and the third five, and *A.* dies intestate, that in this Case the Distribution shall be *per Capita*, and not *per Stirpes*, and that all the Children shall have an equal Share; for the Brothers being all dead, none take by Way of Representation, but all as next of Kin.

Carth. 51, 52. Comb 14, 112 2 Show. 285. pl. 281. 407. pl. 379. Show. 2, 25-6. 3 Danv. 409. pl. 7. Skin. 212. pl. 5. 218. pl. 3. 3 Mod. 58.

4. On the Clause of the Statute, which directs, that no Distribution shall be within a Year after the Death of the Intestate, it hath been adjudged, that, if a Person intitled to a distributive Share dies within the Year, yet it is such an Interest vested in him as shall go to his Executor or Administrator; for the Statute doth not make any Suspension or Condition precedent to the Interest of the Parties, but is a Clause merely for the Benefit of Creditors; also this Statute, being in Nature of a Will for all Persons who die Intestate, ought in this Instance to be resembled to the Case of a Residuary Legatee, in which it is always holden, that if such a Legatee die before the Debts are satisfied, so that it doth not appear to how much the Surplus will amount, yet the Executor or Administrator of such a Legatee shall have the whole Residue, *&c.* which remains over, and not the Executor of the first Testator.

5. It

5. It hath been holden, that, if the Father dies Inteſtate, leaving one Child, this is not *caſus omiſſus*; and conſequently, if there be a Wife, that ſhe ſhall have but a third Part; and that, if the Child dies inteſtate, Adminiſtration is to be granted to the next of Kin to him, and not to the next of Kin to the Father.

Carth. 52. & *vide* 3 Mod. 59. Ld. Raym. 86, 363. Skin. 212. pl. 5. 219. pl. 3. S. P. but no Reſolution.

6. It hath been reſolved, that if one dies inteſtate, leaving a Grandmother and Uncles and Aunts, the Grandmother is intitled to the Perſonal Eſtate, in Excluſion of the Uncles and Aunts.

Salk. 251. pl. 2. Abr. Eq. 249. S. P. reſolved. Ld. Raym. 684.

A Man died Inteſtate leaving a Widow and one Son, afterwards the Son died Inteſtate; then the Mother was delivered of a Child whereof ſhe was enſient at her Huſband's Death: Decreed, that ſuch Poſthumous Daughter was intitled to a Share of the Son's Perſonal Eſtate.

Wallis v. *Hodſon*, in Chan. Hil. 14 Geo. 2.

(K) Of Advancement and bringing into Hotchpot.

BY a Cuſtom, which has prevailed Time out of Mind in certain Places, the Wife and Children of a Perſon deceaſed are intitled to the Writ *de rationabili parte bonorum*, on which Writ they ſhall, according to * the Cuſtom, recover their Shares and Proportions of the Perſonal Eſtate; but ſuch Children, as were reaſonably advanced by the Father in his Life-time with any Part of his Goods, ſhall have no farther Share; for the Words of the Writ are, *nec in vita Patris promoti fuerunt*; but yet ſuch Child being only in Part advanced may bring ſuch Advancement into *Hotchpot*, or, as the Civilians expreſs it, into the *Collatio bonorum*, and then ſuch Child will be intitled to an equal Share with the Reſt.

Co. Lit. 176. b. Reg. 142. for the Cuſtom of *London* herein, *vide* Tit. *Cuſtoms of London*. * Page 430

This Advancement that will exclude a Child muſt be by the Father, and not by any other; nor will any Fortune, though never ſo great, acquired by the Child by his Labour and Induſtry, exclude him.

Swinb. 217.

Alſo ſuch Advancement as will exclude a Child, unleſs he brings it into Hotchpot, muſt be given directly to the Child, and not to another for the Benefit or Advantage of the Child; and therefore Money given to bind a Child out an Apprentice, or laid out in his Education, either at School or at an Univerſity, is no Advancement

Swinb. 217.

So if the Father purchaſes for his Child an Advowſon, or any other Eccleſiaſtical Benefice, or if he buys him any Office Civil or Military; theſe are not ſuch Advancements as will exclude him from a diſtributive Share.

Swinb. 217.

On the Statute 22 & 23 *Car.* 2. *c.* 10. which expreſsly excludes every Child advanced by the Father, except the Heir at Law, from a farther Share, unleſs he brings ſuch Advancement into the *Collatio bonorum*; it hath been holden, that if the Heir at Law hath a Settlement or Proviſion made on him on his Father's Marriage, out of the *Perſonal Eſtate*, that upon the Father's dying Inteſtate, to intitle him to any more, he muſt bring ſuch Advancement into Hotchpot.

2 Vern. 638. *Phiney* and *Phiney*.

So where the Father, on his Marriage, in Conſideration of a Marriage-Portion, covenanted to ſettle ſuch an Eſtate to the Uſe of himſelf for Life,

Abr. Eq. 249. &c. *Freeman* and *Edwards*

2 Will. Rep. 435. Remainder to his intended Wife for Life, Remainder to the firſt and every other Son of the Marriage in Tail Male, Remainder to Truſtees for 1000 Years, in Truſt, to raiſe Portions for Daughters in caſe there were no Sons; that is to ſay, if but one ſuch Daughter, the Sum of 5000 *l.* and if two or more, then the Sum of 6000 *l.* equally between them, payable at their reſpective Ages of eighteen, or Days of Marriage, which ſhould firſt happen, and 80 *l.* Maintenance in the mean Time; the Wife died, leaving but one Daughter, the Father married again and had ſeveral Children and died Inteſtate, the Daughter by the firſt Marriage not being above the Age of eighteen; and it was held, that, in order to intitle her to Share with the other Children, ſhe muſt bring this 5000 *l.* into Hotchpot.

Preced. Chan. 170. Said in 2 Will. 446. a Legacy to a Child not be brought into *Hotchpot*, it not being a Proviſion ſecured by the Parent in his Life-time. If a Father dies Inteſtate, as to Part of his Perſonal Eſtate, a Child advanced by him in his Life-time is not to bring in ſuch Advancement into Hotchpot, in order to have a diſtributive Share of ſuch Part, whereof he died Inteſtate.

(L) What ſhall be a Devaſtavit, either in Executors or Adminiſtrators, and herein of the Order of paying Debts and Legacies: And therein

1. What Manner of Waſting will amount to a *Devaſtavit*.

Off. of Exec. 156. Godolph. 203. *Page 431 A *Devaſtavit* is a Miſmanagement of the Eſtate and Effects of the Deceaſed, in ſquandering and miſapplying the Aſſets contrary to the Truſt and Confidence repoſed in them, and for which Executors and Adminiſtrators ſhall anſwer out of their own Pockets, as far as they had, or might have had, Aſſets of the Deceaſed.

Off. of Exec. 157. Executors may be guilty of a *Devaſtavit*, not only by a direct Abuſe by them, as by ſpending or conſuming the Effects of the Deceaſed, but alſo by ſuch Acts of Negligence and wrong Adminiſtration as will diſappoint Creditors of their Debts.

Off of Exec. 157. Kelw. 59, 62, &c. 3 Leon. 143. Therefore it hath been held, that if the Executor ſells the Teſtator's Goods at an under Value, eſpecially if he might have got more for them; or if this were done by him for his own Advantage, and to defraud Creditors, that is a *Devaſtavit*, and he ſhall anſwer the real Value.

6 Mod. 181-2. So if an Executor omits to ſell the Goods at a good Price, and after they are taken from him, there the Value of the Goods ſhall be Aſſets in his Hands, and not what he recovers, for there was a Default in him.

6 Mod. 181. But if, without any Omiſſion of his, Goods are taken out of his Poſſeſſion, and he does not recover ſo much in Damages as the Goods were really worth, and that happens not through any Default of his, he ſhall anſwer for no more than he recovers: So if the Goods be periſhable Goods, and before any Default in him to preſerve them, or ſell them at due Value, they are impaired, he ſhall not anſwer for the firſt Value, but ſhall give that Matter in Evidence to diſcharge himſelf; but if one takes Goods out of his Poſſeſſion, he muſt ſue him that took them, to have an Opportunity

portunity of discharging himself of answering more in Assets than he recovers.

If the Executor releases Debts due to the Testator, this shall charge him to the *(a)* Value of the Debt, though perhaps he did not receive near so much as was due: So if he releases a Cause of Action, accruing either in the Life-time of the Testator, or in his own Time, in Right of the Testator, this will be a *Devastavit*. Off. of Exec. 158. Hob. 66. And. 138. Cro Eliz. 43. 4 Leon. 102. Godb. 29.

(a) If an Executor should release a Debt of 100*l.* for one Shilling, that will not bind a Creditor; but in case there is no other Creditor, save only the Executor himself, there his Assent will be binding to him; as if an Executor will voluntarily release a Debt, he shall not be relieved against it, though a Creditor should. Vern. 455. *per* Lord Chancellor.

Also it is said, that if an Executor pays Money in Discharge of an usurious Bond, entered into by his Testator, that this is a *Devastavit*. Hob. 167. Noy 129. S. P. If he pays Money on an usurious Contract entered into by the Testator.

It is holden, that if an Executor to an Obligee in a Penal Bond, after the Bond is forfeited, releases the Penalty on Receipt of Principal and Interest, that this is a *Devastavit*; but the Contrary hereof is holden by three Judges in *(b) Cro. Car.* for that the Executor in this Case does no more than what in Equity and Conscience he ought to do; but if an Infant Executor gives such a Release, it is void; but this it seems arises from the Privilege of Infancy.‡ Off. of Exec. 158. (*b*) Cro. Car. 490. *Kniveton* and *Latham*. W. Jones 400.

‡ The Penalty is now saved by bringing Principal, Interest and Costs into Court, by virtue of the Statute 4 Ann. c. 16. s. 13. consequently an Executor or Administrator accepting Principal and Interest, before Suit cannot be guilty of a *Devastavit*.

If an Executor takes an Obligation in his own Name, for a Debt due by Simple Contract to the Testator, this shall charge him as much as if he had received the Money; for the new Security hath extinguished the old Right, and is *quasi* a Payment to him. Off. of Exec. 158. Yelv. 10. 2 Lev. 189. Keil. 52.

So if the Executor sues a Person by Trover and Conversion, in which he has a Right to recover; and afterwards he and the Defendant come to an Agreement that he shall pay the Executor such a Sum at a future Day, and the Party fails, this is a *Devastavit*; and he shall answer *ad valorem*. 2 Lev. 189. *Norden* and *Levit*. 2 Jon. 88. S. C. adjudged, Vern. 474. S. C. cited,

and said to have been affirmed on a Writ of Error in the House of Lords, and a Case there cited by Lord Chancellor, which he said was adjudged when *Pemberton* was Chief Justice, where an Executor of an Obligee accepted a Note drawn upon a Goldsmith for the Money; the Goldsmith accepted the Bill, and before Payment fails; the Executor afterwards brought an Action upon the Bond, and this Matter being given in Evidence was adjudged a good *Payment*.

* So if an Executor submits the Debts, or whatever he is intitled to in Right of the Testator, to Arbitration, and the Arbitrators award him less than his Due; this, being his own voluntary Act, shall bind him, and he shall answer for the full Value. * Page 432 Off. of Exec. 71, 159. 3 Leon. 51.

If an Executor neglects to pay Interest, and afterwards acknowledges a Judgment for Principal and Interest, this is a *Devastavit*, unless he shews Want of Assets to pay Interest, &c. § 2 Lev. 40.

§ But *qu.* If it is a *Devastavit* for

2. Where more than the Interest, which accrued by his Neglect; and if Equity would not give Relief, especially on a Bill filed before Recovery had against him, and without Delay?——Execution shall be upon a *Devastavit*, as for his own proper Debt, by *Capias ad satisfaciendum* or *Elegit*. R. 2 Leon. 188.——But a Debt by *Devastavit* shall be only of the Nature of a Debt by Simple Contract. 2 Vent. 40.——And therefore the Executor of him who was guilty of a *Devastavit* may retain for his Debt, before Payment of the Debt due

2. Where it will be a *Devaſtavit* to pay Debts of an inferior Nature before thoſe of a ſuperior, and the Order in which Debts are to be paid.

Off. of Exec. 131. The better to conſider the Order which the Law preſcribes for the Payment of Debts, and the Duty enjoined Executors and Adminiſtrators in diſcharging themſelves of the Aſſets of the deceaſed, and which they muſt obſerve at their Peril, it is neceſſary to take Notice, that theſe Debts are divided into three Sorts; 1. Debts by Record. 2. Debts by Specialty. 3. Debts by Simple Contract.

Off. of Exec. 131. Debts by Record, which are to have the firſt Precedency, are again divided into Debts due to the Crown, Debts by Judgments obtained in any Court of Record, and Debts by Recognizances, Statutes Merchant or Staple.

2 Inſt. 32. Off. of Exec. 132. Cro. Eliz 793. Of theſe the higheſt in its Nature is the King's Debt, and his Prerogative to be (*a*) preferred before other Creditors ariſes from the Regard the Law hath to the Public Good beyond any private Intereſt.

(*a*) But it is ſaid, that if there be a Debt owing to the King, Equity will order it to be paid out of the Real Eſtate, that other Creditors may have Satisfaction of their Debts out of the Perſonal Aſſets. Vern. 405.

Off. of Exec. 132. Therefore if an Executor, whoſe Teſtator was indebted by Matter of Record to the King, be ſued by Judgment, or any other Creditor, he may plead in Bar, that his Teſtator died ſo much indebted to the King, (*b*) ſhewing how; and that he hath not Aſſets above the Value of that Debt; and this will be a good Plea: So if a Creditor purſues his Remedy by ſuing out Execution upon a Statute Merchant or Staple, the Executor upon ſetting forth this Matter will be relieved on an *Audita Querela*.

(*b*) In Debt upon an Obligation againſt an Executor, who pleaded, that the Teſtator, *tempore mortis ſuæ*, was indebted to the King for the Office of Sheriffſhip; and becauſe it was not averred, that it was *verum & juſtum debitum & minime ſolutum*, it was demurred in Law, and without Argument (becauſe an Injunction was ſerved out of the Exchequer) adjudged for the Plaintiff. Cro. Jac. 182. *Wodell* and *Hungate*. But where in Debt againſt an Executor, he pleaded that the Teſtator entered into a Bond in ſuch a Penalty to *J. S.* conditioned to pay ſo much Money, which was not yet paid, beyond which he had not Aſſets; and there being a Special Demurrer to this Plea, becauſe the Defendant did not aver (as he ought) that the Bond was entered into by the Teſtator *pro vero & juſto debito*, the Court held the Plea good without ſuch an Averment; for it ſhall be intended the Bond was given for a juſt Debt, and the Obligation itſelf ſhall be ſufficient to charge the Executor, though the Teſtator never received any Money thereon. Carth. 8. *Rake* and *Row*, and *vide* Cro. Jac. 8, 625. 6 Co. 109. Lev. 132. bad without ſuch Averment on Special Demurrer. ‖

‖ The uſual Method of pleading now, is to aver the Bond was given for a true and juſt Debt, that it remains unſatisfied, and is ſtill in full Force, &c.

Off. of Exec. 133. But the Debts due to the Crown, which are to have a Precedency, muſt be underſtood of Debts by Matter of Record; and therefore Sums of Money due to the King upon Wood-Sales, Sales of Tin, or other his Minerals, and for which no Specialty is given, are not to be preferred to the Subject's Debt by Matter of (*c*) Record.

(*c*) But it ſeems that if the King's Debt, and likewiſe that of a Subject's, be both inferior to Debts on Record, that the King's ſhall be preferred. *Vide* Tit. Prerogative.

So

due by the *Devaſtavit*. *Id.*——Executor *de ſon tort* of Executor *de ſon tort* is not liable for a *Devaſtavit* committed by the firſt, (as it is ſaid) either at Common Law, or by the ſtat. 30 Car. 2. c. 7. T. 11 & 12 Geo. 2. *Andr.* 252. See *poſt*. 446.

* So of Amercements in the King's Courts Baron, Courts of his Honours which be not of (*a*) Record; also of Fines for Copyhold Estates, or Money for which Strays within the King's Manors, or Liberties, are sold; these are not Debts by Record. * Page 433 Off. of Exec. 133.

(*a*) But as to Fines and Amercements in the King's Courts of Record, there is no Doubt but they are Debts of Record. Off. of Exec. 134-5.

Also whatever accrues to the King by an Attainder or Outlawry, is to be considered as a Debt by single Contract before Office found; for though the Debts due to the Person outlawed, or attainted, were by Matter of Record, and although the Outlawry and Attainder are upon Record, yet the King's Title also must appear on Record, which cannot be before Office found. Off. of Exec. 133.

Also it is said, that the Arrearages of Rent due to the King, whether it be a Fee Farm Rent, or Rent reserved on a Lease for Years, is to be considered as a Debt by Simple Contract. Off. of Exec. 134.

Next to the King's Debts on Record, are Judgments to be paid, for these in Regard of the Solemnity of them are of greater (*b*) Notoriety than Recognizances, or Statutes; for tho' these likewise be of Record, yet, as they are entered into by the private Consent and Agreement of the Parties, they are not esteemed Securities of as high a Natute in the Eye of the Law, as Judgments, which are presumed to be given *Invitè*, tho' voluntarily acknowledged by the Party. Off. of Exec. 135. Rol. Abr. 296. Cro.Eliz.793.

(*b*) An Executor shall discharge a subsequent Judgment before a prior Statute, because of the Notoriety of it. 4 Co. 59.—But if the Statute be extended, whether the Judgment Creditor may enter on the Conuzee, Q. & *vide* 2 And. 157. Cro. Eliz. 734, 822. It is said to have been decreed at the *Rolls*, that Mortgages were to be paid in the first Place, and then Judgments, and then Recognizances; but that upon Appeal to the House of Lords it was adjudged, that Mortgages were not to be preferred to other real Incumbrances; but that Mortgages, Judgments, Statutes and Recognizances should take Place according to their Priority, and as they stood in Order of Time. 2 Vern. 524. But for this, and the Order in which Debts must be paid in Equity, and the Difference between legal and equitable Assets, *vide* Abr. Eq. 141, &c. 235, &c.

Therefore if a *Scire Facias* be brought against an Executor on a Judgment entered into by his Testator, he cannot plead *plene Administravit*; for a Judgment being to be paid next to the King's Debt, the Executor ought to shew that he laid out the Assets in the discharging the King's Debt, or in satisfying some other Judgment; otherwise it might be that he administered the Assets in discharging Statutes, Recognizances, or Debts on Specialty; which he could not do before a Debt on a Judgment. Cro.Eliz.575. *Ordway* and *Godfrey*. Allen 48. Moor 858. Stil. 56. Raym. 230. 3 Keb. 258. 2 Keb. 736.

Comb. 298. Ld. Raym. 3. S. P. but Salk. 296. pl. 5. 4 Mod. 296. S. P. and there held, that such a Plea is good on a General, tho' not on a Special Demurrer; and in the latter of these Books, the Case of *Ordway* and *Godfrey*, Cro. Eliz. 575. is denied to be Law.—And by the Off. of Exec. 137. it is said, that an Executor may, to such a *Scire Facias*, plead generally, that he hath fully administred, without shewing that he did administer in Payment of Debts of as high a Nature; but yet that must be proved upon the Evidence, else the Trial will fall out against the Executor. Skin. 565. pl. 12. *Court* allowed Off. of Exec. to be a good Book, but did not agree in this Point; he should plead nothing in his Hands at Testator's Death, but *Holt* in Comb. 298. says, that Precedent prevails more than the Reason of the Thing. *

* Certainly Payment of a Debt of an inferior Nature cannot be given in Evidence on *plene administravit*, to an Action on Judgment; for, the Debt being on Record, the Law presumes the Executor had Notice of it, and therefore should not have paid the inferior Debt.—But I conceive, if the Payment had been of a Judgment Debt, it might have been given in Evidence on a general Plea of *plene administravit*, because such Payment was legal, and a due Administration of the Effects,

But if the Judgment be satisfied, and only kept on Foot to (*c*) wrong other Creditors; or if there be any Defeazance of the Judgment yet in Force, Off. of Exec. 136.

(*c*) For plead-

ing that a Judgment is kept on Foot by Fraud and Covin, *vide* 8 Co. 132. 9 Co. 108. Cro. Jac. 35, 102, 626 Rol. Abr. 802. Jon. 91. Vaugh. 103, 104. Sand. 336. 2 Saund. 48. 2 Keb. 591. Mod. 33. Lev. 281. Sid. 333. Salk. 298. pl. 10. 4 Mod. 63. 2 Mod. 36. See Ld. Raym. 263. Carth. 429. 12 Mod. 153, 229. Comb. 444, 449.

Force, the Judgment will not avail to keep off other Creditors from their Debts. ‡

‡ It is the ſame Law if a Bond is paid, but kept on Foot by Fraud and Covin; or if leſs is due, for Principal and Intereſt, than the Penalty, and the Executor hath Aſſets *ultra*, in either Caſe, the Special Matter may be ſet forth by the Plaintiff in his Replication.

• Page 434

Vern. 143. 3 Lev. 355. 2 Vern. 37, 88.

It has been holden, and ſeems now agreed, that a Decree in a Court of Equity is equal to a Judgment at Law; and that the filing of a Bill in Equity is of Equal Force to the filing of an Original at Law, • to prevent the Alienation of Aſſets; and therefore where an Executor, tho' without Notice of a Decree, paid a Debt due by Specialty, he was decreed to pay it over again out of his own Pocket.

Tho' the contrary is holden. Rol. Abr. 377. Stil. 38.

Off. of Exec. 138. Dyer 80. Rol. Abr. 925. Bridgm. 79, 80.

As to Statutes and Recognizances, they are of an equal Degree, and to be paid next to Judgments; and therefore the Executor, where there are ſeveral Conuzees, may prefer a ſubſequent Statute to a prior; for each Statute equally affects the Perſonal Eſtate, tho' as to Lands the firſt ſhall have Precedence.

But for this *vide* Tit. *Execution*.

5 Co. 28. *Harriſon's* Caſe. Rol. Abr. 925. Cro. Jac. 8. Cro. Car. 362.

But if the Teſtator had entered into a Statute for Performance of (*a*) Covenants, and none of them were broken, in an Action of Debt againſt the Executor on a Specialty, he cannot plead this Statute; for perhaps the Covenants may never be broken, and it would be unreaſonable to allow the Executor to ward off a juſt Debt upon a Contingency that may never happen.

(*a*) Or for Payment of Money when an Infant ſhall come of Age. 5 Co. 28 & *vide* Rol. Abr. 925-6.

Off. of Exec. 141.

Debts by Specialty as thoſe by Bonds, *&c.* ſealed by the Teſtator, are next to be paid.

Cro. Eliz. 315. 3 Lev. 57. S. P.

Alſo it hath been adjudged, that, if an Action be brought againſt an Executor on a Simple Contract of his Teſtator's, he may plead, that his Teſtator entered into a Bond payable at a future Day, and this will be a good Bar. •

• See *ante* 433. n.

Off. of Exec. 145. Rol. Abr. 927.

Alſo Rent Arrear, and unpaid by the Teſtator, is equal to a Debt by Specialty; for this favouring of the Realty, and maintained from receiving the Profits of the Land, the Executor can no more wage his Law againſt ſuch a Debt, than he can to a Debt by Specialty. *Ergo* 'tis more than a mere Perſonalty.

3 Lev. 267. *Newport* and *Godfrey*. 4 Mod. 44. 2 Vent. 184. S. C. adjudged. Comb. 183. Ver. 490.

So where Debt was brought againſt an Executor for Rent reſerved on a Parol Leaſe, after the Leaſe was determined, and the Executor pleaded, that the Teſtator entered into an Obligation, and that he had not Aſſets *ultra* 5 *l.* which were not ſufficient to diſcharge this Obligation; and on Demurrer it was reſolved, that this Rent, tho' reſerved on a Parol Leaſe, was yet equal to an Obligation; and that the Contract ſtill remained in the Realty, tho' the Term was determined, and no Diſtreſs now. †

† *Sed qu.* If the Plea be true, and well pleaded, if it is not a Bar to ſuch Action?

Alſo

Alſo by the Cuſtom of *London*, if a Citizen of *London* dies indebted by Simple Contract, ſuch Debt is equal to a Debt by Specialty, and ſhall bind the Plaintiff, tho' a Stranger, and no Citizen. ‡

Cro. Eliz. 409. Noy 53. Rol. Abr. 557.

‡ *Sed qu.* If the Executor will not be juſtified in paying the Debt on Specialty, and if he has not a Right to plead the Specialty, &c.

Debts by Simple Contract are poſtponed to all (*a*) others, being Debts of an Inferior Nature; yet an Executor is bound, as far as he has Aſſets, to pay them, as much as any other Debt; and therefore a Simple Contract Creditor need not alledge, that the Executor had Aſſets to ſatisfy Debts of a Superior Nature, and his alſo; but if the Truth be, that the Executor has only Aſſets ſufficient to ſatisfy ſuch Superior Debts, he muſt plead it.

9 Co. 88. Off. of Exec. 155. Rol. Abr. 921. 5 Co. 82.

(*a*) It is ſaid, that Debts due for Servants Wages, on the Statute of Labourers, ſhall be paid before Debts by Simple Contract. Rol. Abr. 927 ——— If a Man recovers a Judgment or Sentence in *France* for Money due to him, the Debt muſt be conſidered here only as a Debt due on Simple Contract. 2 Vern. 540. ——— Alſo in Equity it hath been ruled, that a voluntary Bond ſhall not in a Courſe of Adminiſtration take Place of real Debts, tho' by Simple Contract; but ſhall, notwithſtanding, be paid before Legacies. Abr. Eq. 143-4.

But though the Law requires, that Debts ſhould be paid according to their Superiority; as herein ſet forth; yet may an Executor pay a Debt on a Simple Contract before (*b*) a Specialty, if he has no * (*c*) Notice of ſuch Specialty; for otherwiſe it might be in the Power of the Obligee to ruin the Executor by keeping his Bond in his Pocket until he had paid away all the Aſſets in diſcharging Simple Contract Debts.

* Page 435

Keilw. 51. Plow. 279. 2 And. 157.

Sid. 230. 2 Show. 492. pl. 457. 3 Danv. Abr. 394. pl. 15. Comb. 35. not determined. 3 Lev. 113-4. Vaugh. 94. (*b*) But where to a *Scire facias* againſt Executors, upon a *Judgment* againſt their Teſtator in Debt, they pleaded, that before they had any Conuzance of this Judgment, they had fully adminiſtered all their Teſtator's Goods, in paying of Debts upon Obligations; and upon Demurrer it was adjudged a bad Plea, for they at their Peril ought to take Conuzance of Debts upon Record; and ought firſt of all (unleſs for Debts due to the Crown) to ſatisfy them; and although the Recovery was in another County than where the Teſtator and Executors inhabited, it is not material. Cro. Eliz. 793. *Littleton* and *Hibbins*, & *vide* 3 Mod. 115. Vaugh. 94. 2 And. 159. Mod. 157. 2 Ld. Raym. 786, 1391. 2 Salk. 775. pl. 4. Vern. 143, 293, 457. 2 Vern. 62, 101, 202, 220, 299, 435. Ch. Pre. 188, 534. 10 Mod. 428, 495. 11 Mod. 45. pl. 10. Ld. Raym. 263, 678. 12 Mod. 7, 153, 291, 496, 527. Fitzgib. 77. Will. Rep. 295. pl. 73. 2 Will. Rep. 296, 298. pl. 81, 447. pl. 50. 3 Will. Rep. 222, 400, 402. Comyns 145. pl. 97. Caſ. Temp. Talb. 217. Stra. 407. Lil. Ent. 253. 2 Stra. 732, 1028. 2 Barnard. K. B. 183. Caſ. Temp. *King* C. and *Hardw.* C. J. 165. Andr. 110. ‖ (*c*) That Debts upon Simple Contract may be paid before Bonds, unleſs the Executors have timely Notice given them of theſe Bonds; and that Notice muſt be by Action. † Mod. 174, 175. 2 Vern. 37, 88. Eq. Abr. 236.

‖ The Executor, before he pays Specialty or Simple Contract Debts, ought to ſearch the King's Courts of Record, to ſee if there is any Judgment, as the Courts are open to all, and Judgments, if any, eaſily found.

† *Qu.* If the Poſition, that Notice muſt be *by Action*, is Law? And if demanding the Debt, or giving even parol Notice of the Bond, and producing it, is not ſufficient to make the Executor liable, if he afterwards pays a Simple Contract Debt?

Alſo (*d*) where there are ſeveral Creditors in an equal Degree, the Executor may prefer which he pleaſes; and (*e*) may, when a Creditor himſelf, retain Aſſets againſt thoſe who are in an equal Degree with him.

(*d*) For this *vide* Off. of Exec. 142. Dyer 22.

Rol. Abr. 926. Sid. 21. (*e*) For this *vide* Rol. Abr. 922-3. Hob. 127, 250. Godb. 217. Cro. Eliz. 115, 130. Leon. 111. Moor 260. Dyer 2. Keilw. 63. And. 24. Mod. 208. 2 Show. 403. pl. 375. 3 Danv. 386. pl. 17. Skin. 214. pl. 7.

3. Of paying Legacies before Debts, and therein of the Executor's Assent to a Legacy.

Off. of Exec. 26. Keilw. 128. Dyer 254.

Legacies are properly recoverable in the Spiritual Court, yet (*a*) if an Executor pays Legacies before Debts, tho' by Simple Contract, it is a *Devastavit* in him.

(*a*) And therefore if the Spiritual Court go about to compel an Executor to pay a Legacy without Security to refund, a Prohibition shall go. Vern. 93.

Godolph. 148, 149. Off. of Exec. 27.

And as the Law makes it a *Devastavit* in the Executor to pay Legacies before Debts; so it prohibits the Legatee from meddling with the Legacy without the Assent of the Executor; and therefore it hath been holden, that if a Legatee takes Possession of the Thing devised, without the Assent of the Executor, that he may have an Action of Trespass against him.

Off. of Exec. 29. Godolph. 148. Plow. 525.

But as it is the Will of the Testator which gives the Interest to the Legatee; so this Matter of Assent seems only a perfecting Act for the Security of the Executor; and therefore the Law does not require any exact Form in which it is to be made. Hence any Expression or Act done by the Executor, which shews his Concurrence to the Thing devised, will amount to an Assent.

4 Co. 28. 3 Co. 96.

If *A.* devises a Term to *B.* for Life, Remainder to *C.* and the Executor assents to the Devise to *B.* this will amount to an Assent to the Devise over to *C.* and vest the Interest in him accordingly.

10 Co. 47. Plow. 520. a. Dyer 367. Cro Eliz. 223. 2 Co. 37. b.

If one is himself both Executor and Devisee, and he enters generally without Claim or Demonstration of Election, he shall have the Thing devised as Executor, which is his first and general Authority.

Lev. 25. *Garret* and *Lister*. S. C. Keb. 15.

So where a Man possessed of a long Term devised it to his Wife for Life, Remainder to Trustees for his Son's Life, *&c.* and made his Wife Executrix; and it was held, that the Wife took the Term wholly as Executrix in the first Place, till she agreed to the Devise; but it being proved, that she said she would take the Term according to the Will, it was held by the Court to be a sufficient Assent.

Lev. 25.

So where in a like Case, where the Wife said, that the Son was to have the Estate after her; and this was resolved to be a sufficient Assent.

Hill. 5 Ann. *Becket* and *Ball*.

Hence it hath been held, that if a specific Legacy be devised, as three Gowns, *&c.* and the Legatee takes Money in Satisfaction of them, that this amounts, 1*st*, to a Consent of the Executor to the Legacy or Devise of them; and then it is a Sale of them by the Legatee or Devisee to the Executor for the Money *eo instanti*.

* Page 436

* 4. What shall be allowed on Account of Funeral Expences.

37 H. 6. 30. Rol. Abr. 926.

An Executor may lay out so much of the Testator's Assets as are necessary for defraying his Funeral Expences, before he has paid any of his Debts or Legacies.

Off. of Exec. 129. Supplem. to Wentw. 37, 130. Comb. 342.

And herein the Executor is to be careful that the Expences be moderate, and not exceeding the (*b*) Degree and Circumstances of the deceased; otherwise he may be guilty of a *Devastavit*.

(*b*) Where the Court of Chancery allowed 600 *l.* as a reasonable Sum, in defraying the Expences of a Man of great Estate and Reputation in his Country, and being buried there; but if he had been buried elsewhere, it seems his Funeral might have been more private, and the Court would not have allowed so much. Preced. Chan. 27.

And in Strictness it is said, that no Funeral Expences are allowable against a Creditor, except for the Coffin, Ringing of the Bell, Parson, Clerk, and Bearers Fees; but not for Pall or Ornaments. *Holt* C. J. said, 10*l.* was enough to be allowed for the Funeral of one in Debt. *Comb.* 342. See 13 *Vin. Abr.* 563. *pl.* 5 §

Salk. 296. pl. 3.

§ *Qu.* Where a Man dies insolvent, if more than 40*s.* is allowed to the Executor or Administrator for Funeral Charges?

(M) In what Cases an Executor may make himself liable de bonis Propriis: And herein,

1. Where he shall be liable *de bonis Propriis* by his false Pleading.

EXECUTORS are no farther chargeable than they have Assets, unless they make themselves so by their (*b*) own Act; as by pleading a false Plea, *i. e.* such a Plea as will be a perpetual Bar to the Plaintiff, and which of their own Knowledge they know to be false.

Rol Abr. 930. Godolph. 198.

(*b*) If an Executor suffers Judgment to go against him by Default, upon executing a Writ of Enquiry, he shall not give Evidence of Want of Assets, for he is estopped, as if it had been the Case of an Heir; for he should have pleaded *plene Administravit*, or specially what Assets he had. 6 Mod. 308. *per Curiam.* See Sir *W. Jones* 87. Ld. Raym 589. 591. 2 Ld. Raym. 1051, 1054. 12 Mod. 411. Comyns 87. That if an Executor confesses or suffers Judgment by Default, he admits Assets in his Hands, and is estopped to say the contrary. Salk 310. That an Executor must defend himself by legal Pleading, and cannot in these Cases have any Relief in Equity. *Vide* Vern. 119. 2 Vern. 325. but yet *vide* 2 Vern. 146, 147. where no Defence at Law.

Therefore if an Executor, being sued, pleads *ne unques Executor*, and it is (*c*) found against him, the Judgment shall be *de bonis Testatoris si, &c.* (*d*) *Si non de bonis* (*e*) *Propriis*; for thereby he estrangeth himself from the Testator, and the Benefit of the Will, and by his own Falsity and Folly hath made his own Goods chargeable.

46 E. 3. 10. Rol. Abr. 930, 933. Cro. Jac. 191, 671. Leon. 67. And. 150.

(*c*) If upon a false Plea Judgment be given against an Executor upon Demurrer, and Execution be awarded, the Sheriff cannot return *Nulla habet bona Testatoris*, but is to return a *Devastavit*, as if it had been found against the Executor by Verdict. Cro. Eliz. 102. (*d*) But if there had been Judgment against the Testator, and the Party who recovered had brought a *Scire facias* on the Judgment against the Executor; in this Case, tho' the Executor had pleaded *ne unques Executor*, and it had been found against him, yet he shall be chargeable *de bonis Testatoris* only; for the Prayer of the Writ is for Execution of the Goods of the Testator, by which he is estopped to demand any other. Rol. Abr. 933. *Waldron* and *Berrie.* (*e*) As well of the Debt as of the Damages and Costs. Rol. Abr. 930.

So if to an Action brought against him he pleads a Release made to himself, and it is found against him, this shall charge him *de bonis Propriis*; for it is a Falsity which (*f*) falls within his own Knowledge.

Cro. Jac. 671-2.

(*f*) Where the Executor pleaded, that he performed a Condition, which being found against him, it was held, that he should be charged *de bonis Propriis.* Moor 69. *per* Dyer.

* So where an Action of Debt upon an Obligation was brought against an Administrator for 14*l.* and he pleaded, that before Notice of the Action his Administration was revoked; and that likewise before Notice he delivered over 200*l.* which he had of the Intestate's, to the new Administrator; the Plaintiff replied, that the Revocation was by (*g*) Covin and

* Page 437. Yelv. 219. *Morgan* and *Sock.* Bulst. 187. S. C.

(*g*) But where to an Action of Debt against an Executor he pleaded a former Judgment had against him by another Person, and that he had not Assets more than sufficient to satisfy the Judgment; and the Plaintiff replied, that this

 Fraud;

Judgment was had by Covin, to defraud the other Creditors, though it be found accordingly; and though this be a false Plea, yet the Judgment against the Executor shall only be *de bonis Testatoris*. Rol. Abr. 931. *Borret* and *Boyes*. [*Sed qu. de hoc?*]

Fraud, which being found for him, it was held, that he should recover absolutely from the Administrator.

Rol. Abr. 931. Cro. Jac. 672.

But if an Executor pleads, That such a Deed is not the Deed of his Testator, or that a Release was given to the Testator; though these prove false, yet the Judgment shall be *de bonis Testatoris*; for of these the Executor cannot be presumed to have so perfect a Knowledge.

Cro. Jac. 191. *Johns* and *Adams*.

So in Debt upon a Bond against Baron and Feme as Administratrix, the Defendant pleaded Payment by the Feme, after the Death of the Intestate, and it was found against him, and the Judgment was, *quod recuperet* against them *de bonis Testatoris, si tantum habent in Manibus, & si non, pro missis de bonis* (*b*) *propriis*, and held well enough; for though the Plea is false, yet the Husband was a Stranger to the Intestate, and might not know whether the Wife had paid it to the Plaintiff, or not.

(*b*) It was objected, That the Judgment ought to have been *de bonis Propriis* of the Baron only, for that a Feme Covert cannot have any Goods, but disallowed; for although a Feme Covert hath not any Goods during the Coverture, yet because the Baron is charged only in Respect of the Feme, she might have Goods if she had survived, and Execution might be taken against her. Cro. Jac. 191-2. but for this *vide* Rol. Abr. 930-1. Cro. Car. 693. *

* If there be Judgment against the Husband and Wife, Executrix, and a Return that the Husband wasted, it shall be *de bonis suis propriis*, 1 Rol. 932. l. 25.—If a Return be that the Wife *dum sola* wasted it shall be *de bonis propriis* of both. 1 Rol. 931. l. 5. R. Cro. Car. 519. See also 1 Rol. 930. l. 50.—If a *Devastavit* is returned against a *Feme Covert*, Executrix, and her Husband, that sufficient Goods have come to their Hands which they have wasted and converted to their own Use, it is good; the Conversion is not necessary, and may be rejected; and Judgment shall be *de bonis propriis* of both. Stra. 440.

Hob. 188. Cro. Jac. 647. 671. Hutt. 35. Brownl. 24. Rol. Abr. 931, 932. Saund. 112.

So if an Action of Covenant be brought against an Executor, and the Breach assigned be in the Time of the Executor; yet the Judgment shall be *de bonis Testatoris*, for it is the Testator's Covenant which binds the Executor, as representing him, and therefore he must be sued by that Name.

8 Co. 134. *Mary Shipley*'s Case. Hob. 199. S. C. cited.

It is holden in *Shipley*'s Case, that if an Action of Debt on an Obligation of 200 *l.* be brought against an Executor, who pleads fully administred; and the Plaintiff replies Assets, which are found by the Jury to the Value of 172 *l.* that a Judgment to recover the intire Debt and Damages, and Costs of the Goods of the Testator, *Si &c. & si non, tunc* the Damages of his (*c*) proper Goods, is good; for that the Defendant's Bar being in Effect, that he had not Assets, the same amounted to a (*d*) Confession of the Debt, on which the Plaintiff may take Judgment immediately, though he cannot have Execution until Assets came to the Hands of the Executor.

(*c*) That if the Executor has not sufficient Goods of the Testator's to satisfy both Debt and Damages, the Damages must be levied of the Goods of the Executor for the Delay; and the Levying the Damages of the Goods of the Testator, when it appears they are not sufficient to satisfy the Debt, is erroneous; for the Testator's Goods are to be charged with the Debt and not the Damages, if they are not sufficient to discharge both. Lev. 7. (*d*) That in an Action on the Case against an Executor, who pleads *Plene administravit*, the Plaintiff must prove his Debt, otherwise he shall recover but 1 *d.* Damages, though there be Assets; for the Plea only admits the Debt, but not the Quantity. Salk. 296. pl. 3. *per Holt* Ch. J.

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But in the Case of *Dorchester* and *Webb* it seems to be holden, that the Plaintiff, upon a Plea of *Plene administravit*, cannot have Judgment of Assets

ſets *in futuro*; for that this is ſuch an Acknowledgment of the Want of Aſſets, as will bar him in the ſame Manner as if the Plaintiff had denied that he had fully adminiſtered, which being found againſt him will ba him, and on which the Plaintiff muſt alſo pay Coſts. †

†'Tis common now, on ſuch Plea, to admit the Truth of it, and take Judgment *de bonis quando acciderint*. See the next Caſe, 438.

* But this Matter came to be fully conſidered in the Caſe of *Woel* and *Nelſon*, where in Debt againſt an Executor he pleads fully adminiſtred, whereupon the Plaintiff prays Judgment of Aſſets *in futuro*, and it was ſo entered; and after, upon a Suggeſtion of Aſſets, the Plaintiff ſues forth a *Scire facias*, to which he pleads no Aſſets, and it is found againſt him, and Judgment accordingly; and it was urged for Error, that the Plaintiff hereby has confeſſed the Plea of fully adminiſtred, and then it as as ſtrong againſt him as if there had been a Verdict, in which he ſhould have been barred for ever; but it was reſolved for the Plaintiff, for he had a good Cauſe of Action, and probably did not know but that there were Aſſets, and hath done nothing amiſs; for as ſoon as the Executor denies Aſſets by his Plea, he reſts ſatisfied, and makes only a Reaſonable Prayer, that he may be paid when Aſſets do come, as it is fit he ſhould, and therefore they agreed *Shipley*'s Caſe to be good Law; for when the Executor pleads *Riens en Mains*, he confeſſes the Debt, which is a good Foundation for the Judgment; but the Want of Aſſets at preſent hinders Execution, which is therefore ſtayed till Aſſets ſhall come.

* Page 438 Lev. 286. 2 Saund 214. Sid. 448. 2 Keb. 606, 671. Vent. 94. S. C.

2. Where by his Promiſe to pay or diſcharge the Teſtator's Debts or Legacies, he makes himſelf liable.

If an Executor, in Conſideration that a Creditor to the Teſtator will forbear to ſue him for a certain Time, promiſes to pay him his Debt, this ſhall bind him; and an *Aſſumpſit* lies againſt him on this Promiſe, (*a*) without alledging that he hath Aſſets. †

Cro. Jac. 47. Co. 94. Rol. Abr. 921. — Note. That by the Statute of Frauds 29 Car. 2. c. 3. ſuch Promiſe muſt be in Writing.

(*a*) It is ſaid in 9 Co. 94. a. that though the Plaintiff need not alledge, that the Exector has Aſſets; yet if in Truth there be no Debt due from the Teſtator or if the Executor had no Aſſets at the Time of the Promiſe made, he may give theſe Matters in Evidence.—But the better Opinion ſeems to be, that the Plaintiff need not prove his having Aſſets, and that Forbearance is ſufficient Conſideration to intitle him to the Action. *Vide* Rol. Abr. 24. Cro. Jac. 273. 604, 613. 3 Leon. 67. 2 Lev. 20, 122. Vent. 152‡—But a Promiſe by an Adminiſtrator *durante Minoritate* after the Infant has come of Age, will not bind ſuch Adminiſtrator. Cro. Car. 516. Rol. Abr. 910.

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‡ But the Plaintiff muſt prove his Debt, unleſs he has Evidence of the Defendant's Admiſſion of the *Quantum*.

So where in *Aſſumpſit* the Plaintiff declared, that *J. S.* deviſed a Legacy to him, and made the Defendant Executor, and the Plaintiff intending to ſue him for the Legacy, the Defendant, in Conſideration of Forbearance, promiſed to pay him: The Defendant pleaded divers Bonds and Judgments, and *Null Aſſets ultra*, upon which the Plaintiff demurred, and had Judgment without Argument: For it is not material whether he had Aſſets or no, for he is charged upon his own Promiſe, in Conſideration of Forbearance; and a Forbearance of Suit for a Legacy is a ſufficient Conſideration.

2 Lev. 3, *Davis* and *Reyner*. Vent. 120. S. C.

So if *A.* together with *B.* is bound to *C.* for the proper Debt of *B.* &c. and *A.* pays the Money, and *B.* dies and makes *D.* his Executor, and *D.*

Sid. 89. *Scot* and *Stevens*. Lev. 71. S. C. Rol. Rep. 27. S. P. *per Croke*, in

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Sid. 89. *Scot* and *Stevens*. Lev. 71. S. C. Rol. Rep. 27. S. P. *per Croke*.

in Consideration that *A.* will forbear to sue him till such a Time, assumes and promises to repay him; this Consideration is good, though *D.* was liable in Equity only. ‖

‖ *Qu.* If *D.* was not liable at Law, on the implied Promise of his Testator, as it was Money paid for his Use?

* Page 439 * (N) **What Actions Executors or Administrators may bring in Right of those they represent.**

Cro.Eliz.377. Latch. 167. Rol.Abr.912. Savil 118.

AN Executor stands in the Place of his Testator, and (*a*) represents him as to all his Personal Contracts, and therefore may regularly maintain any Action in his Right, which he himself might.

133. Poph. 189. Leon. 193. (*a*) But if one enters into an Obligation, conditioned to pay 20*l.* to such Person, as the Testator shall by his last Will appoint, and the Testator makes no particular Appointment, his Executors cannot maintain an Action for this 20*l.* for though they are his Assignees in Law, yet the Assignee here must be an Assignee in Deed; for the Word *Paying* carries Property with it. Hob. 9, 10.

But it seems that Executors could not at Common Law bring Trespass for a Trespass done to the Testator; to remedy which, by the 4 *E.* 3. *c.* 7. reciting, That "whereas in Times past Executors have not had Actions "for a Trespass done to their Testators, as of the Goods and Chattels of "the same Testators, carried away in their Life, and so such Trespasses "have hitherto remained unpunished; it is enacted, that Executors in "such (*b*) Cases shall have an Action against the Trespassors, and recover "their Damages in like Manner as they whose Executors they be should "have had, if they were in Life."

(*b*) It hath been adjudged, that an Executor may have an Action of Debt upon the Statute 2 & 3 E. 6. c. 13. against a Defendant, for not setting out Tithes in his Testator's Time; for though it is a Tort done to his Person, yet it is maintainable with the Equity of this Statute. Vent. 30.

Co.Lit.162.a. Also it was holden, that at Common Law there was no Remedy for Recovery of Rent-arrear in the Life-time of the Testator; for the Heir could not maintain an Action of Debt for it, because he had nothing to do with the Personal Contracts of his Ancestor; nor the Executor, because he could not represent his Testator, as to any Contracts relating to the Freehold and Inheritance; but this is remedied by the 32 *H.* 8. *cap.* 37. by which Executors and Administrators are enabled to sue for and recover all such Arrears of Rent, *&c.* for which *vide* Title *Debt*, Letter (C) 16, *&c.*

Cro.Eliz.377. Vent. 30. *vide* Title Trover and Conversion.

Executors and Administrators may bring Trover for the Goods of the Deceased, though the Defendant took the Goods before Probate or Administration committed, for the Probate and Administration relate back to the Death of the Testator or Intestate; and they may alledge the Possession in the Testator or Intestate; for though this be a possessory Action, yet the Law supposes the Possession in the Executor or Administrator, as soon as the Property is derived to them.

2 Lev. 26. Vent. 175. S. C. That

An Executor, (and not Heir or Assignee) for a Covenant broken in the Life-time of the Testator, shall have an Action of Covenant, though it were

Executors shall take Advantage of Covenants in gross. Palm. 558.—But Covenants annexed to the Freehold and Inheritance, though made with the Testator, his Executors and Administrators, shall descend to the Heir Aud. 55. Skin. 305. pl. 1. *vide* Title Covenant.

a Co-

a Covenant Real, which runs with the Land, as he cannot of that have an Heir, *&c.* and the Damages ſhall be recovered by the Executor, tho' not named, as he perſonally repreſents the Teſtator.

But though an Executor repreſents the Teſtator as to his Perſonal Eſtate and Contracts only, yet an Executor may bring an Ejectment † for an Ejectment in the Life of the Teſtator; for in this Action Damages as well as the Poſſeſſion of the Lands are to be recovered. (*c*)

Vent. 30.

† *Qu de hoc?*

(*c*) So they may bring a *Quare Impedit* for a Diſturbance in the Life-time of their Teſtator, and ſhall recover Damages within the Equity of the Statute 4 E. 3. c. 7. Cro. Eliz. 207.

* So if a Lord of a Manor aſſeſſes a Fine upon a Copyholder for his Admittance, and dies, his Executor may bring an Action for it; for it does not depend upon the Inheritance, but is *quaſi* a Fruit fallen.

* Page 440

Carth. 90. *Shuttleworth* and *Garret.*

3 Mod. 239. 3 Lev. 261. Show. 35. Comb. 151. S. C. adjudged by three Judges againſt *Holt* Ch. J. Ld. Raym. 502. [And *qu.* if *Holt* was not right?]

An Executor may bring a Writ of Error to reverſe an Attainder of High Treaſon of his Teſtator, for he is privy to the Judgment, and may have a Loſs thereby.

Salk. 295. pl. 1. *King* and *Ayloff*, by

three Judges againſt *Holt*, who held, that by the Reverſal the Blood and Land is reſtored, which is no Advantage to him, and the Goods were forfeited by the Conviction of the Teſtator, and not by the Attainder. [And *qu.* if his Opinion is not according to Law?]

(O) How ſuch Actions muſt be laid, and therein of joining a Matter in Right of the Teſtator, and in their own Right in the ſame Action.

AN Executor cannot in the ſame Action join a Demand in his own Right, and what he hath in Right of the Teſtator, in the ſame Action, for the Rights being of ſeveral Natures, there muſt be ſeveral Judgments.

Moor 419. Cro. Eliz. 406. Hob. 184. Noy 19. Vent. 268. 2 Lev. 110.

111, 228. 2 Keb. 814. 3 Lev. 74. Show. 366. Salk. 10. pl. 1. Carth. 235.

And therefore if in *Aſſumpſit* againſt an Adminiſtratrix, the Plaintiff declares upon a Sale of Goods to the Inteſtate for 200 *l.* and upon another Sale to the Defendant herſelf for 27 *l.* and that upon Account the Defendant was found indebted to the Plaintiff in theſe Sums, and promiſed, *&c.* the Declaration is naught, for the Charge being in ſeveral Manners, *viz.* in her own Right, and as Adminiſtratix, it ought to have been by ſeveral Actions.

Hob. 88. *Harrand* and *Palmer.*

So if *A. B.* and *C.* be poſſeſſed of Goods as joint Merchants, which come to the Hands of *J. S.* and afterwards *B.* and *C.* dies, *A.* alone may bring Trover for theſe Goods; for though between joint Merchants there is no Survivorſhip, yet the Action in this Caſe muſt ſurvive, though the Intereſt doth not; otherwiſe there would be a Failure of Juſtice, becauſe the Survivor and the Executors of thoſe who are dead cannot join in Action

Carth. 170, 171. *Kemp* ver. *Andrews.*

tion, for that their Rights are of ſeveral Natures, and their muſt be ſeveral Judgments.

5 Co. 32. laid down as Rule.

If an Executor brings an Action of Debt for any Thing in Right of the Teſtator, it muſt be in the (*a*) *Detinet* only.

Moor 566. Rol. Abr. 602, 603. S. P. *(a)* But if in the *Debet* and *Detinet*, it is aided after Verdict, by 16 & 17 Car. 2. *c.* 8. 1 Lev. 250. *Fain* v. *Paynton*, S. C. 379.

*Page 441 20 H. 6. 5. b. Rol. Abr. 602. S. C.

So if an Executor brings Debt upon an Obligation made to the Teſtator, where the Day of Payment incurred (*b*) after the Death of the Teſtator, yet the Writ ſhall be in the *Detinet* only; for he brings the Action as Executor.

(*b*) So if a Man binds himſelf to the Teſtator to pay him 100 *l.* when ſuch a Thing ſhall happen, if it happens after the Death of the Teſtator; yet the Writ of Debt by the Executor ſhall be in the *Detinet* only. Rol. Abr. 602. ——So if a Rent be granted to another for Years, the Executor of the Grantee ſhall have Debt, for the Arrearages of this Rent incurred after the Death of the Teſtator in the *Detinet* only; for he had it as Executor. Rol. Abr. 602.——So if Leſſee for twenty Years leaſes for ten Years, rendering Rent, and dies, his Executor or Adminiſtrator ſhall have Debt for the Rent incurred after the Death of the Teſtator in the *Detinet* only. Rol. Abr. 603. Noy 32. Cro. Car. 225. Lev. 250. 2 Keb. 407. Sid. 379. S P. adjudged.——But in 2 Jon. 169. the contrary ſeems to be adjudged, and a Diverſity taken between Things in Action and Chattels in Poſſeſſion; for as to Things in Action, the Writ muſt always be in the *Detinet*, as for the Arrears of an Account, *&c.* and it ſhall not be Aſſets till recovered; but in this Caſe the Reverſion of the Term being in the Executor immediately by the Death of the Teſtator, it is Aſſets for the whole Value, and the Shewing he is Executor, is only to intitle him to the Term to which the Rent is incident.

Cro. Eliz. 326. 5 Co. 31. Cro. Jac. 545. Hob 88, 184, 272.

So if in an Account an Executor recovers a Debt due to his Teſtator, in Debt, for the Arrears thereupon, the Writ ſhall be in the *Detinet* only; for tho' the Action is converted into a Debt by the Account, yet it is the ſame Thing which was received in the Life of the Teſtator.

Noy 19. 2 Lev. 111. 2 Jon. 47.

Rol. Abr. 602. *Lane* 79. *ante* 394. S. C.

So if *A.* be in Execution upon a Judgment for *B.* and after *B.* dies, and *A.* brings an *Audita Querela* againſt *C.* the Executor of *B.* and has a *Scire facias*; and thereupon puts in Bail by Recognizance in Chancery, according to the Statute of 11 *H.* 6. *c.* 10. and after upon this *Audita Querela*, Judgment is given againſt *A.* and afterwards a *Scire facias* iſſues againſt the Bail, and after Judgment the Bail is taken in Execution upon the Recognizance, and the Sheriff ſuffers him to eſcape, upon which Eſcape the Executor brings an Action of Debt (*c*); this Action ought to be brought in the *Detinet* only, and not in the *Debet* and *Detinet*; for this Recognizance is in Nature of the firſt Debt, this being in a legal Courſe.

(*c*) So if one as Executor obtains Judgment in Debt and takes the Defendant in Execution, and the Sheriff ſuffers him to eſcape, *&c.* for the firſt Action being in the *Detinet*, and that for the Eſcape being founded upon the ſame Record, it ought to purſue it. Cro. Eliz. 326. Cro. Jac. 545. 685. Hob. 264. 2 Rol. Rep. 132. Style 232. Hutt. 79. Carth. 49.

Rol. Abr. 602.

But if an Executor takes an (*d*) Obligation for a Debt due to his Teſtator by Contract, in Debt upon this Obligation the *Writ* ſhall be in the *Debet* and *Detinet*. †

(*d*) So if the Executor ſells the Goods of the Teſtator for a certain Sum, he ſhall have Debt for this in the *Debet* and *Detinet*. Lane 80.—So if a Executor recovers in Treſpaſs for Goods taken out of his Poſſeſſion, in Debt, for the Damages recovered, the Writ ſhall be in the *Debet* and *Detinet*, for he need not name himſelf Executor. Rol. Abr. 602. Lane 80.

† For he has made the Debt his own, and is chargeable with the original Debt as Aſſets.

Cro. Jac 685. Winch. 80. S. C.

So if an Executor, having Lands by an Extent, upon a Statute made to the Teſtator, and naming himſelf Executor, by Deed leaſes them for three

Years, rendering Rent, &c. if an Action of Debt is after brought by him for this Rent, it muſt be in the *Debet* and *Detinet*, becauſe it is founded upon his own Contract. Mod. 185. S. P. See Poph. 120. 5 Co. 31. b.

Vent. 171. 3 Mod. 327. Lev. 128. 8 Mod. 288, 356. 10 Mod. 12. 12 Mod. 7.

So an Executor, being Leſſee for Years of a Rectory in the Right of the Teſtator, may have Debt upon 2 & 3 *E.* 6. *c.* 13. for not ſetting out Tithes in the *Debet* and *Detinet*, becauſe founded upon a Wrong in his own Time; and by the Statute it is given to the Party grieved. Cro. Jac. 545

Alſo Executors and Adminiſtrators may, if they were actually poſſeſſed of the Goods of the Deceaſed, declare that they were poſſeſſed as of their own Goods and Chattels, without naming themſelves Executors or Adminiſtrators, becauſe the Violation is to the Property actually in their own Hands. Mod. 62, 63. 2 Keb. 668. 2 Saund. 148. See 6 Mod. 92. Fitgib. 202, 257.

10 Mod. 21, 389. Vern. 25. pl. 20. Comyns 18. pl. 10. 150. pl. 102. 2 Will Rep. 576. pl. 188. 3 Will. Rep. 81, 88.

It was formerly (*a*) holden, that an Adminiſtrator in his Declaration ought to ſhew how he was Adminiſtrator, and likewiſe to produce his Letters of Adminiſtration; alſo it was (*b*) held, that in an Action againſt an Adminiſtrator, the Plaintiff ought to ſhew by (*c*) whom Adminiſtration was granted.

(*a*) 44 E. 3. 16 35 H. 6. 31.
(*b*) Cro. Jac. 10. *Wade* and *Atkinſon*.
(*c*) That an Adminiſtrator, 25 H. 6. 31.

in his Declaration, was likewiſe to ſhew in what Place Adminiſtration was committed to him. —But this was ruled otherwiſe. Cro. Eliz. 283. *Piers* v. *Turner*.

* Page 442

* But afterwards this Difference was taken, that where an Adminiſtrator is Plaintiff, he muſt ſhew by whom Adminiſtration was granted to him, becauſe it is that which intitles him to the Action; and if granted by a (*d*) peculiar Juriſdiction, ought not only to ſhew by whom, but muſt add this Clauſe, *Cui commiſſio Adminiſtrationis prædict' de jure pertinuit*, which he need not do, if the Adminiſtration was granted by a Biſhop; for in ſuch Caſe it is ſufficient to ſay, that it was granted to him by the Biſhop, *loci illius Ordinarium*, becauſe ſince the Law takes Notice of the general Juriſdiction of a Biſhop over the whole Dioceſe, it likewiſe takes Notice of all Acts done by virtue of that Juriſdiction. Cro. Eliz 838, 879, 907. Style 106.
(*d*) Where Adminiſtration was granted by an Archbiſhop, and not ſaid Whether as Ordinary, or by virtue of his Prerogative, yet held good, Cro. Eliz. 6. 456. 4 Leon. 189.—Where the Adminiſtrator ſet forth, that Adminiſtration was committed to him by *J. S.* Archdeacon of *Norfolk*, and did not ſay *Loci iſtius Ordinarium*; and this was held good on a general Demurrer; for it is not neceſſary to ſhew the Juriſdiction of an Archdeacon more than of a Biſhop. Sid. 302. Lev. 192.—That the Plaintiff need not ſet forth the Authority of an Archdeacon, becauſe he is *Oculus Epiſcopi*, and is to commit Adminiſtration *de jure Ordinario*. 2 Rol. Rep. 124, 150. Cro. Jac. 556. Palm. 97. Style 54. but for this *vide* Cro. Eliz. 431. Moor 367. Leon. 312. Style 236, 282. Jon. 1. 2 Mod. 65 Lutw. 9, 408.—And that ſuch an Omiſſion will be aided after Verdict. Show. 355. *Maſon* and *Hanſon* adjudged. 4 Mod 133. S. C. Show. 355. 8 Mod. 244. Ld. Raym. 562. 2 Ld. Raym. 856, 1037, 1071, 1207, 1216. 10 Mod. 21. 11 Mod. 223. pl. 18. 12 Mod. 100, 385, 443, 537, 616. Comyns 17. pl. 9. Will. Rep. 753, 767. 3 Will. Rep. 349, 370. 2 Barnes 142. Stra. 412. 2 Stra. 716, 781. 2 Ld. Raym. 1510. Barnard. K. B. 29. See 3 Danv. 382. pl. 10. Comb. 196, 392. Salk. 37. pl. 4, 5, 42. pl. 11. 6 Mod. 151, 161, 304. 3 Salk. 23. Holt. 204. pl. 11.

But where the Plaintiff ſues the Defendant as Adminiſtrator, he need not now ſet forth in his Declaration by whom Adminiſtration was committed, for it may not be in his Knowledge, and therefore it hath been held ſufficient Lit. Rep. 80. Style 282, 463. Sid. 228. Jon. 1. Lutw. 301.

for him to declare, that Administration was granted to the Defendant *Debitâ juris formâ*, without shewing by what Ordinary; (*a*) but it is said to be necessary for him to alledge, that Administration was granted to him in order to charge him in the Action.

(*a*) In 2 Vent. 84. it is said, That the Plaintiff in his Declaration must aver, that the Administration was committed to the Defendant.——But in Comb. 465. a Case is cited to have been adjudged, Mich. 1698. that though such an Omission be ill upon a Demurrer, yet it is aided by the Defendant's pleading over, whereby he admits himself a rightful and lawful Administrator. See Ld. Raym. 265. Carth. 432.

Cro. Eliz. 551, 592. Cro Jac. 299, 409. Bulst. 200. 3 Bulst. 223.

Also it was formerly held absolutely necessary, that Executors and Administrators should (*b*) conclude their Declarations with a *Profert hic in Curia Literatas Testamentarias* or *Literas Administrationis*, because these were the Things which intitled them to the Action.

Hob. 38. (*b*) That in a *Scire facias* by an Executor upon a Judgment obtained by the Testator, the *Profert in Curia*, &c. may be in the Middle or End of the Writ. Carth. 69.

Vent. 222. * But it is after Verdict such Neglect would have been a good Cause of Demurrer.

But this also is now held to be but Form, and aided * by the express Words of the Statute *16 & 17 Car.* 2. *c.* 8.

(P) Of Actions and Remedies against Executors and Administrators: And herein,

1. Upon what Contracts or Engagements of their Testators or Intestates Executors or Administrators are liable.

* Page 443 Off. of Exec. 117. Cro. Car. 187. Jon. 223. Yelv. 103.

IT is clearly agreed, That Executors and Administrators, standing in the Place of those they represent, shall be answerable for all their Debts, (*c*) Covenants, &c. as far as they have Assets, and that the * Testator's Covenants shall extend to them, though not (*d*) expresly mentioned.

(*c*) But it is said that the Testator cannot bind his Executor where he is not bound himself; as if he covenants that his Executor shall pay 10 *l.* no Action lies for this Cro. Eliz 232. *Sed qu.*——If a Father articles to pay *J. S.* 1000 *l.* to build an House on Lands of which he is seised in Fee, and dies before the House is built, the Heir may compel *J. S.* to build the House, and the Father's Executor to pay for it. 2 Vern. 322. *Holt* and *Holt*. (*d*) That in every Case where the Testator is bound by Covenant, the Executor shall be bound by it if it be not determined by his Death. 48 E. 3. 2. Bro. Covenant, 12. Cro. Eliz. 553. and Dyer 14. pl. 69. Same Rule, and what shall be a Determination, *vide* And. 12. Leon. 179. Moor 74. pl. 204. Bendl. 150. Dyer 257. Cro. Eliz. 157. Lit. Rep. 334.——But if it be to be performed by the Person of the Testator, the Executor cannot perform it. Cro. Eliz. 553. 2 Mod. 268.

Bro. Covenant, 12.

And therefore where a Man covenanted that *A.* should serve *B.* as an Apprentice for seven Years, and died, it was held, that if *A.* departs within the Term, a Writ of Covenant lies against the Executor of the Covenantor without naming.

Sid. 216. Keb. 761, 820.

If a Man be bound to instruct an Apprentice in a Trade for seven Years, and the Master dies, the Condition is dispensed with, for it is Personal; but if

if he were likewiſe bound to find him with Meat, Drink, Cloaths and Lodging, this the Executors are obliged to perform. Lev. 177. S. C.

If *A.* leaſes to *B.* and *B.* covenants to repair, *&c.* and he aſſigns to *J. S.* who dies inteſtate; the Premiſſes being out of Repair, the Leſſor may bring Covenant againſt his Adminiſtrator as Aſſignee, and declare, that he made a Leaſe to *B. &c. cujus ſtatus & Reſiduum termini Annorum, &c. devenit, &c. per Aſſignationem* to the Adminiſtrator. Carth. 519. *Tilney* and *Norris*. Salk. 309. pl. 13. 316. S. C. Ld. Raym. 553.

The Executor of a Leſſee for Years muſt pay the Rent reſerved, though the Rent be of greater Value than the Land. Off. of Exec. 119. Salk. 297. pl. 6.

And if an Action of Debt be brought againſt an Executor for the Arrearages of a Rent reſerved, upon a Leaſe for Years, and (*b*) incurred after the Death of the Teſtator, the Writ (*c*) ſhall be in the *Debet* and *Detinet* (*d*), becauſe the Executor is charged of his own Poſſeſſion. Rol. Abr. 603. Cro. Eliz. 711. Moor 566. Brownl. 56: Cro. Jac. 411.

546. Bulſt. 23 2 Brownl. 206. Cro. Car. 225. Allen 34. Mod. 186. 2 Brownl. 202. Palm. 116. S. P. (*b*) Where Part incurred in the Time of the Teſtator, and Part after his Death, his Executor may be charged in the *Detinet* for the Whole. Allen 76. Stil. 118. (*c*) He may be charged in the *Detinet* only, but then he ſhall anſwer only out of the Teſtator's Eſtate. Allen 42. S. C. Styl. 79. Lev. 127. S. P. adjudged. (*d*) For though they have the Land as Executors, yet nothing ſhall be employed to the Execution of the Will, but ſuch Profits only which are above that which is to make the Rent; and therefore ſo much of the Profits as is to make or anſwer the Rent they ſhall take to their own Uſe, and they ſhall be charged for it in the *Debet* and *Detinet*, Poph. 120. 5 Co. 31. Cro. Eliz. 712.—And if the Land be not worth more than the Rent, it is a good Plea to ſuch Action in the *Debet* and *Detinet*; for in ſuch Caſe he is to be charged in the *Detinet* only. Vent. 171. *per Curiam*; and for this *vide* Palm. 118. Sid. 266. Mod. 185. and the Authorities to the fifth Section in p. 441.—But where they are to be charged upon a Leaſe made to the Teſtator, and have not the Profits of the Leaſe to anſwer it, they ought to be charged in the *Detinet* only; as where Debt is brought againſt an Executor of a Leſſee for Rent incurred after Aſſignment of the Term. Poph. 120. Sid. 266. S. C. Lev. 127. 3 Mod. 327. So if brought againſt him after Waiver of the Term. Lev. 127. *& vide* Allen 43.

But though he is to be charged in the *Debet* and *Detinet*, yet the Executor may plead that he has not Aſſets, and that the Land is of leſs Value than the Rent, and demand Judgment, if he ought not to be charged in the *Detinet* only; but ſo long as he hath Aſſets he cannot waive the Term, or ſay, that it is of leſs Value than the Rent; but after he hath diſcharged himſelf of the Aſſets, he may waive the Poſſeſſion by giving Notice to the Reverſioner. Salk. 297. pl. 6. Off. of Exec. 119.

Alſo in all Actions againſt Executors and Adminiſtrators, the Charge muſt be in the (*e*) *Detinet* only; for they are only chargeable in reſpect of the Aſſets. 8 Co. 159, 536.

(*e*) But it hath been held, that if Debt be brought againſt an Adminiſtrator in the *Debet* and *Detinet*, for Rent due before his Time, where it ſhould be only in the *Detinet*, that this is aided after Verdict, by 16 & 17 Car. 2. c. 8. Sid. 379.

But if an Executor obliges himſelf to pay a Debt due by Contract by the Teſtator, in Debt upon this Obligation, the Writ may be in the *Debet* and *Detinet*, becauſe the Obligation, makes it his own Debt. Rol. Abr. 603.

* So after (*f*) Judgment againſt an Executor, one may in a new Action of Debt in the *Debet* and *Detinet* ſuggeſt a *Devaſtavit*, and thereby charge him *de bonis Propriis*. * Page 444 Sid. 398.

(*f*) That it muſt be after a Judgment againſt him, *vide* Rol. Abr. 603. 5 Co. 32. 2 Lev. 145. 1 Vent. 315, 321. Sid. 63. ||

|| See 1 Sand. 217. Carth. 2. 2 Lev. 161, 209. Upon a Judgment againſt Huſband and Wife Executrix, if ſhe ſurvives, Debt does not lie ſuggeſting a *Devaſtavit* by the Huſband; for though chargeable for the Waſting by the Huſband, ſhe ſhall not be charged *de bonis Propriis* for Coſts recovered againſt the Huſband. *R.* 2 Lev. 161.

2. Of Personal Torts, which are said to die with the Party.

Plow. 181. Off. of Exec. 120. (b) For this Reason, it seems, that Executors were not chargeable in Account, because not supposed to be conusant enough in the particular Dealings of their Testators, *vide* Tit. Account.—Hence also it hath been held, that if *A.* bails Goods to *B.* to which *C.* hath a Right, and *B.* dies, that the Executors of *B.* must deliver these Goods to *C.* and are no ways accountable for them to *A.* for they came to the Possession by the Law; and therefore must only deliver them to those Persons in whom the Law hath established the Property. Rol. Abr. 607.

The taking up an Executorship is an Engagement to answer all Debts of the Deceased, and all Undertakings that create a Debt, as far as there are Assets; but doth not embark him in the Personal *(b)* Trusts of the Deceased; nor is he obliged to answer for his several Injuries, which none can tell how they might have been discharged or answered by the Testator himself.

Rol. Abr. 21, 25. 9 Co. 86. 4 Co. 93. Cro. Eliz. 121, 302, 425. And. 182. Leon. 165. Goldsb. 106. Moor 366. Poph. 31.

Hence it hath been established as a Maxim, that *Actio Personalis moritur cum Persona*; and on this Foundation it was formerly held, that there was no Remedy for the Recovery of Debt due by Simple Contract by the Testator, especially by Action of Debt; for herein the Testator might have waged his Law, of which Benefit his Executor is deprived.

9 Co. 87. 10 Co. 77. b. Cro. Jac. 293. Vaugh. 101. (c) That although Debt on a Simple Contract can't be recovered against an Executor by Action of Debt, yet it may by Assumpsit. Lev. 200, 201.

But it is now agreed, that an *(c)* Action lies against Executors, where there is a Duty as well as a Wrong; and that they are answerable in those Personal Actions which arise *ex contractu*, and not *ex maleficio*; for that every Contract implies a Promise to perform it, in which the Testator himself could not wage his Law, because he could not make Oath that he had discharged the Duty before the *Quantum* had been ascertained by a Jury.

Hob. 216. *Bidwell* and *Catton*.

So where in Case against an Executor the Plaintiff declared, that he prosecuted an Attachment of Privilege against the Testator; and that the Testator, in Consideration that he would forbear any further Proceedings, promised to pay him 50*l.* and it was held, that the Action lay against the Executor, this being such a Contract as bound the Testator himself.

Cro. Jac. 405, 417, 571. Jon. 16. *Fawcett* and *Carter*. Palm. 329. Cro. Jac. 662. S. C. Rol. Rep. 266. *Sander* and *Esterlie*, S. P.

Also it hath been resolved, that there is no Difference between a Promise to pay a Debt certain and a Promise to do a Collateral Act, which is incertain, and rests only in Damages, as a Promise to give such a Fortune with his Daughter, to deliver up such a Bond, *&c.* and that wherever in those Cases the Testator himself is liable to an Action, his Executors shall be liable also.

Raym. 95. *Wilks* and *Russil*. Sid. 18. and Keb. 692. S. C. Lev. 39. S. P.

So where a Prohibition was prayed, because a Parson libelled in the Spiritual Court for Tithes, substracted *(d)* by the Testator, against an Exe-

(d) So where an Administrator to his Son brought Debt for Tithes, and it was moved in Arrest of Judgment, that this Action being given for the Contempt and Wrong done to the Intestate does not lie for the Administrator; the Intent of the Statute 2 & 3 E. 6. c. 13. being to give Remedy only to the Party grieved; but it was resolved, that it lay for the Administrator of the Party grieved, that here was a Duty as well as a Wrong. Vent. 30. Sir *William Moreton* and *Hopkins*. 2 Keb. 502. S. C. Sid. 407. S. C. in which last Book it is said, that it will not lie against the Executor of him who did the Wrong, but *Qu. & vide* Yelv. 63. 2 Inst. 650. Rol. Abr. 912.

* Executor, upon this Ground, that it was a Perſonal Tort, that died with the Perſon; at leaſt the Penalty given by the Statute ſhould not be recovered after the Party's Death who offended; but the Court denied the Prohibition, and held, that the Rule, that *quod oritur ex delicto & non ex contractu* ſhould not charge the Executor, did not extend to the Caſe of Tithes. * Page 445

Trover lies againſt Executors, for this Action is not merely *ex Maleficio*, which dies with the Perſon, but here there is ſuppoſed an Intention in the Teſtator to reſtore the Goods to the right Owner, for the Law will not preſume an Intention of Injury in any Perſon; and therefore the *Maleficium* is in the Executors, in not making Reſtitution accordingly.† *Vide* Tit. Trover and Converſion.

† *Sed qu.* If the Specific Goods did not come to the Hands of the Executor? In a late Argument in *B. R.* a Caſe of *Collins* and *Pepperell*, 22 & 23 Geo. 2. *B. R.* was cited, that an Action of Trover does not lie againſt an Adminiſtrator for Trover and Converſion by the Inteſtate. But *qu.* if in that Caſe, it was proved that the Specific Goods came to the Hands of the Adminiſtrator, or, if the Determination was not, that the Action did not lie againſt him as Adminiſtrator?

And though the Rule at Common Law, that a Perſonal Action dies with the Perſon, hath been conſtrued equally to extend to Wrongs and Injuries done by or to the Teſtator; ſuch as Aſſaults and Batteries, Breaches of Truſt, *&c.* yet it ſeems, that an Executor in ſome Caſes may within the Equity of 4 *E.* 3. *cap.* 7. *de bonis Aſportatis in Vita Teſtatoris*, maintain an Action for an Injury done to his Teſtator; whereas, if it had been done by the Teſtator, it would have come within the Rule of *Actio Perſonalis moritur cum Perſona.* 4 Mod. 403. Salk. 314. pl. 22. See 6 Mod. 125. 2 Ld. Raym. 971. 1502. Salk. 12. pl. 2. Vent. 30. Sid. 48, 80. 12 Mod. 71, 565. Ld. Raym. 40, 437, 698, 733, 973. 2 Ld. Raym. 1073. Gilb. Eq. Rep. 190. Stra. 60, 576.

And therefore it hath been held, that if a Sheriff ſuffers a Perſon in his Cuſtody on meſne Proceſs to eſcape, that the Executor of the Party, at whoſe Suit he was in Cuſtody, may maintain an Action againſt him; becauſe the Body of the Priſoner being a Pledge for the Debt, the Executor might be otherwiſe without any Remedy, which is an Injury to the Goods, and not to the Perſon of the Teſtator (*a*): But in this Caſe, if the Sheriff died, the Party could have no Remedy againſt his Executor. Jon. 173. Poph. 189. Latch. 67. Noy 87. *Maſon* ver. *Dixon.* Cro. Car. 297. S. P. Rol. Abr. 921. S. P. 6 Mod. 126. S. P. and the ſame Diverſity.

(*a*) So an Executor may charge another Executor for a *Devaſtavit*, to the Injury of his Teſtator; but at Common Law the Executor of an Executor was not liable for a *Devaſtavit* of the firſt Executor. Salk. 314. pl. 22. 2 Ld. Raym. 971, 1502.—[See *infra*, Div. 3.]

So where to a *Fieri facias* the Sheriff made a falſe Return, *viz.* that he levied only ſo much, when in Truth he had actually levied more; and the Executor of the Party brought an Action for this falſe Return; and adjudged, that it lay; for this was not properly an Injury done to the Perſon of the Teſtator, for then *moritur cum Perſona*, but it was an Injury to his Eſtate. 4 Mod. 403. *Williams* ver. *Cary.* Salk. 12. pl. 2. S. C. adjudged For by levying the Goods a Right was veſted in the Teſtator. Cro. Car. 297. S. P. but no Reſolution.

3. Of Remedies againſt Executors or Adminiſtrators of Executors.

It ſeems agreed, that Executors or Adminiſtrators of Executors or Adminiſtrators were not at (*b*) Common Law liable to the *Devaſtavits* of thoſe Rol. Abr. 920. 2 Lev. 110, 133. 3 Keb. 462, 530. Vent. 292.

(*b*) But in Chancery ſuch Executors and Adminiſtrators were made liable as far as they had Aſſets. 2 Mod. 293. Chan. Ca. 302. 2 Chan. Ca. 217. 2 Stra. 716.—

And that in Equity Creditors and Legatees may follow the Assets into whose Hands soever they come. Chan. Ca. 57. 2 Vern. 75.

they represented, because they could not be supposed to know how their Testators or Intestates had disposed of the Goods; and therefore this was esteemed *Actio Personalis quæ moritur cum Persona.*

* Page 446 * But it being found very inconvenient, that where an Executor *de son tort* died, there could be no Remedy at Law against his Executors or Administrators; or that where a lawful Executor made an Alteration of the Goods of the Testator, and died, that Creditors to the first Testator should be disappointed of their Debts, though such Executor left sufficient Assets.

Therefore by an Act of 30 *Car.* 2. *c.* 7. "Creditors were enabled to recover their Debts of the Executors and Administrators of Executors in "their own Wrong; and this Act by the 4 & 5 *W.* & *M. cap.* 24. is "made perpetual; and also by the said last mentioned Act reciting, that "it had been doubted, whether the 30 *Car.* 2. extended to any Executor "or Executors, Administrator or Administrators of any Executor or Administrator of Right, who, for Want of Privity in Law, were not before "answerable; it is enacted and declared, that all and every the Executor "and Executors, Administrator or Administrators of such Executor or Administrator of Right, who shall waste or convert to his own Use Goods, "Chattels or Estate of his Testator or Intestate, shall from thenceforth be "liable and chargeable in the same Manner as his or their Testator or Intestate should or might have been." †

† And upon this Statute the Executor or Administrator of a rightful Executor or Administrator, shall be charged upon a *Devastavit* of the Testator or Intestate, for the Word *(Administrator)* comprehends him. R. 3 Mod. 113.——See *ante* 432. n.

4. Where Executors and Administrators shall be excused from Costs.

Cro. Jac. 228. Yelv. 168. N. Bendl. 19. pl. 28. Brownl. 107. Keilw. 207. Hutt. 69, 79. Cro. Eliz. 69, 503. Cro. Car 289. Winch. 10, 70. Rol. Rep. 63. Sav. 133. Carth. 281. 4 Mod. 244. 3 Lev. 375. Skin. 400. pl. 34. See Ld. Raym. 437. 2 Ld. Raym. 865, 1215, 1413. 8 Mod. 108. 10 Mod. 276. 11 Mod. 135. pl. 17. 174. pl. 18. 196. pl. 11. 256. pl. 10. 12 Mod. 440. Comyns 162. pl. 110. *Barnes's* Notes C. P. 90, 103, 110. 2 Barnes 99, 100, 102, 106, 122. Stra. 188, 682. Latch 214, 250. 2 Ld. Raym. 1413. Andr. 357. 2 Stra. 871. *Barnes's* Notes C. P. 110. *contra.* And see Cas. Temp. *King*, C. and Hardw. C. J. 70. 2 Barnard. K. B. 154. 2 Stra. 977. 2 Barnard. K. B. 465. 2 Stra. 1106. Andr. 356. Salk. 314. pl. 21. 7 Mod. 48. 6 Mod. 93.

Executors and Administrators, when Plaintiffs, pay no Costs; for they sue in *Auter droit*, and are but Trustees for the Creditors, and are not presumed to be sufficiently conuzant in the Personal Contracts of those they represent; and therefore are not comprehended within the Statutes 23 *H.* 8. *cap.* 15. 4 *Jac.* 1. *cap.* 3. or 8 & 9 *W.* & *M. cap.* 10. which give Defendants Costs.*

* But if they are nonsuited, or Judgment, as in case of a Nonsuit, given on the Statute, *qu.* If they are not liable to Costs?

Savil. 134. Hutt. 79. Dal. 9. Latch. 220. Vent. 92. 6 Mod. 94, 181. 7 Mod 98, 118. But for this, and where the Action shall be said to be in their own Right, *vide* Tit. Costs, Letter (E). Will. Rep. 482. 593. 2 Will. Rep. 285. pl. 76, 298. pl. 81. 3 Will Rep. 347, 373. pl. 103. and the Authorities in the preceding Section.

But if Executors or Administrators bring an Action in their own Right, as for a Conversion or Trespass in their own Time, they shall pay Costs, although they name themselves Executors, for this is but Surplusage.

So an Executor Defendant ſhall pay Coſts in all Caſes, and the Judgment is *de bonis Teſtatoris, ſi, &c. & ſi non, tunc de bonis Propriis*; alſo when he is Defendant, and there is Judgment for him, he ſhall have his Coſts. Plow. 183. Hard. 165. Cro Eliz. 503. Hutt. 69.

Where Judgment againſt an Adminiſtrator for Coſts *de bonis Propriis*, and Error brought that it ought to have been *de bonis Teſtatoris, & ſi nulla bona*, then *de bonis Propriis*; and this was agreed to be Error; but whether this Judgment for the Coſts might not be reverſed without affecting the principal Judgment was the Queſtion, they being diſtinct Judgments; and it was held by *Holt* Chief Juſtice, that if Judgment be given for Recovery of Dower and meſne Profits in Damages, it may be reverſed for the one, and ſtand for the other; and he took this Difference; If one Part of the Judgment be warranted by Act of Parliament, and the other by Common Law, this may be reverſed for Part, and ſtand for the other; but if all be at Common Law, it muſt ſtand or be reverſed in all; and in this Caſe the Judgment for the Coſts was reverſed, and the principal Judgment affirmed. Trin. 6 Ann. in B. R. *Hickman* and *Weſtbrook*.

* 5. Executors and Adminiſtrators excuſed from putting in Special Bail. * Page 447

Executors and Adminiſtrators are not to be held to (*a*) Special Bail; for the Demand is not on the Perſons, but on the Affects of the Deceaſed; and it would be unreaſonable to ſubject their Perſons to an Execution for the Debt of another. Cro. Jac. 350. Yelv. 53. Cro. Car. 59. Lit. Rep. 2.

(*a*) Altho' an Attorney be Plaintiff, and it was pretended he was intitled to have Special Bail by his Privilege. Sid. 63.——So though the Cauſe is removed from an Inferior Court to a Superior; for this would encourage Plaintiffs to commence their Actions againſt Executors in ſuch Inferior Courts. 2 Lev. 204. Sid. 418. Lev. 245, 268. 2 Jon. 82. Salk. 98. pl. 4. but Lit. Rep. 81. *cont.*

Hence it hath been held, that if there be a Judgment againſt an Executor for the Debt *de bonis Teſtatoris*, and for the Damages only *de bonis Propriis*, he may bring Error, and have a *Superſedeas*, without giving Sureties, according to 3 *Jac.* 1. *cap.* 8. for though the Words of the Statute are general, yet it muſt be intended where Judgment is againſt the Defendant himſelf upon his own Bond, or where the Judgment is general againſt Executors; for it would be unreaſonable they ſhould find Sureties to pay the whole out of their own Eſtate. Cro Jac. 350. *Goldſmith* ver. *Platt*. Cro. Jac. 59. S. P. Lit. Rep. 2. S. P. Keb. 716. S. P.

But upon a *Devaſtavit* Executors ſhall be held to Special Bail; and herein the Difference is, that upon a bare Suggeſtion of a *Devaſtavit*, an Executor ſhall not be held to Special Bail; but where upon a Judgment againſt him Execution is taken out, and the Sheriff returns a *Devaſtavit*, upon an Action of Debt upon this Judgment the Executor ſhall be held to Special Bail. Lev. 145. Sid. 63. Carth. 264. Comb. 206.

Extinguiſhment.

Co.Lit.147.b. Rol.Abr.933. WHEREVER a Right, Title or Intereſt is deſtroyed or taken away by the Act of God, Operation of Law, or Act of the Party, this in many Books is called an Extinguiſhment.

But as it is a Word of a large Signification, and relative to other Things elſewhere treated of, I ſhall here only conſider it briefly as it regards the following Matters, to which it ſeems to be moſt frequently applied.

(A) Of the Extinguiſhment of Rents. 448.
(B) Of the Extinguiſhment of Copyholds. 451.
(C) Of the Extinguiſhment of Common. 451.
(D) Of the Extinguiſhment of Debts. 452.

*(A) Of the Extinguiſhment of Rents.

*Page 448

Pollexf. 142. IF a Leſſor purchaſes the Tenancy from his Leſſee, the Leſſor cannot have both the Rent and the Land; nor can the Tenant be under any Obligation to pay the Rent, when the Land, which was the Conſideration thereof, is reſumed by the Leſſor into his own Hands; and this Reſumption or Purchaſe of the Tenancy makes what is (*a*) properly called an Extinguiſhment of the Rent; that is, the Rent can never become due or payable by the Tenant, by virtue of the Donation which created the Tenancy, when the Land or Tenancy is conveyed to the Leſſor, in as abſolute a Manner as he was ſeiſed of the Rent.

(*a*) That the Rent in this Caſe is extinguiſhed, Vaugh. 199. But if a Rent be granted to *A.* for the Life of *B.* and *A.* dies, living *B.* the Rent is determined upon the Death of *A.* equally as if granted to him for his own Life; and in this Caſe the Rent is ſaid more properly to be *determined* than extinguiſhed. Vaugh. 199.—So when either the Rent or Land are ſo conveyed, not abſolutely or finally, but for a certain Time, after which the Rent will be again revived; this is properly called a *Suſpenſion* of the Rent. Vaugh. 199.

Bro. Extinguiſhment 17. Vaugh. 39, 199. Pollexf. 142. But if the Conveyance to the Leſſor was not abſolute, but upon Condition; or if it were only of a particular Eſtate, of ſhorter Duration than the Eſtate which the Leſſor had in the Rent; in theſe Caſes, though there be an Union of the Tenancy and the Rent in the ſame Hand, yet becauſe that Union is but temporary, for upon the Performance of the Condition, or Determination of the particular Eſtate, the Tenant is reſtored to the Enjoyment of the Land, and conſequently the Obligation to pay the Rent revives; therefore the Rent in ſuch Caſe is only *ſuſpended*, and not extinguiſhed.

Alſo if the Lands demiſed be evicted from the Tenant, or recovered by a Title Paramount, the Leſſee is diſcharged from the Payment of the Rent from the Time of ſuch Eviction; and this is alſo called an Extinguiſhment of the Rent. But notwithſtanding ſuch Recovery or Eviction, the Tenant (*b*) ſhall pay the Rent which became due (*c*) before the Recovery; becauſe the Enjoyment of the Land being the Conſideration for which the Tenant was obliged to pay the Rent, ſo long as the Conſideration continued, the Obligation muſt be in Force; there being the ſame Reaſon that the Tenant ſhould pay the Rent for Part of the Time contracted for, as for the whole Term, if he had enjoyed the Land ſo long.

2 Rol. Abr. 429. Hob. 82. Cro. Eliz. 47. Co. Lit. 148. b. 201. b.

(*b*) Tho' the Leaſe was made by a Diſſeiſor, for the Leſſee came in under the Sanction of a legal Contract, and the peaceable Enjoyment of the Land during the Time he held it, was a ſufficient Obligation on him to pay the Rent. 2 Rol. Abr. 429. Hob. 6. (*c*) But if the Tenant be cuſted by a Title Paramount, before the Day appointed for the Payment of the Rent, ſuch Eviction intirely diſcharges the Tenant from the Payment of any Part of the Rent. 10 Co. 128. a.*

* But if the Perſon having Title recovers in Ejectment againſt the Tenant, and lays his Demiſe far enough back to include the Time the Tenant held, the Tenant will be anſwerable to the Perſon ſo recording for the meſne Profits.

For the ſame Reaſon, if Part only of the Land letten be evicted from the Tenant, ſuch Eviction is a Diſcharge of the Rent in Proportion to the Value of the Land evicted.

10 Co. 128. Rol. Abr. 135. Dyer 56.

If a Man who hath a Rent-Service * purchaſes Part of the Land out of which the Rent iſſues, the Rent-Service is not extinguiſhed, but ſhall be apportioned according to the Value of the Land; ſo that ſuch Purchaſe is a Diſcharge to the Tenant for ſo much of the Rent only as the Value of the Land purchaſed amounts unto.

Lit. Sect. 222.

* See the Definition of *Rent-Service*, 4 V. 335.

But if a Man has a Rent-Charge, ‖ and purchaſes Part of the Land out of which the Rent iſſues, the whole Rent is extinguiſhed, and conſequently the Tenant diſcharged from the Payment of it.

Lit. Sect. 222, 223. 8 Co. 105.

‖ See Definition of *Rent-charge*, 4 V. 336.

But in this Caſe, if the Grantor by Deed reciting the Purchaſe had granted that the Grantee ſhould diſtrain for the ſame Rent in the Reſidue of the Land, the whole Rent-Charge had been preſerved; becauſe ſuch Power of Diſtreſs had amounted to a new Grant.

Co. Lit. 147. * Page 449

But the Law has carried this Notion of Extinguiſhment only to ſuch Caſes where the Grantee of the Rent wilfully by his own Act prevents the Operation of the Grant according to the Original Intention thereof; for if Part of the Land deſcends to the Grantee of the Rent-Charge, the Rent ſhall be apportioned according to the Value of the Land; for the Grantee in this Caſe is perfectly paſſive, and concurs not by an Act of his to defeat the Intention of the Grant; and therefore it would be unreaſonable and ſevere, that he ſhould be puniſhed without his Default, or concurring in that Act which extinguiſhes the Rent.

Lit. Sect. 224. Co. Lit. 149 b. Rol. Abr. 236.

Hence likewiſe it is, that if a Man grants a Rent-Charge out of two Acres, and afterwards the Grantee recovereth one Acre by Title Paramount the Grant, the whole Rent ſhall not be extinguiſhed, becauſe the Law, that gives the Remedy for the Recovery of a Man's Right, will not prevent the Proſecution of ſuch Right, by depriving the Proſecutor of a greater Profit than the Thing recovered may amount to; but in this Caſe there ſhall be no Apportionment, but the Grantee ſhall have the whole Rent after he has recovered the one Acre; becauſe by the Grant each Acre is charged with the whole Rent; and upon the Recovery it appears, that

Co. Lit. 148. b.

the Grantor had no Intereſt in one Acre, and conſequently could not charge it; and therefore the Grant being to be taken moſt ſtrongly againſt him, the whole Rent ſhall continue after the Recovery, becauſe the Grant was originally for ſo much, and therefore ſhall iſſue out of that Land which he had Power to charge; whereas in the former Caſe the Grantor had, at the Time of the Grant, Power to charge all the Land; and therefore when Part of the Land, ſubject to ſuch Charge, comes to the Grantee by Act of Law; it is reaſonable at leaſt that the Charge ſhould be apportioned.

Co. Lit. 148. a. But Cro. Eliz. 742. ſeems *cont.*

Alſo a Rent-Charge may in ſome Caſes be apportioned by the Act of the Party; as if the Grantee releaſes Part of his Rent to the Tenant of the Land, ſuch Releaſe does not extinguiſh the whole Rent; ſo if the Grantee gives Part of it to a Stranger, and the Tenant attorns, ſuch Grant ſhall not extinguiſh the Reſidue, which the Grantee never parted with, becauſe ſuch Releaſe or Diſpoſition makes no Alteration in the Original Grant, nor defeats the Intention of it, as the Purchaſe of Part of the Land does, for the whole Rent is ſtill iſſuable out of the whole Land according to the original Intention of the Grant.

6 Co. 1. *Bruerton's* Caſe. Co. Lit. 149 a. 8 Co. 105. Moor 203.

Here alſo, as to the Apportionment of a Rent-Service, by the Purchaſe of the Leſſor of Part of the Tenancy, we muſt diſtinguiſh between Services diviſible in their own Nature, as a Rent, and ſuch as are indiviſible, as a Horſe, a Hawk, *&c.* For in the laſt Caſe, if the Lord purchaſe Part of the Tenancy, there can be no Apportionment of the Service from the Nature of the Thing; and therefore ſuch Service is extinct, and the Tenant diſcharged from the Payment of it; for the whole Tenancy being equally chargeable with the Payment of ſuch Service, the Lord by his own Act ſhall not diſcharge Part, and throw the whole Burthen upon the Reſidue, for his own private Benefit and Advantage.

6 Co. 1, 2. Co. Lit. 149.

But if ſuch intire Services were for the Benefit of the Publick, as Knight-Service and Caſtle-guard, for the Defence of the Realm, or for the Adminiſtration of Juſtice; or if ſuch entire Service were a Work of Charity or Piety; in all ſuch Caſes the Tenant is ſtill chargeable with the whole Service; for there can be no Apportionment, becauſe the Thing in its Nature is indiviſible, and the Whole ſhall not be extinguiſhed, becauſe the Publick has an Intereſt in ſuch Services, and therefore ſhall not be prejudiced by the private Tranſactions of the Parties.

Co. Lit. 149. a

So where the Tenure is by a Service in its Nature indiviſible, as by a Horſe, or a Hawk, *&c.* which are only for the private Benefit or Pleaſure of the Lord; yet if Part of the Tenancy comes to the Lord * by Deſcent, the Service is not extinguiſhed; becauſe here is no Conſent or Concurrence of the Lord to the Diviſion.

* Page 450

2 Inſt. 504. Rol. Abr. 234. Cro. Eliz. 651, 851. Co. Lit. 148. 8 Co. 79. Dyer. 326. Hob. 177. 13 Co. 57, 58. Moor, pl. 255, 260.

It was formerly doubted, whether a Rent-Service incident to a Reverſion could be apportioned, or was not utterly extinguiſhed by a Grant of Part of the Reverſion; for ſince the Reverſion and Rent incident thereto were intire in their Creation, they thought it hard, that by the Act of the Leſſor they ſhould be divided, and thereby the Tenant made liable to ſeveral Actions and Diſtreſſes for the Recovery of them; but it was at length reſolved, that the Reverſion, being a Thing in its Nature ſeverable, the Rent as incident to it may be divided too, becauſe that being made in Retribution for the Land, ought from the Nature of it, to be paid to thoſe who are to have the Land upon the Expiration of the Leaſe; and hence it is that the Rent paſſes incidently with the Reverſion, without any expreſs Mention of it in the Grant; beſides the Tenant has really no Prejudice from ſuch Grant, becauſe it is in his Power, and his Duty to prevent the ſeveral Suits and Diſtreſſes by a punctual Payment of the Rent; and therefore he ought not to complain of a Miſchief which he wilfully brings upon himſelf; beſides that, (*a*) formerly ſuch Grants could not take Effect without the Attornment and Conſent of the Tenant; but

(*a*) *Viz.* before the 4 & 5 Ann. *c.* 16. *ſ.* 9.

but on the other Hand it would be extremely prejudicial, if upon ſuch Grants the Rent ſhould not be apportioned, becauſe then the Leſſor could not out of his Eſtate make a Proviſion for his younger Children, or anſwer the Contingencies of his Family which are in View.

If Leſſee for Life or Years ſurrenders Part, or if he commit a Forfeiture of Part by making a Feoffment, or doing Waſte, there can be no Colour to conſtrue theſe Acts an Extinguiſhment of the whole Rent; but in theſe Caſes the Rent ſhall be apportioned, becauſe the Rent is a Retribution for the Land, and therefore muſt neceſſarily ceaſe according to the Proportion of the Land reſumed by the Leſſor; for it were abſurd, that the Leſſor ſhould have both the Land and Retribution for it; but the whole Rent is not extinguiſhed, becauſe from the Nature of the Contract the Rent is to be paid in Conſideration of the Enjoyment of the Land, and therefore the Tenant ſhall be obliged to pay the Rent in Proportion to the Land which he enjoys; ſo if the Leſſor grant the Reverſion of Part to the Leſſee, the Rent ſhall be apportioned.

Co. Lit. 148. a. Rol. Abr. 235. Dyer 5. a. 13 Co. 58. Moor, pl. 255.

There ſeems to have been Variety of Opinions, whether the Leſſor's entring wrongfully into Part of the Lands demiſed did not ſuſpend the whole Rent during ſuch tortious Entry, or whether the Rent ought not to be apportioned; and it is now ſettled, that ſuch tortious Entry ſuſpends the whole Rent; for if any Apportionment were allowed in this Caſe, it would be in the Power of the Lord or Leſſor to reſume any Part of the Land againſt his own Engagement and Contract, and ſo, by taking that which lies moſt commodiouſly for the Tenant, render the Remainder in Effect uſeleſs, or put him to the Expence to reſtore himſelf to ſuch Part by Courſe of Law; and therefore to prevent theſe Inconveniencies, and that no Man might be encouraged to injure or diſturb his Tenant, whom he ought to protect and defend, it hath been reſolved, that ſuch Diſſeiſin or tortious Entry ſuſpends the whole Rent, and that the Tenant or Leſſee is diſcharged from the Payment of any Part of it till he is reſtored to the whole Poſſeſſion.

Co. Lit. 148. b. Bro. Tit *Extinguiſhment.* 48. Rol. Abr. 938. 4 Co. 52. 9 Co. 135. 3 Keb. 453, 497. Pollex. 142, 144. Vent. 277.

(B) Of the Extinguiſhment of Copyholds.

* Page 451

AS to the Extinguiſhment of Copyholds it is laid down as a general Rule, that any Act of the Copyholder's, which denotes his Intention to hold no longer of his Lord, and amounts to a Determination of his Will, is an Extinguiſhment of his Copyhold.

Hutt. 81. Cro. Eliz. 21. Jon. 41. *vide* Tit. *Copyhold.* Letter (K).

As (*a*) if a Copyholder in Fee accepts a Leaſe for Years of the (*b*) ſame Land from the Lord, this determines his Copyhold Eſtate; or (*c*) if the Lord leaſes the Copyhold to another, and the Copyholder accepts an Aſſignment from the Leſſee, his Copyhold is extinct.

(*a*) Moor 184. 2 Co. 16. b. Godb. 11, 101. (*b*) But if he takes a Leaſe for Years of the Manor, that is only a Suſpenſion of his Copyhold during the Term. Cro. Jac. 84. Sav. 70.—But in other Books it is ſaid to be extinguiſhed, as in Cro. Eliz. 7. Moor 185. and in 4 Co. 31. it is ſaid, that the Leſſee may in this Caſe regrant the Copyhold again to whom he pleaſes. (*c*) 2 Co. 17. Leon. 70. And. 191. Goulſ. 34. Rol. Abr. 510. S. C.

So (*d*) if a Copyholder bargains and ſells his Copyhold to the Leſſee for Years of the Manor, his Copyhold is thereby extinguiſhed, or (*e*) if he joins with his Lord in a Feoffment of the Manor, his Copyhold is thereby extinct;

(*d*) Hut. 65. Jon. 41. S. C. (*e*) Godb. 11.

extinct; for theſe are Acts which denote his Intention to hold no longer by Copy.

And. 199. Latch 213. So if a Copyholder accepts to hold of his Lord, by Bill under the Lord's Hand, this determines his Copyhold; ſo if he accepts an Eſtate for Life by Parol, if there be Livery, this is an Extinguiſhment; otherwiſe not; for without Livery nothing but an Eſtate at Will paſſes, which cannot merge or extinguiſh an Eſtate at Will.

Cro. Eliz. 459. If one ſeiſed of a Manor in Right of his Wife lets Lands by Indenture for Years; this doth not deſtroy the Cuſtom as to the Wife; for (*a*) after the Death of her Huſband ſhe may demiſe it again by Copy.

(*a*) So if a Copyholder intermarries with the Feme Seignioreſs; this is no Extinguiſhment, but only a Suſpenſion. Sav. 66. Co. Copyholder 172.—So if the Copyholder hath the Manor in Execution. Co. Copyholder 172.

2 Sid. 82. 4 Co. 24. Cro. Eliz. 252. adjudged, & *vide* 2 Leon. 208. 4 Co. 26. b. Cro. Eliz. 103. So if a Copyhold is in the Hands of a Subject, who after becomes King, the Copyhold is extinct, for it is below the Majeſty of a King to perform ſuch ſervile Services; yet after his Deceaſe the next that hath Right ſhall be admitted, and the Tenure revived.

(C) Of the Extinguiſhment of Common.

Co. Lit. 122. Hob 235. 8 Co. 78. Owen 122. 4 Co. 37. IF a Commoner, who hath Common appurtenant, purchaſes Part of the Land in which he hath ſuch Common, this is an Extinguiſhment of the Common; but if ſuch Purchaſe had been made by one who had Common appendant; this being of common Right muſt be apportioned; alſo both Common appendant and appurtenant ſhall be apportioned by Alienation of Part of the Land to which the Common is appendant or appurtenant.

But for this 4 Co. 37. 8 Co. 136. A Releaſe of Common in one Acre is an Extinguiſhment of the whole Common.

Show. 350. 4 Mod. 365. & *vide* Title Common, Letter (E). And where there may be Relief in Equity againſt an Extinguiſhment. 2 Vern. 250.

* (D) Of the Extinguiſhment of Debts.

* Page 452

Bur. Rep. 9. 13 H. 4. 1. Rol. Abr. 470, 471, 604. 6 Co. 44. Yelv. 38. IT ſeems to be agreed as a general Rule, that a Creditor's accepting a higher Security than he had before, is an Extinguiſhment of the firſt Debt; as if a Creditor by ſimple Contract accepts an Obligation, this extinguiſhes the ſimple Contract Debt.

So if a Man accepts a Bond for a Legacy, he cannot after ſue for his Legacy in the Spiritual Court; for by the Deed the Legacy is extinct, and it is become a mere Debt at Common Law.

6 Co. 44. b. So if a Bond Creditor obtains Judgment on the Bond, or has Judgment acknowledged to him, he cannot afterwards bring an Action on the Bond; for the Debt is drowned in the Judgment, which is a Security of a higher Nature than the Bond.

But theſe Caſes muſt be underſtood where the Debtor himſelf enters into theſe Securities; and therefore if a Stranger give Bond for a ſimple Contract Debt due by another, this does not extinguiſh the ſimple Contract Debt; but if upon making the Contract, a Stranger gives Bond for it, or being preſent, promiſes to give Bond for it, and after does ſo, the Debt by ſimple Contract is extinguiſhed, the Obligation being made upon, or purſuant to the Contract. 2 Leon. 110.

But the Accepting a Security of an inferior Nature is by no Means an Extinguiſhment of the firſt Debt; as if a Bond be given in Satisfaction of a Judgment. Cro. Jac. 649, Brownl. 29. Cro. Jac. 649, 650. Like Point adjudged, where it was pleaded, that an Annuity was granted, in Diſcharge of a Bond.

Alſo the Accepting a Security of equal Degree is no Extinguiſhment of the firſt Debt; as where an Obligee has a ſecond Bond given to him; for one Deed cannot determine the Duty upon another. Cro. Eliz. 304, 716, 727. Brownl. 74. Lit. Rep 58. Cro Car. 86.

Alſo it is ſaid to have been adjudged, that if the Condition of an Obligation be to pay 10 *l.* at a Day, which is not paid at the Day, but after the Day the Obligee accepts a Statute Staple from the Obligor for the ſame Debt, in full Satisfaction of the Obligation; yet this is not any Satisfaction; for though the Statute be a Matter of Record and higher than the Obligation, yet the Obligation remains in Force, and the Obligee hath his Election to ſue the one or the other. 6 Co. 44. *Braithet's* Caſe cited in *Higgen's* Caſe. Rol Abr. 470. Cro. Car. 86. S. C. cited.

If an Infant becomes indebted for Neceſſaries, and the Party takes Bond of the Infant; this ſhall not extinguiſh the ſimple Contract; for the Bond has no Force. Cro. Eliz. 920.

Debts are alſo ſaid to be extinguiſhed where a Creditor makes his Debtor Executor; for in his Caſe he cannot ſue himſelf; but where notwithſtanding ſuch Debts remain Aſſets, *vide* Tit. *Executors and Adminiſtrators*, Letter (A) 379, *&c.* Hob. 10. Rol. Abr. 920.

So where the Obligor marries the Obligee, this is ſaid to be an Extinguiſhment of the Debt; for by the Intermarriage they become one Perſon, and cannot ſue each other; but for this *vide* Tit. *Baron and Feme*, Letter (E.)

* Extortion.

* Page 453

EXTORTION is ſaid by my Lord *Coke* to ſignify any Oppreſſion by Colour or Pretence of Right, and in this reſpect it is ſaid to be more heinous than Robbery itſelf; as alſo, that it is uſually attended with the aggravating Sin of Perjury. Co. Lit. 368. b. 10 Co. 102. a. 2 Hawk. P. C. 170. Cro. Car. 438, 448.

Co. Lit. 368. 10 Co. 102. But in a ſtrict Senſe it is defined, the Taking of Money by any Officer, by Colour of his Office, either where none at all is due, or not ſo much is due, or where it is not yet due.

2 Inſt. 209. Co. Lit. 368. By the Common Law, as alſo by the Statute of *Weſtm.* 1 *cap.* 26. it is declared and enacted to be Extortion, for any Sheriff or other Miniſter of the King, whoſe Office any-ways concerns the Adminiſtration or Execution of Juſtice, or the common Good of the Subject, to take any Reward whatſoever, except what he received from the King.

(*a*) 43 E. 3. 4. b. 5. a. 2 Rol. Abr. 226. (*b*) Moor 523. 2 Inſt. 209. And this Inſtitution hath been thought ſo conducive to the Good of the Publick, that all (*a*) Preſcriptions whatſoever, which have been contrary to it, have been held to be void: As (*b*) where the Clerk of the Market claimed certain Fees as due Time out of Mind, for the Examination of Weights and Meaſures; and this was adjudged to be void.

4 Inſt. 274.

21 H. 7. 17. Co. Lit. 368. But the ſtated and known Fees allowed by the Courts of Juſtice to their reſpective Officers for their Labour and Trouble, are not reſtrained by the Common Law, or by the ſaid Statute of *Weſtm.* 1. *c.* 16. and therefore ſuch Fees may be legally demanded and inſiſted upon, without any Danger of Extortion.

21 H. 7. 17. 2 Inſt. 176, 210. Staund. P. C. 49. And for this Reaſon it is held, that the Fee of 20*d.* called the Bar-Fee, taken Time out of Mind by the Sheriff for every Priſoner that is acquitted, and the Fee of a Penny claimed by the Coroner from every *Viſne*, when he came before the Juſtices in Eyre, are not within this Statute; as alſo becauſe they are due of Courſe as Perquiſites, whether any Thing be done by ſuch Sheriff or Coroner, or not.

2 Inſt. 210. 3 Inſt. 149. Co. Lit. 368. Alſo it ſeems that an Officer, who takes a Reward which is voluntarily given to him, and which has been uſual in certain Caſes, for the more diligent or expeditious Performance of his Duty, cannot be ſaid to be guilty of Extortion; for without ſuch a *Præmium* it would be impoſſible in many Caſes to have the Laws executed with Vigour and Succeſs.

Rol. Abr. 16. Rol. Rep. 313. Noy 76. Jon. 65. But it has been always held, that a Promiſe to pay an Officer Money for the doing of a Thing, which the Law will not ſuffer him to take any Thing for, is merely void, however freely and voluntarily it may appear to have been made.

Cro. Eliz. 654. Moor 468. Cro. Jac. 103.

2 Rol. Abr. 32, 33, 57. Raym. 315. 2 Inſt. 209. This Offence of Extortion is puniſhable at Common Law by Fine and Impriſonment, and alſo by a Removal from the Office in the Execution whereof it was committed; and there is a farther additional Puniſhment by the Statute of *Weſtm.* 1. *c.* 26. with Regard to the Perſons to which the Statute extends, by which it is enacted, "That no Sheriff nor other King's "Officer ſhall take any Reward to do his Office, but ſhall be paid of that "which they take of the King; and that he who ſo doth ſhall yield twice "as much, and ſhall be puniſhed at the King's Pleaſure."

* Page 454 Sid. 91. *The King* and *Cover.* * If an Indictment of Extortion charges *J. S.* with the Taking of 50*s.* as Bailiff of an Hundred *colore Officii*, without (*a*) ſhewing for what he took it; this is good, at leaſt after Verdict, for perhaps he might claim it generally,

(*a*) That an Information for Extortion muſt ſet forth the Time when the Offence was committed. 4 Mod. 101, 103.——That the Court of *King's Bench* will not quaſh an Indictment for Extortion or Oppreſſion, though erroneous, but oblige the Party to plead or demur to it. 5 Mod. 13 ——[If the Chancellor and Regiſter of a Dioceſe compel an Executor to prove a Will in the Biſhop's Court, knowing it had been proved in the Prerogative, and take Fees, this is Extortion at the Common Law, *Rex* v. *Loggan*, H. 4 Geo. Stra. 73. — If a Bailiff takes Bargains for Money to be paid him by *A.* to accept *A.* and *B.* as Bail for *C.* whom he has arreſted, this is Extortion at the Common Law. *Stotesbury* v. *Smith*. H. 33 Geo. 2. 2 Burr. 924——As to *Fees*,—A Receiver of Feefarm-Rents can take only 4*d.* for one Acquittance (tho'

as being due to him as Bailiff, in which Caſe the Taking could not be otherwiſe expreſſed. (tho' for ſeveral Years) and if the Party brings the Acquittance ready written, he muſt ſign it *gratis*; and if the Party tenders his Rent, and refuſes to pay for the Acquittance, the Receiver cannot diſtrain for both. *Roberts* v. *Middleton*, p. 1741. Bunb. 348.

Fairs and Markets.

(A) Of the Right to a Fair or Market. 455.

And herein,

1. How a Right to a Fair or Market muſt firſt commence. 455.
2. Of the Owner's Remedy for a Diſturbance in the Enjoyment of them. 455.

(B) Of the Manner of holding Fairs and Markets. 456.

And herein,

1. In what Place they are to be held. 456.
2. At what Time they are to be held. 456.
3. How long to continue. 457.

(C) Of the Duty and Power of Owners of Fairs and Markets in Things incident to them. 457.

(D) Of the Toll and other Duties which Owners of Fairs and Markets are intitled to. 458.

And herein,

1. Where ſuch Tolls, &c. ſhall be ſaid to be reaſonable and legally due. 458.
2. What Perſons are exempt from Payment thereof. 459.

(E) How far a Sale in a Fair or Market-overt changes the Property of a Thing ſold therein. 459.

(A) Of

Fairs and Markets.

* Page 455 * (A) Of the Right to a Fair or Market: And herein,

1. How a Right to a Fair or Market muſt firſt commence.

THE firſt Inſtitution of Fairs and Markets ſeems plainly to be for the better Regulation of Trade and Commerce, and that Merchants and Traders may be furniſhed with ſuch Commodities as they want at (*a*) a particular Mart, without that Trouble and Loſs of Time which muſt neceſſarily attend travelling about from Place to Place; and therefore, as this is a Matter of univerſal Concern to the Commonwealth, ſo it hath always been held, that no Perſon can claim a Fair or Market, unleſs it be by Grant from the King, or by Preſcription, which ſuppoſes ſuch a Grant.

2 Inſt. 220.

(*a*) *Vide* the 1 & 2 P. & M. c. 7. which aſſigns the Reaſon of the Decay of Trade in Cities and Towns, to Perſons not ſelling their Goods in Fairs and Markets, and enacts, that all Country People ſhall ſell in ſome open Market, *&c.* *&* *vide* 2 Lev. 89. and does not prohibit Inhabitants of one Market Town to ſell in another.

3 Mod. 127. And therefore if any Perſon ſets up any ſuch Fair or Market without the King's Authority, a *Quo Warranto* lies againſt him, and the Perſons who frequent ſuch Fair, *&c.* may be puniſhed by Fine to the King.

3 Lev. 222. Alſo it ſeems, that if the King grants a Patent for holding a Fair or Market, without a Writ *Ad quod damnum* executed and returned, that the ſame may be repealed by (*b*) *Scire facias*; for though ſuch Fairs and Markets are a Benefit to the Commonwealth, yet too great a Number of them may become Nuſances to the Public, as well as a Detriment to thoſe who have more antient Grants.

(*b*) Or by Aſſiſe of Nuſance, *Quod permittat, &c.* as well as by *Scire facias*, for which *vide* Dyer 197, 276. 2 Inſt. 406.

3 Lev. 220, 221. *The King* ver. *Sir Oliver Butler*. 2 Vent. 344. S. C. So where a Writ of *Ad quod damnum* is deceitfully executed, as where *J. S.* intending to get a Patent for a Market every *Tueſday* in *Chatham*, which is within a Mile and a half of *Rocheſter*, in which there is a Market every *Wedneſday* and *Friday*, took out a Writ of *Ad quod damnum*, which was executed the ſame Day it bore *Teſte*, and thirty Miles from *Rocheſter*, without Notice to the Mayor, *&c.* of *Rocheſter*; and the Patent obtained thereupon was repealed by *Scire facias*.

2. Of the Owner's Remedy for a Diſturbance in the Enjoyment of them.

22 H. 6. 14. b. 41 E. 3. 24. b. 2 Rol. Abr. 140. It ſeems clearly agreed, that if a Perſon hath a Right to a Fair or Market, and another erects a Fair or Market ſo near his, that it becomes a Nuſance to his Fair, *&c.* that for this Detriment and Injury done him, an Action on the Caſe lies; for it is implied in the (*c*) King's Grant, that it ſhould be no Prejudice to another.

(*c*) That where a Patent is granted to the Prejudice of the Subject, the King of Right is to permit him, upon his Petition, to uſe his Name for the Repeal of it in a *Scire facias* at the King's Suit, and to hinder Multiplicity of Actions upon the Caſe. 2 Vent. 344.

2 Saund. 172. *Yard* and *Ford* adjudged. Mod. 69. S. C. Alſo, although the new Market be held on a different Day, yet an Action on the Caſe lies; for this, by foreſtalling the ancient Market, 10 Mod. 258, 260, 354. 11 Mod. 67. pl. 8.

may

may be a greater Injury to the Owner than if held on the ſame Day with his.

* If a Man hath a Fair or Market, and a Stranger diſturbs thoſe who are coming to buy or ſell there, by which he loſes his Toll, or receives ſome (*a*) Prejudice in the Profits ariſing from his Fair, &c. an Action on the Caſe lies.

* Page 456 Rol. Abr. 106. 2 Vent. 26, 28. S. C. cited, and admitted to be Law.

(*a*) In caſe the Plaintiff declared, that he was Lord of the Manor of, &c. and had a Market, &c. and that all Butchers, &c. ought to ſell in the High Street upon the Stalls of the Plaintiff, paying 1 *d.* and that the Defendant was a Butcher, and ſold, &c. in his own Houſe *occultè*; and the Defendant pleaded, that he was an Houſholder, and that Time out of Mind every Houſholder in, &c. had uſed to ſell, &c. in their own Houſes. 8 Co. 127. cited, and held no good Plea.

So if upon a Sale in a Fair a Stranger diſturbs the Lord in taking the Toll, an Action upon the Caſe lies for this. 9 H. 6. 45. Rol. Abr. 106. S. C.

(B) Of the Manner of holding Fairs and Markets: And herein,

1. In what Place they are to be held.

THE King is the ſole Judge where Fairs and Markets ought to be kept; and therefore it is ſaid, that if he grants a Market to be kept in ſuch a Place, which happens not to be convenient for the Country, yet the Subjects can go to no other; and if they do, the Owner of the Soil where they meet is liable to an Action at the Suit of the Grantee of the Market. 3 Mod. 127. See 2 Rol. Abr. 140.

But if no Place be limited for keeping a Fair by the King's Grant, the Grantees may keep it where they pleaſe, or rather where they can moſt conveniently; and if it be ſo limited, they may keep it in what Part of ſuch Place they will. 3 Mod. 108. ſaid by Ch. Juſt. 10 Mod. 355.

By the 13 *E.* 1. *cap.* 5. "No Fairs or Markets ſhall be kept in Church-"yards."

2. At what Time they are to be held.

By the 27 *H.* 6. *cap.* 5. "Fairs and Markets on the principal Feaſts, "*viz. Aſcenſion-Day, Corpus Chriſti-Day, Whitſunday, Trinity-Sunday*, and "all other *Sundays*, the *Aſſumption of our Lady, All-Saints*, and *Good-"Friday*, ſhall ceaſe from all ſhewing of Goods and Merchandizes, neceſ-"ſary Victuals only excepted; upon Pain of Forfeiture of their Goods "ſhewed, (*b*) the four *Sundays* in Harveſt excepted; and the Fairs or "Markets, which are granted to be holden on theſe Feſtivals, may be "holden within three Days before or after."

(*b*) But *vide* the Statute 1 Car. 1. c. 1. and 29 Car. 2. c. 7. by which it is enacted, That no Perſons whatſoever, above fourteen Years old, ſhall exerciſe any worldly Labour, Buſineſs or Work of their ordinary Calling, on the Lord's Day, (except Works of Neceſſity and Charity, and the Dreſſing and Selling of Meat in an Inn and Victualling-houſe, for thoſe who cannot otherwiſe be provided); on Pain of forfeiting five Shillings; and no Perſon ſhall publickly cry or expoſe to Sale any Goods whatſoever on this Day, (except Milk, which may be ſold before Nine in the Morning and after Four in the Afternoon); on Pain of forfeiting the ſame. *Vide* 11 & 12 W. 3. c. 24. ſ. 14. whereby Mackarel may be ſold before or after Divine Service; and by 9 Ann. c. 23. Coachmen or Chairmen may ply on the Lord's Day.

* Page 457

* How long to continue.

By the 2 *E.* 3. *cap.* 15. it is eſtabliſhed, "That it ſhall be commanded "to all the Sheriffs of *England*, and elſewhere, where Need ſhall require, "to cry and publiſh, within Liberties and without, that all the Lords "which have Fairs, be it for yielding certain Ferm for the ſame to the "King, or otherwiſe, ſhall hold the ſame for the Time they ought to hold "it, and no longer, that is to ſay, ſuch as have them by the King's Char- "ter granted them, for the Time limited by the ſaid Charters; and alſo "they that have them without Charter, for the Time that they ought to "hold them of Right; and that every Lord, at the Beginning of his Fair, "ſhall there do, cry and publiſh, how long the Fair ſhall endure, to the "Intent that Merchants ſhall not be at the ſame Fairs over the Time ſo "publiſhed; upon Pain to be grievouſly puniſhed towards the King; nor "the ſaid Lords ſhall not hold them over the due Time, upon Pain to "ſeiſe the Fairs into the King's Hands, there to remain till they have "have made a Fine to the King for the Offence, after it be duly found, "that the Lords held the ſame Fairs longer than they ought, or that the "Merchants have continued above the Time ſo cryed and publiſhed."

And by the 5 *E.* 3. *cap.* 5. reciting, that by the above-mentioned Statute 2 *E.* 3. called the Statute of *Northampton*, there is no certain Puniſhment "ordained againſt the Merchants if they ſell after the Time, it is accorded, "That the ſaid Merchants, after the ſaid Time, ſhall cloſe their Booths "and Stalls, without putting any Manner of Ware or Merchandize to ſell "there; and if it be found that any Merchant from henceforth ſell any "Ware or Merchandize at the ſaid Fairs, after the ſaid Time, ſuch Mer- "chant ſhall forfeit to our Lord the King the double Value of that which "is ſold, and every Man that will ſue for our Lord the King ſhall be re- "ceived, and alſo have the fourth Part of that which ſhall be loſt at "his Suit.

(C) Of the Duty and Power of Owners of Fairs and Markets in Things incident to them.

2 Inſt. 220.

IF the King grants unto one a Fair or Market, he ſhall have, without any Words to that Purpoſe, a Court of Record, called a Court of (*a*) Pie-powders, as incident thereunto, for that is for Advancement and Expedition of Juſtice, and for the Supporting and Maintenance of the Fair or Market.

(*a*) That it is as well incident to a Fair as to a Market, but there may be a Court of Piepowders by Cuſtom, without a Fair or Market, as there may be a Market without an Owner. 4 Inſt. 272.—For the Juriſdiction of this Court, *vide* under Tit. *Courts and their Juriſdiction in general.*

Owners and Governors of Fairs are to take Care that every Thing be ſold according to juſt (*b*) Weight and Meaſure, who for that and other Purpoſes

(*b*) That according to *Magna Charta, cap.* 25. there ſhall be but one Weight and one Meaſure of Corn, Wine, Beer and Ale, and one Yard throughout the whole Realm; but for the ſeveral Statutes regulating Weights and Meaſures *vide* 14 E. 3. *cap.*

Purpoſes may appoint a Clerk of the Fair or Market, who is to mark * and allow all ſuch Weights, and for his Duty herein can only take his reaſonable and juſt (*a*) Fees.

* Page 457 *cap.* 12, 25. E. 3. *c.* 10. 27 E. 3. *c.* 10.

34 E. 3. *c.* 5. 13 Rich. 2. *c.* 9. 8 H. 6. *c.* 5. 7 H. 7. *c.* 4. 11 H. 7. *c.* 4. 12 H. 7. *c.* 5. the Statute called 17 Car. 1. *c.* 19. and 22. Car. 2. *c.* 8. and *vide* Dalt. Juſt. *c.* 112. (*a*) For this *vide* 4 Inſt. 274. Moor 523. Salk. 327.

Fairs and Markets are ſuch Franchiſes as may be forfeited; as if the Owners of them hold them contrary to their Charter, as by continuing them a longer Time than the Charter admits, by Diſuſer, and by extorting Fee and Duties where none are due, or more than are juſtly due.

2 Inſt. 220. Finch. 164. 3 Mod. 108. 10 Mod. 353.

(D) Of Toll and other Duties which Owners of Fairs and Markets are intitled to: And herein,

1. Where ſuch Tolls ſhall be ſaid to be reaſonable and legally due.

(*b*) TOLL payable at a Fair or Market is a reaſonable Sum of Money due to the Owner of the Fair or Market, upon Sale of Things tollable within the Fair or Market, or for Stallage, Piccage, or the like.

2 Inſt. 222. 2 Jon. 207. (*b*) Toll is a gene ral Word

which comprehends all Duties and Payments at a Fair or Market, and therefore a Grant to be diſcharged of Toll diſcharges a Man from Piccage and Stallage. Palm. 78. 2 Lutw. 1519.—Piccage is a Sum of Money paid for Leave to dig the Ground to erect a Stall. Palm. 77.—Stallage is a Sum of Money paid for Leave to erect a Stall, or to remove a Stall from one Part of the Fair to another. Palm. 77.—But for the different Kinds of Tolls, *vide* 2 Rol. Abr. 522. Mod. 47, 231. 2 Mod. 143. Ld. Raym. 385. 4 Mod. 319. 2 Show. 34. pl. 26.

Toll is a Matter of private Benefit to the Owner of the Fair or Market, and not incident to them; therefore if the King grants a Fair or Market, and grants no Toll, the Patentee can have none, and ſuch Fair or Market is counted a free Fair or Market.

Cro. Eliz. 558. *Hoddy* and *Wheelhouſe*. 2 Inſt. 220. S. P.

2 Lutw. 1336. S. P. reſolved, 7 Mod. 12. 2 Stra. 471.——[Toll is not incident of common Right to a Fair, and if it be a new Fair Cuſtom cannot ſupport it. Stra. 1171.——Erecting a Stall in a Market is not of common Right, and the Stall-Keeper muſt compound as he can. The *Mayor of Northampton* v. *Ward*, M. 19 Geo. 2. Stra. 1238. Wils. 107.]

Alſo if the King, at the Time he grants a Fair or Market, grants a Toll and the ſame is (*c*) outrageous and exceſſive, the Grant of the Toll is void, and the ſame becomes a free Fair or Market.

2 Inſt. 220. 2 Lutw. 1336. (*c*) That the

Reaſonableneſs of every Toll muſt be determined by the Diſcretion of the Judge. 2 Inſt. 222.

But the King, after he has granted a Fair or Market, may grant that the Patenteee may have a reaſonable Toll; but this muſt be in Conſideration of ſome Benefit accruing from it to thoſe who trade and merchandize in ſuch Fair or Market. 2 Inſt. 221.

No Toll ſhall be paid for any Thing brought to the Fair or Market, before the ſame is ſold, unleſs it be by Cuſtom Time out of Mind, and upon ſuch Sale the Toll is to be paid by the Buyer; and therefore my 2 Inſt. 221.

Lord *Coke* ſays, That a Fair or Market by Preſcription is better than one by Grant.

And by *Weſtm.* 1. *cap.* 31. touching them that take outrageous Toll, contrary to the common Cuſtom of the Realm in Market-Towns, it is provided, "That if any do ſo in the King's Town, which is let in Fee-
Page 459 " Farm, the King ſhall (*a*) ſeiſe into his own Hand the Franchiſe of the
(*a*) This muſt be intended upon Office found. "Market; and if it be another's Town, and the ſame be done by the
2 Inſt. 221. "Lord of the Town, the King ſhall do in like Manner; and if it be done
"by a Bailiff or any mean Officer, without the Commandment of his
"Lord, he ſhall reſtore to the Plaintiff as much more, for the outrageous
"Taking, as he had of him, if he had carried away his Toll, and ſhall
"have forty Days Impriſonment."

But where by Cuſtom a Toll is due upon the Sale of any Goods in a Fair or Market, and he who ought to pay it refuſes, an (*b*) Action on the Caſe lies againſt him.

Rol. Abr. 103, 104, 106.
(*b*) *Vide* 3 Lev. 400.

Toll is *quaſi* a Debt, for which Debt or an *Aſſumpſit* lies.——[The Owner of a Market cannot diſtrain for Toll the Goods brought there to be ſold, as Damage feaſant, but he has an Action for the Toll. Ld. Raym. 1589.]

2. What Perſons are exempt from Payment of Toll.

2 Inſt. 221. for the Writ to be quit of Toll, *vide* F. N. B. 503. & *vide* 2 Show. 34. pl. 26.

If the King, or any of his Progenitors have granted to any to be diſcharged of Toll, either generally or ſpecially; this Grant is good to diſcharge him of all Tolls to the King's own Fairs or Markets, and of the Tolls, which together with any Fair or Market have been granted after ſuch Grant of Diſcharge; but cannot diſcharge Tolls formerly due to Subjects either by Grant or Preſcription.

2 Inſt. 221.

Alſo the King himſelf ſhall not pay Toll for any of his Goods; and if any be taken, it is puniſhable within the Statute *Weſtm.* 1. *cap.* 31.

4 Inſt. 269. 2 Inſt. 221. Rol. Abr. 321.

So Tenants in Antient Demeſne are free and quit from all Manner of Tolls in Fairs and Markets, whether ſuch Tenants hold in Fee, for Life, Years, or at Will.

F. N. B. 228. 2 Leon. 191. Cro. Eliz. 227. 2 Inſt. 221. Rol. Abr. 321. 2.

But this Privilege does not extend to him who is a Merchant, and gets his Living by Buying and Selling, but is annexed to the Perſon in Reſpect of the Land, and to thoſe Things which do grow, and are the Produce of the Land.

——And how this Exemption muſt be ſet forth in Pleading, *vide* 2 Lutw. 1144.——[By Charter H. 1. all the Men of *London*, and all their Goods, ſhall be free from Scot and Lot, Dane Gilt, and Murder. And from all *Toll*, Paſſage and Laſtage, and all other Cuſtoms through all *England*, and the Ports of the Sea. So by Charters 11 H. 3. and 50 H. 3. *vide* 4 Inſt. 232. So by Charters H. 2. and 1 *John*; and alſo that they ſhall be free from Brid-Toll, &c. *Vide* Priv. Lond. 4. See farther Com. Dig. 4 V. 162.]

(E) How far a Sale in a Fair or Market overt changes the Property of a Thing ſold therein.

4 H. 7. 5. pl. 1. Latch. 144. 2 Inſt. 713.

FOR the Encouragement of Trade, and to render Contracts in Fairs and Markets ſecure, by the Common Law, every Sale made in a (*c*) Fair

(*c*) That the Law is now ſettled, that a Sale in a Fair where no Toll is paid, is as effectual to change the Property as in any other. 2 Inſt. 714.

Fair or *(a)* Market-overt transfers a complete Property in the Thing ſold to the Vendee; ſo that however injurious or illegal the Title of the Vendor may be, yet the Vendee's is good againſt all Men.

(a) That the City of *London* is a Market-overt every Day in the Week, except *Sundays*, ſo that a Sale on any of thoſe Days has the ſame Effect as if on a Fair or Market-day in another Place. 2 Inſt. 713. Moor 360. S. P. 2 Brownl. 288. Godb. 131. 8 Co. 127. a. S. P.

But this general Rule, that a Sale in a Market changes the Property, muſt be underſtood with the following Reſtrictions:

1. That this Sale in a Market-overt ſhall not bind the King, although it bindeth all others, as Infants, Femes Covert, *Non Compos*, beyond Sea, or in Priſon, and whether they were poſſeſſed of them in their own Right, or as Executors or Adminiſtrators. 2 Inſt. 713.

* 2. That though all Fairs and Markets are overt, yet the Sale muſt be in ſome open Place, as in a Shop, and not in a Warehouſe or other private Part of the Houſe, ſo that People who go along may ſee what is a-doing; and therefore if the Shop-door or Windows be ſo ſhut, that the Goods cannot be ſeen, this alters no Property. * Page 460 5 Co. 83. Biſhop of *Worceſter's* Caſe. And. 344. S. C. and S. P. Moor 360. S. C. and S. P. Poph. 84. S. C. and S. P. Cro. Eliz. 454. S. P. 8 Co. 127. S. P.

3. The Things bought muſt be of the Nature and Quality of thoſe which the Buyer deals in, and therefore if Plate, *&c.* are bought in *(b)* a Scrivener's Shop in *London*, this alters no Property, and the true Owner may maintain Trover for them. 5 Co. 83. Caſe of Market-overt determined at the *Old Bailey*, by *Popham*, *Egerton*, *Anderſon*, *Brian*, and others, Poph. 84. S. C. and S. P. Cro. Eliz. 454. S. C. and S. P. by the Name of the Biſhop of *Worceſter's* Caſe, And. 344. S. C. and S. P. Moor 360. S. C. and S. P. and there ſaid that the Law is the ſame, if Horſes are ſold in *Cheapſide*, or Shop Goods in *Smithfield*. Cro. Jac. 68, 69. *Taylor* and *Chamber*, S. P. adjudged. *(b)* And by the 1 Jac. 1. c. 21. it is enacted, That no Sale, Exchange, Pawn, or Mortgage of any Jewels, Plate, Apparel, Houſhold-ſtuff, or other Goods, of what Kind, Nature or Quality ſoever the ſame ſhall be of, and that ſhall be wrongfully or unjuſtly purloined, taken, robbed or ſtolen from any Perſon or Perſon, or Bodies Politic, and which at any Time hereafter ſhall be ſold, uttered, delivered, exchanged, pawned, or done away within the City of *London*, or Liberties thereof, or within the City of *Weſtminſter* in the County of *Middleſex*, or within *Southwark* in the County of *Surry*, or within two Miles of the ſaid City of *London*, to any Broker or Brokers or Pawntakers, by any ways or means whatſoever, directly or indirectly, ſhall work or make any Change or Alteration of the Property or Intereſt of and from any Perſon and Perſons, or Body Politic, from whom the ſame Jewels, Plate, Apparel, Houſhold-ſtuff or Goods, were or ſhall be wrongfully purloined, taken robbed or ſtolen.

4. The Goods muſt be ſold, and a valuable Conſideration actually paid for them. 2 Inſt. 713.

5. If the Buyer knows at the Time of the Sale that the Owner hath not the abſolute Property; this will not bar the Right Owner. 2 Inſt. 713. 2 And. 115. and 3 Co. 78. b. S. P.

6. The Sale muſt be without Covin, or any Combination between the Buyer and Seller, to defraud the true Owner. 2 Inſt. 713. 2 And. 315. and 3 Co. 78. b. S. P.

7. If a Sale be made of Goods by a Stranger in a Market-overt, whereby the Right of *A.* is bound; yet if the Seller acquireth the Goods again, *A.* may take them again, becauſe he was the Wrong-doer, and he ſhall not take Advantage of his own Wrong. 2 Inſt. 713.

8. There muſt be a Sale and Contract, and therefore a Sale to a Man of his own Goods in Market-overt bindeth not; and likewiſe a Sale in Market-overt by an Infant of ſuch Tenderneſs of Age, as it may appear to the Buyer that he is within Age, or by a Feme Covert, if the Buyer know her to be a Feme Covert, unleſs for ſuch Things as ſhe uſually trades for, or by the Conſent of her Huſband, bindeth not. 2 Inſt. 713.

Inſt. 713, 714.

9. The Contract muſt be originally and wholly made in the Market-overt, and not to have the Inception out of the Market, and the Conſummation in the Market.

2 Inſt. 714.

10. The Sale muſt not be in the Night, but between Sun-riſing and Sun-ſet; but a Sale made in the Night is good to bind the Parties, but not a Stranger.

4 H. 7. 5. Fitz. Coron. 62, 460. Staundf. P.C. 66. Hale's P. C. 212. Latch. 144.

Here alſo we muſt obſerve, that at Common Law there was no Reſtitution of Goods ſtolen on any Proſecution whatſoever, except on an (*b*) Appeal of Larceny; but to remedy this Inconveniency, and to encourage the proſecuting of Felons,

(*b*) For this *vide* 2 Hawk. P. C. 170, 171.

By the 21 *H.* 8. *cap.* 11. it is enacted, "That if any Felon or Felons "do rob, or take away any Money, Goods or Chattels, from any of the "King's Subjects, from their Perſons, or otherwiſe within this Realm, "and thereof the ſaid Felon or Felons be indicted, and after arraigned * Page 461 "* of the ſaid Felony, and found guilty thereof, or otherwiſe attainted "by Reaſon of Evidence given by the Party ſo robbed, or Owner of the "ſaid Money, Goods or Chattels, or by any other by their Procurement, "that then the Party ſo robbed, or Owner, ſhall be reſtored to his "ſaid Money, Goods and Chattels, and that as well the Juſtices of Gaol-"Delivery, as other Juſtices before whom any ſuch Felon ſhall be found "guilty, or otherwiſe attainted by Reaſon of Evidence given by the Party "ſo robbed, or Owner or by any other by their Procurement, have "Power by the ſaid Act to award from Time to Time Writs of Re-"ſtitution for the ſaid Money, Goods and Chattels, in like Manner as "though any ſuch Felon or Felons were attainted at the Suit of the Party "in Appeal."

Kelynge 35, 48. 2 Inſt. 714.

Since this Statute it hath been the Practice to reſtore the Goods ſtolen, upon the Conviction of the Offender, to the Proſecutor of the Indictment, notwithſtanding any Sale of them in a Market overt; but he can be reſtored to no Goods but thoſe mentioned in the Indictment.

As to the changing the Property of Horſes by a Sale in a Fair or Market overt, the ſame is provided againſt by the 2 & 3 *P. & M. cap.* 7. and 31 *Eliz.*

But more eſpecially by the 31 *Eliz. cap.* 12. by which it is enacted, "That no Perſon ſhall, in any Fair or Market, ſell, give, exchange, or "put away any Horſe, Mare, Gelding, Colt or Filly, unleſs the Toll-taker "there or (where no Toll is paid) the Book-keeper, Bailiff, or the chief Of-"ficer of the ſame Fair or Market, ſhall and will take upon him perfect "Knowledge of the Perſon that ſo ſhall ſell, or offer to ſell, give, or ex-"change any Horſe, *&c.* and of his true Chriſtian Name, Surname, and "Place of Dwelling or Reſiancy, and ſhall enter all the ſame his Knowlege "in a Book there kept for Sale of Horſes, or elſe that he ſo ſelling or of-"fering to ſell, give, exchange, or put away any Horſe, *&c.* ſhall bring "unto the Toll-taker, or other Officer aforeſaid, of the ſame Fair or Mar-"ket, one ſufficient and credible Perſon, that can, ſhall, or will teſtify "and declare unto, and before ſuch Toll-taker, Book-keeper, or other "Office, that he knoweth the Party that ſo ſelleth, giveth, exchangeth, or "putteth away ſuch Horſe, *&c.* and his true Name, Surname, Myſtery "and Dwelling Place, and there enter, or cauſe to be entered in the Book "of the ſaid Toll-taker or Officer, as well the true Chriſtian Name, Sur-"name, Myſtery, and Place of Dwelling or Reſiancy of him that ſo ſel-(*c*) For this *vide* Palm. 484. Jon. 163. "leth, giveth, exchangeth, or putteth away ſuch Horſe, *&c.* as of (*c*) him

"that

" that ſo ſhall teſtify or avouch his Knowledge of the ſame Perſon, and " ſhall alſo cauſe to be entered the very true Price or Value that he ſhall " have for the ſame Horſe, *&c.* and that no Perſon ſhall take upon him " to avouch, teſtify or declare, that he knoweth the Party that ſo ſhall " offer to ſell, give, exchange, or put away ſuch Horſe, *&c.* unleſs he do " indeed truly know the ſame Party and ſhall truly declare to the Toll- " taker or other Officer, as well the Chriſtian Name, Surname, Myſtery " and Place of Dwelling and Reſiancy of himſelf, as of him, of and for " whom he maketh ſuch Teſtimony and Avouchment, and that no Toll- " taker, or other Perſon keeping any Book of Entry of any Sale, Gift, " Exchange, or putting away of any Horſe, *&c.* unleſs he knoweth the " Party that ſo ſelleth, giveth, exchangeth, or putteth away any ſuch " Horſe, *&c.* and his true Chriſtian Name, Surname, Myſtery, and " Place of his Dwelling or Reſiancy, or the Party that ſhall and will " teſtify and avouch his Knowledge of the ſame Perſon ſo ſelling, *&c.* " any ſuch Horſe, *&c.* and his true Chriſtian Name, *&c.* and ſhall make " a perfect Entry into the ſaid Book, of ſuch his Knowledge of the Perſon " and of the Name, *&c.* and alſo the true Price or Value, that ſhall be " *bona fide* taken or had for any ſuch Horſe, *&c.* ſo ſold, given, *&c.* ſo far " * as he can underſtand the ſame; and then give to the Party ſo buying, *Page 462 " *&c.* ſuch Horſe, *&c.* requiring, and paying two Pence for the ſame, a " true and perfect Note in Writing, of all the full Contents of the ſame, " ſubſcribed with his Hand, on Pain that every Perſon that ſo ſhall ſell, " *&c.* any Horſe, *&c.* without being known to the Toll-taker, or other " Officer, or without bringing ſuch a Voucher or Witneſs, cauſing the " ſame to be entered as aforeſaid, and every Toll-taker, Book-keeper, or " other Officer of Fair or Market offending in the Premiſſes, contrary to " the true Meaning aforeſaid, ſhall forfeit, for every ſuch Default, the " Sum of 5 *l.* but alſo that every Sale, Gift, *&c.* of any Horſe, *&c.* " not uſed in all Points according to the true Meaning aforeſaid, ſhall be " void, the one half of all which Forfeiture to be to the Queen's Majeſty, " her Heirs and Succeſſors, and the other half to him or them that will " ſue for the ſame.

And by *Sect.* 4. it is enacted, " That if any Horſe, *&c.* ſhall be ſtolen, " and afterwards ſhall be ſold in open Fair or Market, and the ſame ſhall " be uſed in all Points and Circumſtances as aforeſaid, that yet nevertheleſs " the Sale of any ſuch Horſe, *&c.* within ſix Months next after the Felony " done, ſhall not take away the Property of the Owner from whom the " ſame was ſtolen, ſo as Claim be made within ſix Months by the Party " from whom the ſame was ſtolen, or by his Executors or Adminiſtrators, " or by any other by any of their Appointment, at or in the Town or Pa- " riſh where the ſame Horſe, *&c.* ſhall be found, before the Mayor or " other Head Officer of the ſame Town or Pariſh, if the ſame Horſe, *&c.* " happen to be found, in any Town Corporate or Market Town, or elſe " before any Juſtice of Peace of that County near to the Place where ſuch " Horſe, *&c.* ſhall be found, if it be out of a Town Corporate or Market- " Town, and ſo as Proof be made within forty Days then next enſuing, by " two ſufficient Witneſſes to be produced and depoſed before ſuch Head " Officer or Juſtice, (who by virtue of this Act ſhall have Authority to mini- " ſter an Oath in that Behalf) that the Property of the ſame Horſe, *&c.* ſo " claimed, was in the Party, by or from whom ſuch Claim is made, and " was ſtolen from him within ſix Months next before ſuch Claim or any " ſuch Horſe, *&c.* but that the Party, from whom the ſaid Horſe, *&c.* " was ſtolen, his Executors or Adminiſtrators, ſhall and may, at all Times " after, notwithſtanding any ſuch Sale or Sales in any Fair or Market " thereof made, have Property and Power to have, take again and enjoy " the ſaid Horſe, *&c.* upon Payment or Readineſs or offer to pay the

" Party, that ſhall have the Poſſeſſion and Intereſt of the ſame Horſe, &c. " if he will receive and accept it, ſo much Money as the ſame Party ſhall " depoſe and ſwear before ſuch Head Officer or Juſtice of Peace, (who by " virtue of this Act ſhall have Authority to miniſter, and give an Oath " in that Behalf), that he paid for the ſame *bona fide*, without Fraud or " Colluſion."

[There cannot be a Market Overt for Pawning. *Hartop* v. *Hoare*, P. 16 *Geo.* 2. *Stra.* 1187. 1 *Wills.* 8. 3 *Atkyns* 44.]

*Page 463

*Fees.

FEES are certain Perquiſites allowed to Officers who have to do with the Adminiſtration of Juſtice, as Recompence for their Labour and Trouble; and theſe are either aſcertained by Acts of Parliament, or eſtabliſhed by ancient Uſage, which gives them an equal Sanction with an Act of Parliament.

Of theſe there are ſeveral Kinds; but we ſhall only conſider thoſe about which there hath been moſt Controverſy in our Books, under the following Heads:

(A) In what Caſes a Fee ſhall be ſaid to be due. 463.
(B) How much ſhall be ſaid to be due. 464.
(C) At what Time it ſhall be ſaid to be due. 466.
(D) In what Court Fees are to be recovered. 468.

(A) In what Caſes a Fee ſhall be ſaid to be due.

Co. Lit. 368. 2 Inſt. 176, 208-9.

AT Common Law no Officer, whoſe Office related to the Adminiſtration of Juſtice, could take any Reward for doing his Duty, but what he was to receive from the King.

And this fundamental Maxim of the Common Law is confirmed by *Weſtm.* 1. *cap.* 26. which enacts, " That no Sheriff, nor other (*a*) King's Officer, " ſhall

(*a*) That this comprehends Eſcheators, Coroners, Bailiffs, Gaolers, the King's Clerk of the Market, Aulneger, and other inferior Miniſters and Officers of the King, whoſe Offices do any way concern the Adminiſtration or Execution of Juſtice. 2 Inſt. 209.——And according to my Lord *Coke*, by ſome Opinions, it extends to the King's Heralds, for they are the King's Miniſters, and were long before this Act. 2 Inſt. 209.

" ſhall take any Reward to do his Office, but ſhall be paid of that which " they take of the King; and that he who ſo doth ſhall yield twice as " much, and ſhall be puniſhed at the King's Pleaſure."

And ſo much hath this Law been thought to conduce to the Honour of the King and Welfare of the Subject, that all Preſcriptions whatſoever, which have been contrary to it, have been holden void; as where by Preſcription the Clerk of the Market claimed certain Fees for the View and Examination of all Weights and Meaſures; and it was held merely void. 4 Inſt. 274. Moor 523. 2 Inſt. 209. 2 Rol. Abr. 226.

But it hath been holden, that the Fee of 20*d.* commonly called the Bar-Fee, which hath been taken, Time out of Mind, by the Sheriff, of every Priſoner who is acquitted; and alſo the Fee of one Penny, which was claimed by the Coroner of every Viſne, when he came before the Juſtices in Eyre, are not within the Meaning of the Statute, becauſe they are not demanded of the Sheriff or Coroner for doing any Thing * relating to their Offices, but claimed as Perquiſites of Right belonging to them. 21 H. 7. 17. 2 Inſt. 210. Stamf. P. C. * Page 464

Alſo it is holden by my Lord *Coke*, that within the Words of the Statute 34 *E.* 1. which are *Nullum tallagium vel auxilium, per nos vel per hæredes noſtros, in regno noſtro, ponatur ſeu levetur, ſine voluntate & aſſenſu Archiepiſcoporum, Epiſcoporum, Comitum, Baronum, Militum, Burgenſium & aliorum Liberorum com. de regno noſtro*, no new Offices can be erected with new Fees, or old Offices with new Fees; for that is a Tallage upon the Subject, which cannot be done without common Aſſent by Act of Parliament. 2 Inſt. 533.

(*a*) But yet it is holden, that an Office erected for the Public Good, though no Fee is annexed to it, is a good Office; and (*b*) that the Party, for the Labour and Pains which he takes in executing of it, may maintain a (*c*) *Quantum meruit*, if not as a Fee, yet as a competent Recompence for his Trouble. (*a*) Moor 808. pl. 1094. Biſhop of *Sarum*'s Caſe. (*b*) Hard. 351. *Veale* and *Priour* adjudged.

(*c*) Where *A.* was libelled againſt in the Eccleſiaſtical Court for Fees, and upon Motion a Prohibition was granted; for no Court has a Power to eſtabliſh Fees; the Judge of the Court may think them reaſonable but that is not binding; but if in a *Quantum meruit* a Jury think them reaſonable, then they become eſtabliſhed Fees. Salk. 333. pl. 11. *Giffard*'s Caſe.

All Fees allowed by Acts of Parliament become eſtabliſhed Fees, and the ſeveral Officers intitled to them may maintain Actions of Debt for them. 2 Inſt. 210.

Alſo ſuch Fees as have been allowed by the Courts of Juſtice to their Officers, as a Recompence for their Labour and Attendance, are eſtabliſhed Fees; and the Parties (*d*) cannot be deprived of them without an Act of Parliament. 21 H. 7. 17. Co. Lit. 368. (*d*) Preced. Chan. 551.

Where a Fee is due by Cuſtom, ſuch Cuſtom, like all others, muſt be reaſonable; and therefore where a Parſon libelled in the Spiritual Court for a Burying-Fee due to him for every one who died in his Pariſh, though buried in another; and the Court held this unreaſonable, and a Prohibition was granted. Hob. 175. Rol. Abr. 557, 559. S. C. adjudged.

So where a *French* Proteſtant had his Child baptized at the *French* Church in the *Savoy*, and the Vicar of St. *Martin*'s, in which Pariſh it is, together with the Clerk, libelled againſt him for a Fee of 2*s.* 6*d.* due to him, and 1*s.* for the Clerk; and a Prohibition was granted; and in this Caſe it was held by *Holt*, that no Fee could be due but by Cuſtom, and that a Cuſtom for any Perſon to take a Fee for Chriſtening a Child, when he does not Chriſten him, is not good; and that the Vicar, if he had a Right to Chriſten, ſhould have libelled for that Right. Salk. 332. pl. 9. *Bardeaux* ver. Dr. *Lancaſter*. 12 Mod. 171.

(B) How much ſhall be ſaid to be due.

10 Co. 102. a. Co. Lit. 368.

HERE we muſt obſerve in general, that it is Extortion for any Officer to take more for executing his Office than is allowed by Act of Parliament, or is the known and ſettled Fee in ſuch Caſe. †

† See *ante* 454. n.

But in this Place we ſhall only take Notice of the Fees of Sheriffs for Executions, about which there ſeems to have been the moſt Controverſies in our Books.

And for this Purpoſe we ſhall recite the (*a*) 28 *Eliz. cap.* 4. by which it is enacted, "That it ſhall not be lawful to or for any Sheriff, Under-"Sheriff, Bailiff of Franchiſes or Liberties, nor for any of their or "either of their Officers, Miniſters, Servants, Bailiffs or Deputies, nor "* for any of them, by Reaſon or Colour of their or either of their Office "or Offices, to have, receive or take of any Perſon or Perſons whatſoever, "directly or indirectly, for the ſerving and executing of any Extent or "Execution upon the Body, Lands, Goods or Chattels of any Perſon or "Perſons whatſoever, more or other Conſideration or Recompence than in "this preſent Act is and ſhall be limited and appointed, which ſhall be "lawful to be had, received and taken; that is to ſay, twelve Pence of "and for every twenty Shillings, where the Sum exceedeth not one hundred "Pounds; and Six-pence of and for every twenty Shillings, being over "and above the ſaid Sum of 100 *l.* that he or they ſhall ſo levy or extend, "and deliver in Execution, or take the Body in Execution for, by Virtue "and Force of any ſuch Extent or Execution whatſoever; upon Pain and "Penalty that all and every Sheriff, Under-Sheriff, Bailiff of Franchiſes "and Liberties, their and every of their Miniſters, Servants, Officers, "Bailiffs or Deputies, which at any Time ſhall directly or indirectly do the "contrary, ſhall loſe and forfeit to the Party grieved his treble Damages; "and ſhall forfeit the Sum of 40 *l.* for every Time that he, they or any "of them, ſhall do the contrary; the one Moiety thereof to be to our "Sovereign Lady the Queen, her Heirs and Succeſſors; and the other "Moiety thereof to the Party or Parties that will ſue for the ſame by any "Plaint, Action, Suit, Bill or Information, wherein no Eſſoign, Wager "of Law or Protection ſhall be allowed.

"Provided always, that this Act, or any Thing therein contained, ſhall "not extend to any Fees to be taken or had for any Execution within any "City or Town Corporate.".

* Page 465

(*a*) in the printed Statutes this Act is called 29 *Eliz.* but by the Parliament Roll it is the 28th, and ſo ought to be recited. Salk. 331. pl. 4. Skin. 363. pl. 7. [And this Obſervation is right, becauſe the Roll has been ſearched in a modern Caſe, and found to be the 28th.]

In the Conſtruction of this Statute the following Points have been holden:

1. That though the Words of the Statute are, that it ſhall not be lawful for the Sheriff to take any more, or greater Fee, than by the Act is limited, *&c.* that herein by Implication at leaſt, if not by expreſs Words, a Right is given the Sheriff to demand thoſe Fees mentioned in the Statute; and conſequently that he may, as in all Caſes where a Statute creates a Debt or Duty, (*b*) maintain an Action of Debt for them.

Moor 853. pl. 1166. *Probey* and *Lumley.* adjudged. Latch 19. Poph. 175. Palm. 400.

(*b*) but he cannot take a Bond for his Fees, though he takes it for no more than the Statute allows, and bring Debt on that. Winch. 51, 52. Cro. Jac. 103. Cro. Car. 286.

2. It hath been adjudged, that the Sheriff ſhall have a Shilling *per* Pound for the firſt Hundred, and Six-pence *per* Pound for every other Pound exceeding

Poph. 173. *Welden* ver. *Veſy.* Hill. 1 Car. 1, Latch. 17, 18, 52. Palm. 399, 400. Bendl. 165. Noy. 75. S. C. adjudged by three Judges againſt *Cro.*

Salk. 331. S. P. admitted, *& vide* Cro. Eliz. 335.

ceeding a Hundred; and not Six-pence for every Pound where the whole Debt happens to exceed a hundred Pound; for by this Conſtruction the Sheriff would have leſs where the Debt was 199 *l.* than if it were but 100 *l.* and the Intention of the Statute was to allow Sheriffs ſuch reaſonable Fees as would incourage them to diſcharge this Branch of their Duty ſo much favoured by the Law, with Vigour and Succeſs; who before were backward and intimidated, by Reaſon of the Dangers they run from Eſcapes, *&c.* from engaging herein; and therefore it has been held the moſt reaſonable Conſtruction to allow them their Fees in Proportion to ſuch Danger.

Cro. C. J. Cro. Car. 286-7. *Liſter* and *Bromley* S. P. adjudged. Trin. 8. Car. 1. 1 Jones. 307. S. C. adjudged and affirmed on a Writ of Error. Salk. 331. S. P. admitted to be Law, *& vide* Cro. Eliz. 263-4.

3. It hath been reſolved, on the Proviſo of the ſaid Statute, that it ſhall not extend to any Fees to be taken for any Execution within any City * or Town Corporate; that this muſt be intended of Executions on Judgments given in thoſe Courts; and that therefore where a Sheriff executes a Judgment given in *Weſtminſter-Hall* in a City or Town Corporate, he is as much intitled to his Fees, purſuant to this Statute, as if the Execution had been done in any Part of the County at large; for herein the Sheriff runs as great a Riſque, and his Trouble is as great; but where both the Judgment and Execution are within a limited Juriſdiction, it cannot be preſumed to be attended with equal Difficulty; and therefore the Proviſo in the Statute excludes them.

* Page 466

Latch. 17, 18. Poph. 173. Palm. 399, 400. Dalt. Sheriff. 527. *cont.* Cro Eliz. 263-4. *& vide* 5 Mod. 97. Where an Action of Debt was brought by the Bailiff of the Palace Court of the Biſhop of *Rocheſter* for Fees, upon Execution of a Judgment in that Court, purſuant to this Statute; and after Verdict for the Plaintiff the Judgment was ſtaid, although it was objected, that the Proviſo in the Statute could not extend to it, being neither a City nor Town Corporate where the Execution was made; nor was it within the Reaſon thereof, becauſe the Biſhop's Juriſdiction is as large as his Dioceſe; and the Reaſon of the Proviſo, that no Execution Fees ſhould be taken in Cities and Towns Corporate, is from the Narrowneſs of thoſe Juriſdictions, which renders Executions in them more eaſy and leſs dangerous. Salk. 331. *Brockwel* and *Lock* S. C. but no Judgment.

4. It hath been reſolved, that the Bailiff of (*a*) a Liberty, who executes a Judgment given in *Weſtminſter-Hall*, is intitled to the Fees, within the Words and Meaning of the Statute; and not the Sheriff of the County, who directs his Precept to him.

Latch 19, 52. Poph 175. Salk 331. pl. 4. Dalt. Sheriff 526. S. P. And there ſaid, that the conſtant Practice was ſo, and Noy 27. *Cooper* and *Hes* S. P. adjudged, for he ſhall anſwer for the Eſcape, *&c.* and therefore ought to have the Fees. (*c*) So if the Execution of a Judgment in *Weſtminſter* be in a City, which is a County of itſelf, the Sheriff there ſhall have his full Fees, for he is the proper Officer to the Courts above. Latch 19. Palm. 401. Dalt. 527. Cro. Eliz. 263-4

5. It ſeems agreed, that if a Sheriff makes an *Extent*, and before the *Liberate* a new Sheriff is choſen, the new Sheriff ſhall have the Fees appointed by the Statute.

Winch 50, 51. *per* Hob. C. J. Dal. Sheriff, 526.

6. It hath been reſolved, that the Statute does not extend to Real Executions, ſuch as *Habere facias ſeiſinam*, or *Poſſeſſionem*, but only to Executions in Perſonal Actions; alſo it is ſaid, that the Statute does not extend to Executions upon Statutes Merchant, Recognizances, *&c.* and that the Act is to be underſtood of Caſes where the Judgment *Redditur in Invitum*, and not by the voluntary Confeſſion of the Party. †

Salk. 331. pl. 6. *Peacock* and *Harris.*

† Certainly the Sheriff is intitled to his Fees on a Judgment by Confeſſion.

7. That

Hetley 52. 2 Brownl. 283.

7. That for executing a *Capias Utlagatum*, or for a Warrant to execute it, or for a Return of it, no Fee is due to the Sheriff, becauſe this is at the Suit of the King.

Salk 331. pl. 6.

8. It ſeems to have been reſolved, that upon a *Capias ad ſatisfaciendum*, the Sheriff ſhall have his Fees for the (*a*) whole Debt; alſo (*b*) if one in Execution dies, and a *Fieri facias* iſſues againſt his Goods, the Sheriff ſhall have his Fees upon executing the *Fieri facias*, for his Trouble was as great as at firſt.

(*a*) But that upon executing an Elegit where perhaps the Land is not worth 40 *s.* it is unreaſonable that the Sheriff ſhould have 6 *d.* for every Pound of the Debt. Cro. Jac. 103. *per Curiam*, & *vide* Salk. 331. pl 6. where by *Treby* Chief Juſtice, in ſuch Caſe he ſhall have Fees according to the Sum levied, and not according to the Debt recovered.——But this is denied by *Powel*, becauſe the Party might detain the Land till he was ſatisfied the entire Debt; and the Plaintiff is by having made his Election barred of all other Executions. (*b*) *Vide* Skin. 363. pl. 7.

(C) At what Time it ſhall be ſaid to be due.

Co. Lit. 368. 16 Co. 102. a. (*c*) Salk. 330. pl. 3. (*d*) So where on a Motion that an Under Sheriff might attend for refuſing to execute a *Fieri facias* till his Shilling and Pence were paid, the Court would not grant the Rule, but ſaid it was Extortion, for which he might be indicted. Salk. 331. pl. 5.

HERE alſo we muſt obſerve, that it is Extortion for an Officer to take his Fee before it is due; and therefore (*c*) where an Under Sheriff refuſed to execute a *Capias ad ſatisfaciendum* till he had his Fees, the Court held that the Plaintiff might bring an Action againſt him for not doing his Duty, or might pay him his Fees, and then indict him for (*d*) Extortion.

*Page 467 Keb. 272. pl. 57.

* If a *Habeas Corpus ad ſubjiciendum* be directed to a Gaoler, he muſt bring up the Priſoner although his Fees were not paid him; and he cannot excuſe himſelf of the Contempt to the Court, by alledging, that the Priſoner did not tender him his Fees.

March 89. Keb. 280. 2 Jon. 178. but Keb. 566. *cont.*

Alſo it is no Excuſe for not obeying a Writ of *Habeas Corpus ad faciendum & recipiendum*, that the Priſoner did not tender him his Fees.

But for this *vide* Rol. Rep. 338. Co. Lit. 295. 9 Co. 87. Plow. 68. a.

But if the Gaoler brings up the Priſoner by virtue of ſuch *Habeas Corpus*, the Court will not turn him over till the Gaoler be paid all his Fees; nor, according to ſome Opinions, till he be paid all that is due to him for the Priſoner's Diet; for that a Gaoler is not compellable to find his Priſoner Suſtenance.

2 Rol. Abr. 32. 2 Jones 178.

Fitz. Coron. 294. 4 E. 4. 10. b. *Pulton de pace* 88. a. Kelinge 25. 2 Jon. 56. Sid. 452.

If a Perſon pleads his Pardon, the Judges may inſiſt on the uſual Fee of Gloves to themſelves and Officers, before they allow it.

Salk. 332. pl. 7. *Earle* and *Plummer*.

If an erroneous Writ be delivered to the Sheriff, and he executes it, he ſhall have his Fees, though the Writ be erroneous.

It ſeems to be laid down in the old Books as a Diſtinction, that upon an Extent of Land upon a Statute, the Sheriff is to have his Fees, ſo much *per* Pound, according to the Statute immediately; but that upon an Elegit he is not to have them (*a*) till the *Liberate*. Poph. 176. Winch 51. S. P. and there ſaid, that the Sheriff cannot take his Salary, appointed by the Statute, till a complete Execution, *viz.* till the *Liberate*; for the Words of the Statute are in the Negative, and do not eſtabliſh the Fees, but only tolerate them. (*a*) And therefore if the Conuzee ſue an Extent, and then refuſe to ſue the *Liberate*, to the Intent to defraud the Sheriff of his Fees, the Sheriff may have his Remedy by Action on the Caſe. Winch 51. *per* Hobart.

But where the Sheriff, having executed an Elegit, brought an Action of Debt for his Fees; and it was objected, that this was not within the Statute, the Execution not being complete, for the Plaintiff could not enter but muſt bring his Ejectment; and it was held by *Holt*, that there was the ſame Reaſon for Fees for executing an Elegit as an Extent; for upon an Elegit the Sheriff returns, that he has taken an Inquiſition, extended the Lands, and delivered them to the Plaintiff, and that there is a *Liberate* in the Body of the Writ of Elegit, on the Return of which the Plaintiff may enter; for by the Return he becomes Tenant by Elegit, and may maintain an Ejectment, and aſſign his Intereſt upon the Land; but the Defendant's continuing in Poſſeſſion after the Return of the Writ turns the Plaintiff's Eſtate to a Right, and therefore he muſt enter to aſſign; and his being put to an Ejectment is no Reaſon, for in caſe of an Extent upon a Statute, where the *Liberate* is diſtinct, he cannot enter by Force; it is true he may without Force, and ſo he may here; and *Powell* ſaid, that Extent generally is the Word of the Statute 28 *Eliz. c.* 4. and that an Extent upon an Elegit was an Extent within the Statute, as well as an Extent upon a Statute. Salk. 209. pl. 2. 333. pl. 12. *Tyſon* and *Paſke*. 2 Ld. Raym. 1212.

* (D) In what Court Fees are to be recovered. *Page 468

A Solicitor in Chancery may exhibit his Bill for his Fees for Buſineſs done in that Court; and ſo he may where the Buſineſs is done in another Court, if it relates to another Demand the Plaintiff makes in Chancery. Vern. 203. 2 Chan. Ca. 153.

But it hath been held, that Chancellors, Regiſters and Proctors, who are Officers of Temporal Profit, and whoſe Fees do not relate to the Juriſdiction of the Spiritual Court, cannot ſue for them in the Spiritual Court. *Vide* 3 Leon. 268. 2 Rol. Rep. 59.

Mod. 167. 2 Keb. 615. 3 Keb. 508, 441, 516. 4 Mod. 254. 5 Mod. 242. 10 Mod. 261, 440. 12 Mod. 583. Ld. Raym. 703. Com. Rep. 18. pl. 11. 2 Sua. 1168.

As where the Regiſter in the Eccleſiaſtical Court libelled there for 4*s.* 6*d.* for his Fees, and proceeded to Excommunication; and the Defendant ſuggeſted, that the Office of Regiſter was a Temporal Office, and a Freehold, and moved for a Prohibition, which was granted; for the Court hath no Power to compel the Party to pay Fees to their Officers, but they muſt bring their *Quantum meruit*; or if the Office be a Freehold, they may bring an Aſſiſe, for the Denial of juſt Fees is a Diſſeiſin; although it was objected, that this Caſe differed from that of a Proctor, becauſe a Regiſter is a mere Officer of the Court, and the Court may appoint a reaſonable Fee to the Officers that attend them. Salk. 333. pl. 10. *Ballard* and *Gerrard*.

Salk. 330. pl. 2 *Goſlin* and *Elliſon.*

So a Prohibition was granted to ſtay a Suit in the Archdeacon of *Litchfield*'s Court, againſt Churchwardens for a Fee for Swearing them and taking their Preſentments, becauſe no Fees could be due but by Cuſtom, or for Work done, in which Caſe a *Quantum meruit* lay.

Hil. 5 Ann. *Dean and Chapter of Exeter* ver. *Drue.*

Salk. 334. pl. 13. S. C.

So where the Dean and Chapter of the Cathedral Church of *Exeter*, having the Freehold and Inheritance of the ſaid Church, had by Preſcription 10*l.* for every Corpſe that was buried in the ſaid Church; and the Defendant's Teſtator being buried there, without their Licence, the Defendant refuſed to pay the 10*l.* for which they ſued him in the Eccleſiaſtical Court; and on ſhewing Cauſe why a Prohibition ſhould not go, it was urged, that none can preſcribe to have a Burying-place in a Cathedral Church, for the Pariſhioners have nothing to do with it, nor pay any Tithes to it; but in the Pariſh Church to which they pay Tithes and other Duties, there ſuch a Preſcription may be good, and in the Church-yard they have a Right to be buried without any Preſcription; but the Court held, admitting that no Perſon could preſcribe to bury in a Cathedral Church, and admitting that this Fee, like that of 20*l.* which is uſually paid for burying in the Cathedral Church of *Weſtminſter*, is reaſonable, yet it is not of Spiritual Cognizance, but is in Nature of a Licence, on which a *Quantum meruit* may be brought, and the conſtant Uſage to pay ſo much given in Evidence; and therefore the Prohibition was granted.

*Page 469

* Felony.

Spelm. Gloſſ. verbo Felonia 214. Co. Lit. 391.

WHoever becomes infamous by the Commiſſion of a Crime which ſubjects him to a Capital Puniſhment, is ſaid to be guilty of Felony; which *ex vi Termini*, ſays my Lord *Coke*, ſignifies *quodlibet crimen felleo animo perpetratum*, and can be expreſſed by no Periphraſis or Word equivalent, without the Word *Felonice.*

(*a*) And conſequently a Pardon of Felony diſcharges an Indictment of High Treaſon, if it wants the Word *Proditorie.* H. P. C. 11. 3 Inſt. 151. Hawk. P. C. 65.

Felony is included in (*a*) High Treaſon, Murder, Robbery, Burglary, Rape, Sodomy, *&c.* but for theſe we ſhall refer to their proper Heads, and in this Place chiefly conſider it as it is a Violation of a Man's Property, known by the Name of Larceny.

Felony.

For the better Understanding whereof we shall consider,

(A) Of what Nature the Things taken must be, to constitute the Offence Felony. 469.

(B) How far the Goods ought to belong to another. 471.

(C) What shall be said to be a felonious and fraudulent Taking. 472.

(D) What shall be said to be a carrying away. 474.

(E) By whom the Offence may be committed. 475.

(F) Of what Value the Goods must be; and herein of the Difference between Grand and Petit Larceny. 475.

(G) Where the Offender is or is not excluded his Clergy. 476.

(H) Where the Offender is to be Transported. 478.

(A) Of what Nature the Things taken must be, to constitute the Offence Felony.

HERE it may be proper to take Notice, that in the Times of the Military Tenures every Tenant was obliged to attend in the Camp; and there being no Provision made out of the Public Stock for them, as there is now-a-days for our Mercenary Soldiery, it was necessary for every Freeman to carry with him his own Provision; which obliged them to a very severe and rigid Justice upon all Persons who should violate any Man's Property; otherwise Camps would have been Scenes of intolerable Violence, and every Man would have perished by his Neighbour's Sword, and not by his Enemies. Hence they learned the Institution of punishing Theft by Death, and from thence they derived it into their Civil State, which consisting of the same Orders and Conditions of Men, it was necessary that the same Measures of Justice should be used both at Home and in the Camp; for they could not understand that a Freeman should be punished otherwise in the Camp than in the Civil State, as they thought Justice was the same, and could not alter with the Distinction of Countries and Places; and therefore it is that in this * Punishment our Law differs from the (a) *Roman* and *Mosaick* Laws, which only obliges those Sort of Offenders to the Restitution of four-fold, and Custom hath approved the Method; for should we admit a Restitution from such profligate Offenders, we should have no End of Rapine and Violence.

* Page 470

(a) S. P. C. 25 See Exod. 22.

Hence we have the Reason of the Distinction between the Real and Personal Property, and why our Law does not punish the Stealing (b) of Corn or Grass growing, or Apples on a Tree, or (c) Lead on a Church or House

(b) 12 Ass. 32. Bro. Coron. 77. Cromp. 37. 18 H. 8. 2.

S. P. C. 25. b. Mod 89. Allen 83. 2 Keb 875. Vent. 187. (c) But now by the 4 Geo. 2. c. 32. every Person who shall steal or rip, cut or break, with Intent to steal, any Lead, Iron Bar, Iron Gate, Iron Pali-

ſadoe, or Iron Rail whatſoever, being fixed to any Dwelling-houſe, Out-houſe, Coach-houſe, Stable, or other Building uſed or occupied with ſuch Dwelling-houſe, or thereunto belonging, or to any other Building whatſoever; or fixed in any Garden, Orchard, Court-yard, Fence or Outlet, belonging to any Dwelling-houſe, or other Building, ſhall be deemed and conſtrued to be guilty of Felony; and the Court, before whom ſuch Perſons ſhall be tried, ſhall and hereby have Power to tranſport ſuch Felons for ſeven Years; as alſo ſuch Perſons who ſhall be aiding, abetting or aſſiſting in ſtealing, &c. or who ſhall buy or receive any ſuch Lead, &c. knowing the ſame to be ſtolen.

Houſe with Death; becauſe theſe never came under the Camp Diſcipline; and therefore it was not neceſſary to guard this Sort of Property with ſuch Sanguinary Laws, where the Redreſs may be by a Civil Action.

Vent. 187. Hawk. P. C. 93.

But if they are ſevered from the Freehold, whether by the Owner, or even by the Thief himſelf, if he ſever them at one Time and then come again at another Time and take them, it is Felony.

3 Inſt. 109. H. P. C. 66.

If a Man take away a Box of Charters, this is not Felony, becauſe they are the Muniments of the Freehold, and relate to the Eſtate at home, and not to the Proviſions that were uſed in ſupplying the Camp abroad.

(d) H. P. C. 67.

But it is ſaid, in (d) *Hale*, to be Felony to take away an Obligation for Money, and the Reaſon hereof may be, becauſe Securities might be taken to anſwer Money at the Camp from a neighbouring Freeholder; and therefore there was the ſame Reaſon they ſhould be within this Proviſion, as that other Chattels ſhould be protected by the Obligation, being equally valuable.

Hawk. P. C. 93, for which are cited H. P. C. 66, 67. 3 Inſt. 109. Bro. Coron. 155. S. P. C. 25. b. Coron. 27.

But *per Hawkins* the Things taken ought to have ſome Worth in themſelves, and not to derive their whole Value from the Relation they bear to ſome other Thing, which cannot be ſtolen, as Paper or Parchment, on which are written Aſſurances concerning Lands, or Obligations, or Covenants, or other Securities for a Debt or other *Choſe* in Action; and the Reaſon, he ſays, wherefore there can be no Felony in taking away any ſuch Thing, ſeems to be, becauſe generally ſpeaking they being of no Manner of Uſe to any but the Owner are not ſuppoſed to be ſo much in Danger of being ſtolen, and therefore need not be provided for in ſo ſtrict a Manner, as thoſe Things which are of a known Price, and every Body's Money; and for the like Reaſon it is no Felony to take away a Villein or an Infant in Ward.

But now by the (e) 2 *Geo.* 2. *cap.* 25. it is enacted, "That if any Perſon or "Perſons ſhall ſteal, or take by Robbery, any Exchequer Orders or Tal- "lies, or other Orders, intitling any other Perſon or Perſons to any Annu- "ity or Share in any Parliamentary Fund, or any Exchequer Bills, Bank "Notes, *South Sea* Bonds, *Eaſt-India* Bonds, Dividend Warrants of the Bank, "*South-Sea* Company, *Eaſt-India* Company, or any other Company, Socie- "ty or Corporation, Bills of Exchange, Navy Bills or Debentures, Gold- "ſmiths Notes for Payment of any Money, or other Bonds or Warrants, "Bills or Promiſſory Notes for the Payment of any Money, being the "Property of any other Perſon or Perſons, or of any Corporation; notwith- "ſtanding any of the ſaid Particulars are termed in Law a *Choſe* in Action, "it ſhall be deemed and conſtrued to be Felony, of the ſame Nature and in
* Page 471 "* the ſame Degree, and with or without the Benefit of the Clergy, in the
(e) Made perpetual by 9 G. 2. c. 18. by 7 Geo. 2. c. 22. If any Perſon or Perſons ſhall falſly make, alter, forge, or counterfeit, or cauſe or procure to be falſly made, &c. any Acceptance of any Bill of Exchange, or the Number or Principal Sum of any accountable Receipt for any Note, Bill, or other Security for Payment of Money; or any Warrant or Order for Payment of Money, or Delivery of Goods, with Intention to defraud any Perſon whatſoever; or utter or publiſh, as true, any falſe, altered, forged or counterfeited Acceptance of any Bill of Exchange, &c. with Intention to defraud, knowing the ſame to be falſe, &c. he or they ſhall be guilty of Felony without Benefit of Clergy. 7 Geo. 2. c. 22.

"ſame Manner as it would have been if the Offender had ſtolen or taken "by Robbery any other Goods of like Value with the Money due on ſuch "Orders, Tallies, Bills, Bonds, Warrants, Debentures or Notes, or ſecured "thereby

" thereby, and remaining unſatisfied; and ſuch Offender ſhall ſuffer ſuch Pu-
" niſhment, as he or ſhe ſhould or might have done, if he or ſhe had ſtolen
" other Goods of the like Value with the Money due on ſuch Orders, Tal-
" lies, Bonds, Bills, Warrants, Debentures or Notes, reſpectively, or ſe-
" cured thereby, and remaining unſatisfied."

It is alſo from the ſtrict Diſcipline that was obſerved in the Camp, that the Diſtinction is raiſed concerning Beaſts that are *Feræ Naturæ*; for thoſe that are for the Proviſion of a Man, when reclaimed, are within the Protection of the Law, and it is Felony to ſteal them, becauſe theſe anſwered the Uſe of the Camp for their neceſſary Food and Suſtentation; but Dogs, Cats, Bears, Foxes, Monkeys, Ferrets and the like, that are not uſed for Proviſion, may be ſtolen without any Danger of Death, for they are not within the Inconveniency for which the Law was provided.

H. P. C. 66. 7 Co. 18. 3 H. 8. 3. b. Crom. 36. Dalt. c. 103. 3 Inſt. 109. Hawk. P. C. 93.

But to ſteal Hawks reclaimed is Felony, *(a)* becauſe they were uſed for the Entertainment of noble and generous Perſons, and were carried into the Camp for Diverſion there; and therefore were conſtrued within the ſame Proviſion.

3 Inſt. 109.

(a) And this is alſo made Felony by 37 E. 3. c. 19.

Wherever it is Felony to ſteal Beaſts, it is ſo in Relation to the *(b)* young of ſuch Beaſts, becauſe they by Right of Acceſſion follow the Condition of the Dams.

3 Inſt. 109. H. P. C. 68.

(b) But it is not Felony to ſteal Eggs of Swans and Hawks, but a particular Puniſhment is preſcribed by the Statute 11 H. 7. c. 17. H. P. C. 68. By 29 Geo. 2. c. 30. Buying or receiving Lead, Iron, *&c.* knowing it to be ſtolen, to be puniſhed by Tranſportation. By 29 Geo. 2. c. 30. ſ 6. Penalties on having thoſe Materials without being able to account for them. By 14 Geo. 2. c. 6. and 15 Geo. 2. c. 34. Stealing or killing Cows or Sheep, Felony without Clergy. By 24 Geo. 2. c. 40. ſ. 28. Reſcuing Offenders againſt the Acts for reſtraining the Retailing of Spirituous Liquors, Felony. By 24 Geo. 2. c. 45. Theft in Veſſels and on Wharfs, deprived of Clergy. By 25 Geo. 2. c. 10. Stealing Black Lead in the Mine, Felony. By 25 Geo. 2. c. 36. and 28 G. 2 c. 19. Penalty on advertiſing a Reward for ſtolen Goods and and no Queſtions aſked. By 25 Geo. 2. c. 36. ſ. 11. The Court may order the Expence of proſecuting a Felon to be paid by the Treaſurer of the County; by 27 Geo. 2. c. 3. ſ. 3. and the Expence of the Attendance of poor Witneſſes. By 27 Geo. 2. c. 15. Sending anonymous incendiary Letters is made Felony without Clergy, though no Money, *&c.* is demanded.———[Felonies are very numerous. *Vide* the Tables to the Statutes.]

(B) How far the Goods ought to belong to another.

THE Taking of Goods, whereof no one had a Property at the Time, cannot be Felony; and therefore he who takes away Treaſure Trove, or a Wreck,† Waif or Stray, before they have been ſeiſed by the Perſons who have a Right thereto, ſhall only be puniſhed by Fine, *&c.*

3 Inſt. 109. H. P. C. 67. Hawk. P. C. 93-4.

† Plundering ſhipwrecked Goods, or beating, *&c.* with Intent to kill, or otherwiſe obſtructing the Eſcape of any Perſon from ſuch Ship, or putting out falſe Lights, with Intent to bring any Ship into Danger, Felony without Benefit of Clergy. 26 Geo. 2. c. 19.

If one takes Fiſh in a River, or other great Water, wherein they are at their natural Liberty, he is not guilty of Felony; but he who takes them out of a Trunk or Pond is guilty of Felony, becauſe being thus ſecured, the Party hath the full Dominion of them.

Owen 20. 3 Inſt. 109. H. P. C. 97.

And for this Reaſon there can be no Doubt but that the Taking of domeſtic Beaſts, as Horſes, Mares, Colts, *&c.* or of any Creatures whatſoever, which are *Domitæ Naturæ*, and fit for Food, as Ducks, Hens,

H. P. C. 68. 3 Inſt. 109. Hawk. P. C. 94.

Hens, Geeſe, Turkies, Peacocks, or their Eggs, or young Ones, is Felony.

* Page 472. Hawk. P. C. 94.

* But a Man cannot commit a Felony by taking (*a*) Deer, Hare or Conies in a Foreſt, Chaſe or Warren, or old Pigeons being out of the Houſe.

(*a*) *Vide* 3 W. & M. c. 10. An Act for the more effectual Diſcovery and Puniſhment of Deer Stealers; and 5 Geo. c. 15. An Act by which ſuch Offenders are liable to Tranſportation; and 9 Geo. 1. c. 22. commonly called the Black Act, made perpetual by 31 Geo. 2. c. 42. ſect. 2. by which Perſons going armed, having their Faces blacked, or diſguiſed, and hunting Deer, robbing any Warren, Fiſh-pond, *&c.* are guilty of Felony and excluded the Benefit of their Clergy.

3 Inſt. 109. 7 Co. 17. H. P. C. 86. Hawk. P. C. 94.

But a Perſon, who takes any other Creatures, though *Feræ Naturæ*, if they be fit for Food, and reduced to Tameneſs, and known by him to be ſo, is guilty of Felony; alſo by the better Opinion, it is Felony to ſteal wild Pigeons in a Dove-houſe ſhut up, or Hares or Deer in a Houſe, or even in a Park, incloſed in ſuch a Manner, that the Owner may take them whenever he pleaſes, without the leaſt Danger of their eſcaping; in which Caſe they are as much in his Power as Fiſh in a Pond, or young Pigeons or Hawks in a Neſt, *&c.* the Taking of which ſeems agreed to be Felony.

Hal. P. C. 68. Hawk. P. C. 94.

Alſo the Taking away Swans marked or pinioned, or thoſe which are unmarked, if kept in a Pond or private River, is Felony.

Hawk. P. C. 94. and ſeveral Authorities there cited.

Alſo it is ſaid, that there may be Felony in taking Goods, the Owner whereof is unknown; in which Caſe the King ſhall have the Goods, and the Offender ſhall be indicted for taking *bonis cujuſdam hominis ignoti*; and it ſeems that, in ſome Caſes, the Law will rather feign a Property, where in Strictneſs there is none, than ſuffer an Offender to eſcape; and therefore it is ſaid, that he, who takes away the Goods of a Chapel, or Abbey, in Time of Vacation, may be indicted in the firſt Caſe for ſtealing *bona Capellæ*, being in the Cuſtody of ſuch and ſuch; and in the ſecond, for ſtealing *bona Domûs & Eccleſiæ*, *&c.* and *a fortiori* therefore it follows, that he, who ſteals Goods belonging to a Pariſh Church, may be indicted for ſtealing *bona Parochianorum*; and it hath been adjudged, that he, who takes off a Shroud from a dead Corpſe, may be indicted, as having ſtolen it from him, who was the Owner thereof when it was put on, for a dead Man can have no Property.

Cro. Eliz. 536. Moor pl. 981. Keilw. 70.

There is alſo a ſpecial Caſe, in which a Man may be guilty of Felony in ſtealing Goods, the abſolute Property whereof is in himſelf; as where one, who has delivered Goods to a Carrier or Taylor, *&c.* afterwards, with an Intent to charge ſuch Carrier or Taylor, fraudulently and ſecretly takes them away.

(C) What ſhall be ſaid to be a felonious and fraudulent Taking.

Keling 24. H. P. C. 61. Hawk. P. C. 89.

TO conſtitute an Offence Felony, it is not ſufficient that there be a Fraud and (*b*) Intent to ſteal, unleſs there be alſo a Taking, for

(*b*) But the bare Intention to commit was held ſo very criminal, that at Common Law it was puniſhable as Felony, when it miſſed its Effect through ſome Accident, no way leſſening the Guilt of the Offender. S. P. C. 17.

for all Felony includes Treſpaſs, and every Indictment for Larceny muſt have both the Words *Cepit & Aſportavit*; and therefore if there be no Treſpaſs in Taking the Goods, there can be no Felony in carrying them away. C. 17. And though at this Day Felony ſhall not be imputed to a bare Intention to commit it, yet the Party may be ſeverely fined for ſuch an Intention. Lev. 46. Sid. 23. 5 Mod. 206. and by a Statute 7 Geo. 2. c. 21. an Aſſault with an Intent to rob is Felony, but the Offender may chuſe Tranſportation.

* Therefore if a Perſon finds Goods, and converts them to his own Uſe *animo furandi*, yet he is not guilty of Felony. * Page 473 3 Inſt. 103. H. P. C. 61.

So if a Perſon who has a limited Property in the Goods, as one who has Goods delivered to him to keep, a Carrier who has a Box delivered to him to carry to a certain Place, or a Taylor who has Cloth † delivered to him to make into a Suit of Clothes; for here the Party injured muſt ſeek Redreſs by Civil Action, and muſt abide the Folly of his own Act in placing Confidence in the Perſon who was guilty of the Breach of Truſt. S. P. C. 25. a. 3 Inſt. 108. † *Qu.* If he take Part and make up the reſt? See the next Note.

But though if I ſend a Box to the Carrier, and the Carrier ſells it, this is not Felony; yet if the Box be broke open, and the Goods in it carried away, it is (*a*) Felony; for he hath Property in the Box to carry it to the Place appointed, but he hath no Property in the Goods in the Inſide, for that I have reſerved in my own Power, having locked it up out of the Power of the Carrier to whom it is ſent; for no Man hath Property that is ſhut out from the Command of the Thing to which he pretends. So if a Carrier carries the Goods to the Place, and then ſteals them, this is Felony; becauſe the Property is determined when the Goods are come to the Place appointed; beſides, it is for Publick Convenience, that the Inſide of the Box ſhould be thus ſecured; otherwiſe the Carrier might ſteal the Things contained in the Box, and yet deliver the Box itſelf, which would not be of very eaſy Diſcovery. 13 E. 4. 9. 10. S. P. C. 25 a. Kelyng 35. Rol. Abr. 73. (*a*) So where a Weaver who has received Silk to work, or a Miller who has Corn to grind, fraudulently and clandeſtinely take and embezzle Part, it is Felony; for in ſuch Caſe, the Poſſeſſion of ſuch Part, diſtinct from the Whole, was gained by their own Wrong, and in a Manner more baſe than if they had been Strangers. Hawk. P. C. 90.

He who has the bare Charge of Goods, as a Shepherd has of Sheep, or a Butler of Plate, or that has only the Special Uſe of Goods, as a Gueſt in an Inn, and not the Poſſeſſion, may be guilty of Larceny, in fraudulently taking them away; for the Offence comes as properly under the Word *Cepit*, and the Fraud is as ſecret, and the Villany more baſe than if it had been done by a Stranger. Moor 246. Poph. 84. Hawk. P. C. 90.

If he, who intending to ſteal Goods obtains a Delivery of them from the Sheriff, by virtue of a Replevin, or by way of Execution of a Judgment obtained by Impoſition on a Court, without any Colour of Title, by falſe Affidavits, &c. he may be indicted as having feloniouſly taken them, for the Law will not endure to have its Juſtice eluded by ſuch ſhameful Evaſions. 3 Inſt. 108. H. P. C. 63. Kelyng. 43. Sid. 254. Raym. 276.

Alſo he, who ſteals Goods from one who had ſtolen them from me, may be indicted as having ſtolen them from me; becauſe in Judgment of Law both the Poſſeſſion and Property of them was always in me; and for this Cauſe, he that ſteals Goods in the County of *A.* and carries them into that of *B.* may be indicted in (*b*) either. Hawk. P. C. 90. (*b*) But a Pirate carrying to Land the Goods taken at Sea by Piracy cannot be indicted at Law, as having taken the Goods at Land, becauſe the original Taking was not ſuch, whereof the Common Law takes Conuſance. 3 Inſt. 113. but for this *vide* Tit. Piracy.

Kelyng 24. Show. 50, 57. Hawk. P. C. 91.

It was formerly a Doubt, whether a Lodger, by Reaſon of the Special Property he had in the Furniture of his Lodgings, could be guilty of Felony in taking them away; but now by the 3 & 4 *W. & M. cap.* 9. it is enacted, "That if any Perſon or Perſons ſhall take away, with an Intent to ſteal, "imbezil, or purloin any Chattel, Bedding or Furniture, which by Con- "tract or Agreement he or they are to uſe, or ſhall be let to him or them "to uſe in or with ſuch Lodging, ſuch Taking, Embezzling or Purloin- "ing, ſhall be, to all Intents and Purpoſes, taken, reputed and adjudged "to be Larceny and Felony, and the Offender ſhall ſuffer as in Caſe of "Felony."

*Page 474

* By the 7 *Jac.* 1 *cap.* 7. it is enacted, "That if any Sorter or Kember, "&c. of Wool, or Weaver of Yarn, &c. ſhall embezzil it, &c. and ſhall "be convicted before two Juſtices of Peace, he ſhall be whipped."

(a) The Benefit of the Clergy was taken away from all Felonies within this Statute by 27 H. 8. c. 17. and reſtored by 1 E. 6. c. 12. but taken away again by 12 Ann. c. 7. from all ſuch as ſhall be committed in a Dwelling-houſe or Out-houſe,

By the (a) 21 *H.* 8. *cap.* 7. if a Servant (being of the Age of eighteen Years, and not an Apprentice) ſhall have a (b) Caſket, Jewel, or Money, or Goods, or Chattel of the Maſter delivered to him by the (c) Maſter to (d) keep, and ſuch Servant withdraw himſelf from the Maſter, and go away with ſuch Caſket, &c to the Intent to ſteal the (e) ſame and defraud the Maſter, &c. or elſe being in the (f) Service, without Aſſent of the Maſter, embezzel the ſame Caſket, &c. or any Part thereof, or otherwiſe (g) convert the ſame to his own Uſe, with like Purpoſe to ſteal it, he ſhall be guilty of Felony, if ſuch Caſket, &c. be of the Value of 40 *s.*

(b) Extend not to Choſes in Action. Dyer 5. Hawk. P. C. 92. (c) If delivered by a Servant to a Servant to keep, it is within the Statute; for the Delivery of ſuch Servant is the Delivery of the Maſter. Hawk. P. C. 92. (d) Therefore a Receiver, who receives his Maſter's Rents, and runs away with them, or a Servant, who being intruſted to ſell Goods or to receive Money due on a Bond, ſells the Goods, &c. are not within the Statute. Dyer 5. pl. 2, 3. H. P. C. 62, 63. 3 Inſt. 105. (e) Includes not the waſting or conſuming of Goods howſoever wilful it may be. H. P. C. 63. (f) Muſt be Servant both at the Time when the Goods were delivered and when they were ſtolen. H. P. C. 63. (g) It hath been holden, that if a Servant, who hath Corn or Money delivered to him by the Maſter to keep, of his own Head make the Corn into Malt, or melt down the Money into Plate, and then go away with it, he is not within the Statute, becauſe the Property was altered. 5 H. 7. 16. a. Crom. 50. Dalt. c. 102. but Q. for *Hawkins* ſeems to be of a contrary Opinion, and ſays, that it comes within the Reaſon of thoſe Caſes which have been adjudged within the Statute; as where a Servant makes up his Maſter's Cloth, delivered to him to keep, into a Suit of Clothes, or his Leather into Shoes, and then goes away with them; ſo where the Servant changed his Maſter's Money delivered to him to keep, from Silver into Gold, and then goes away with it. Hawk. P. C. 92.

(D) What ſhall be ſaid to be a carrying away.

(b) 3 Inſt. 108. 2 Vent. 215. (i) 27 Aſſ. 39. S.P.C. 26. a. Bro. Coron. 107. Hawk. P. C. 92.

ALTHOUGH the Word *Aſportavit* be (b) neceſſary in every Indictment for this Species of Felony, (i) yet the Felony lies in the very firſt Act of removing the Property; for if the Felon be caught in the Act of carrying the Goods away before he is out of the Houſe, it is Felony; for the Act of the Mind declared by ſubſequent Facts makes the Crime.

2 Inſt. 109. Dalt. c. 102. Hawk. P. C. 92.

Hence it hath been adjudged, that where a Gueſt having taken off the Sheets from his Bed with an Intent to ſteal them, carried them into the Hall, and was apprehended before he could get out of the Houſe, was guilty of Larceny.

3 Inſt. 109.

So where a Perſon having taken a Horſe in a Cloſe, with an Intent to ſteal him, was apprehended before he could get him out of the Cloſe.

So if a Perſon pulls off the Wool from another's Sheep, or ſtrips their Skins, with an Intent to ſteal them, he is guilty of Felony. ‖ Dalſ. 21. Crom. 36.

‖ By 14 Geo. 2. c. 6. Whoever ſteals, or kills with Intent to ſteal any Part of any Sheep or other Cattle, or aſſiſts in ſo doing, is guilty of Felony, without Clergy.——Ten Pounds Reward on every Conviction to be paid by the Sheriff in a Month; on Default he forfeits double the Sum, and treble Coſts.——By 15 Geo. 2. c. 34. The Word Cattle in the above Act declared to extend to Bull, Cow, Ox, Steer, Bullock, Heifer, Calf and Lamb, as well as Sheep, and to no other Cattle whatſoever.

Alſo where a Perſon intending to ſteal Plate, took it out of a Trunk, wherein it was, and laid it on the Floor, but was ſurprized before he could carry it away; and it was adjudged Felony. Kelyng 31.

* (E) By whom the Offence may be committed. * Page 475

ALL thoſe who are under a natural Diſability of diſtinguiſhing between Good and Evil, as Infants under the Age of Diſcretion,† Ideots and Lunatics, are not puniſhable by any Criminal Proſecution whatſoever, and conſequently cannot be guilty of Felony. H. P. C. 10. Hawk. P. C. 2. But for this *vide* the Heads of *Infancy and Age*, and of *Ideots and Lunatics*.

† But a Court and Jury will, from Circumſtances, judge, whether he is or is not of Diſcretion. See Foſter, fo. 70, &c. the Caſe of *William Yorke*.

Alſo a Feme Covert is ſo much favoured, in reſpect of that Power and Authority which her Huſband has over her, that ſhe ſhall not ſuffer any Puniſhment for committing a bare Theft in Company with, or by Coercion of her Huſband. Kelyng 31. S. P. C. 26. Hawk. P. C. 2.

But if ſhe be guilty of Treaſon, Murder, or (*a*) Robbery, in Company with, or by Coercion of her Huſband, ſhe is puniſhable as much as if ſhe were Sole. S. P. C. 65. Hawk. P. C. 2.

(*a*) But not if ſhe be guilty of Burglary‡. Kelyng. 31.

‡ The Huſband and Wife going together.

Alſo a Feme Covert may be guilty of Larceny, if ſhe of her own voluntary Act, or by the bare Command of her Huſband, ſteal the Goods of a Stranger, but not if ſhe ſteal her Huſband's, becauſe a Huſband and Wife are conſidered but as one Perſon in Law; and the Huſband by endowing his Wife at the Marriage with all his worldly Goods, gives her a Kind of Intereſt in them; for which Cauſe, even a Stranger cannot commit Larceny in taking the Goods of the Huſband by the Delivery of the Wife, as he may by taking away the Wife by Force, and againſt her Will, together with the Goods of the Huſband. S. P. C. 65. Hawk. P. C. 2, 93.

(F) Of what Value the Things muſt be; and herein of the Difference between Grand and Petit Larceny.

A Perſon who ſteals the Goods of another, let the Value of them be never (a) ſo ſmall, is guilty of Felony; but it is (b) ſaid to be no Felony for one reduced to extreme Neceſſity to take ſo much of another's Victuals, as will ſave him from Starving. §

(a) Hal P. C. 69.
(b) Crom. 33. Dalt. c. 99.

But if ſuch Neceſſity be owing to his Unthriftineſs, it is far from being an Excuſe. Hawk. P. C. 93.

§ This Doctrine is now antiquated, the Law of *England* admitting of no ſuch Excuſe at preſent. Black. Com. 4 V. 31. and cites 1 Hal. P. C. 54.

But here we muſt obſerve the Difference between Grand and Petit Larceny, which is again divided into Simple and Mixt Larceny.

S. P. C. 27. Crom. 33. H. P. C. 74. Hawk. P. C. 97.

Simple Grand Larceny is the felonious and fraudulent taking and carrying away the Perſonal Goods of another, not from his Perſon, nor out of his Houſe, where the Goods are above the Value of twelve Pence, but if of that Value, or under, then it is Petit Larceny; if from his Perſon, or out of his Houſe, it is called Mixt Larceny, but hath no greater Degree of Guilt attending it at Common Law, than Simple Larceny, for in both Caſes the Offender was allowed the Benefit of his Clergy, but is at this Time in ſeveral Inſtances excluded by Acts of Parliament.

* Page 476
S. P. C. 24. Crom. 36. H. P. C. 70.

* If two or more Perſons together ſteal Goods above the Value of 12 *d.* every one of them is guilty of Grand Larceny, for each Perſon is as much an Offender, as if he had committed the Fact alone.

S. P. C. 24. Crom. 36. H. P. C. 7. But this Severity is ſeldom uſed. Hawk. P. C. 95.

Alſo if one at ſeveral Times ſteal ſeveral Parcels of Goods, each under the Value of 12 *d.* but amounting in the whole to more, from the ſame Perſon, and be found guilty thereof on the ſame Indictment, he ſhall have Judgment of Death as for Grand Larceny.

Hetl. 66. Hawk. P. C. 95.

If one be indicted for ſtealing Goods to the Value of ten Shillings, and the Jury find Specially, that he is guilty, but that the Goods are worth but ten Pence, he ſhall not have Judgment of Death, but (a) only as for Petit Larceny.

(c) Petit Larceny is not puniſhed with the Loſs of Life or Lands, but only with the Forfeiture of Goods and Whipping, or other corporal Puniſhment. H. P. C. 70. Hawk. P. C. 95.

(G) Where

(G) Where the Offender is or is not excluded his Clergy.

BY the Common Law a Perſon guilty of any Crime, which ſubjected him to the Loſs of Life or Member, was allowed his (*b*) Clergy, except in High (1) Treaſon and Sacrilege: 11 Co. 29. 2 Inſt. 634.

For the more accurate Knowledge hereof, *vide* 2 Hawk. P. C. 337, *&c.* (*b*) None were intitled to this Privilege but Eccleſiaſtics; but as the Clergy were Judges hereof, they extended this Privilege to the Clerk that ſet the Pſalm, the Door-keeper, the Exorciſt, the Subdeacon, the Reader, *&c.* and as they extended it too far, it was neceſſary to reſtrain them; and therefore the Temporal and Eccleſiaſtical Power joined in making the Reading before the Secular and Spiritual Judge the Teſt of their being Eccleſiaſtics; for it was a ſtrong Preſumption, in thoſe Times of Ignorance, that a Man was an Eccleſiaſtic if he could read; and therefore the Reading was before the Secular Judge; but the Atteſtation, that he could read, was by the Ordinary.——By the 21 Jac. 1. c. 16. and 3 & 4 W. & M. c. 9. Women (the better half of the human Race. Foſt. Cr. Law 305) ſhall have this Privilege in ſuch Caſes as Men. ‡——By the 1 E. 6. c. 12. A Lord of Parliament ſhall have this Privilege, though he cannot read, without burning in the Hand.——And by 5 Ann. c. 6. If any Perſon, Convict of ſuch Felony for which he ought to have his Clergy, pray the Benefit of that Act, he ſhall not be required to read, but ſhall be puniſhed as a Clerk Convict.—— A Perſon is not intitled to this Privilege more than once. 4 H. 7. c. 13.——Where it may ſtill, in certain Caſes, be allowed to one actually in Holy Orders, *vide* 28 H. 8. c. 1. 32 H. 8. c. 3. 1 E. 6. c. 12.——And how a former Allowance thereof is to be proved and certified, *vide* 34 & 35 H. 8. c. 14. 2 & 3 E. 6. c. 33. & 3 & 4 W. & M. c. 9.

(1) But ſee Foſt. Cr. Law 190.

‡ But by 4 & 5 W. & M. c. 24. ſ. 13. *Women* ſhall have the Benefit of the Statute but once.

And therefore it may be laid down as a good general Rule, that wherever a Perſon is denied the Benefit of his Clergy, as he is in Petit Treaſon, Murder, Robbery, Burglary, Arſon, *&c.* that ſuch Denial muſt be grounded on ſome Act of Parliament, which excludes him from the Benefit of it. H. P. C. 232. 2 Hawk. P. C. 342.

It is alſo a general Rule, that where an Offence is made Felony by Statute, it ſhall have the Benefit of Clergy, unleſs expreſsly excluded. H. P. C. 230. 2 H. H. P. C. 330, 334, 335. 3 Inſt. 39, 73. Kel. 104. 2 Hawk. P. C. 342. Sect. 24.

So wherever a Perſon is denied the Benefit of the Clergy in reſpect of a Statute excluding it from the Crime charged againſt him, the Indictment or Appeal, and the Evidence thereon muſt expreſsly bring his Caſe within the Words of ſuch Statute. 2 Hawk. P. C. 342.

A Statute, by excluding Principals from their Clergy, doth not thereby exclude the Acceſſaries before or after, *& ſic e converſo*, and a Statute generally excluding thoſe who ſhall be found guilty of Murder, Robbery, or Burglary, or other Crime, without ſaying any Thing of Acceſſaries, ſhall be conſtrued to intend Principals only. 2 Hawk. P. C. 342-3.

* Where Clergy is allowable, thoſe who ſtand mute or challenge above twenty, or are outlawed, are as much intitled to it as thoſe who are convicted. * Page 477 2 Hawk. P. C. 343.

Alſo a Statute, by taking away Clergy from thoſe who ſhall be found guilty, doth not thereby take it from thoſe who ſtand mute, or challenge above twenty, or are outlawed; but a Statute taking it from thoſe who ſhall be found guilty, extends as well to thoſe who ſhall confeſs themſelves guilty upon Record, as to thoſe who ſhall be found guilty by Verdict. 2 Hawk. P. C. 343.

But what we are chiefly to take Notice of here are the ſeveral Caſes in which by Statute the Benefit of the Clergy is taken away from this Species of Felony called Larceny.

And firſt by the 8 *Eliz. cap.* 4. it is enacted, "That no Perſon, who "ſhall be indicted or appealed for felonious taking (*a*) any Money, "Goods or Chattels from the Perſon of any other, (*b*) privily without "his Knowledge, in any Place whatſoever, and thereupon found guilty "by Verdict of twelve Men, or ſhall confeſs the ſame upon his or their "Arraignment, or will not anſwer directly to the ſame, according to the "Laws of the Realm, or ſhall ſtand wilfully, or of Malice, or obſtinately "mute, or challenge peremptorily above the Number of twenty, or "ſhall be upon ſuch Indictment or Appeal outlawed, ſhall be admitted "to his Clergy."

(*a*) Yet if the Jury find the Offender guilty under the Value of 12 *d.* he ſhall not have Judgment of Death, but only as of Petit Larceny Hawk. P. C. 98. H. P. C. 75.

(*b*) The Offence muſt be laid to be done *clam* and *ſecrete*, in exact Purſuance of the Statute, otherwiſe the Party ſhall have the Benefit of his Clergy. H. P. C 75. Hawk. P. C. 98. ——And therefore if a Man takes off another's Hat from his Head and runs away with it, or comes into a Shop ‡ and cheapens Goods, and runs away with them without paying for them, it is not within the Statute, nor indeed an Offence indictable as a Felony, but rather a Treſpaſs, unleſs the Offender were either unknown, or immediately fled the Country if he were known. Dyer 224. 2 Rol. Rep. 154. H. P. C. 73. Raym. 275.

‡ See *infra*.

By the 1 *E.* 6. *cap.* 12. and 2 *&* 3 *E.* 6. *cap.* 33. Horſe Stealers are excluded the Benefit of their Clergy, and by the latter of theſe Statutes it is enacted, "That all Perſons felonioufly taking or ſtealing any Horſe, Geld-"ing or Mare, ſhall not be admitted to the Privilege of the Clergy, but "ſhall be put from the ſame in like Manner and Form as though they had "been indicted or appealed for felonious ſtealing of two Horſes, two "Geldings, or two Mares, of any other, and thereupon found guilty by "Verdict of twelve Men, or confeſſed the ſame upon their Arraignment, "or ſtand wilfully or of Malice mute."

By 3 *W. & M. c.* 9. "If any one ſhall ſteal Goods from any Shop or "Warehouſe belonging *to a Dwelling Houſe*, to the Value of 5 *s.* he ſhall not "be intitled to his Clergy, *although no Perſon ſhall happen to be within.*" *Stat.* 10 *&* 11 *W.* 3. *c.* 23. beſides including *Coach Houſes* and *Stables*, does not make it neceſſary, that the Shop or Ware-Houſe *ſhall be belonging to the Dwelling Houſe*, which is required by 3 *&* 4 *W. & M. c.* 9.—and I the rather take Notice of this Diſtinction between the two Laws, as Mr. *Juſtice Foſter* has reported in his *Crown Law*, *fol.* 78. a Deciſion at the *Old Baily* in *July* 1751. *that this Statute does not extend to any Ware-Houſe which is a mere Repoſitory for Goods, but only where Merchants and Traders deal with, and ſell to their Cuſtomers.* It ſhould ſeem however, that theſe *diſtant Warehouſes* were thoſe expreſly, which were intended to be protected by this Statute; as the Shop or Warehouſe *belonging to a Dwelling-Houſe* was before protected by 3 *&* 4 *W. & M. c.* 9. and the more diſtant the Warehouſe, the more probable it is that it ſhould be broke open. See Obſervations on the Statutes 4*to p.* 288, 289. *Edit.* 1766.

By the 10 *&* 11 *W.* 3. *cap.* 23. (commonly called the *Shoplifting Act*) "All Perſons, who by Night or Day ſhall in any *Shop*, *Warehouſe*, *Coach-"houſe* or *Stable* privately and feloniouſly ſteal any Goods, Wares or Mer-"chandizes of the Value of 5 *s.* or more, though ſuch Shop, *&c.* be not "broke open, and though the Owner or any other Perſon be not in ſuch "*Shop*, *&c.* or that ſhall aſſiſt, hire or command any Perſon to commit "ſuch Offence, being thereof convicted, or attainted by Verdict or Con-
* Page 478 "* feſſion, or being indicted thereof ſhall ſtand mute, or challenge "above twenty of the Jury, ſhall be excluded from the Benefit of the "Clergy."

And

And by the 12 *Ann cap.* 7. it is enacted, " That every Perſon, who ſhall " felonioufly ſteal any Money, Goods or Chattels, Wares or Merchandi- " dizes of the Value of 40 *s.* or more, being in a Dwelling-houſe, or Out- " houſe thereunto belonging, although ſuch Houſe or Out-houſe be not " actually broken by ſuch Offender, and although the Owner of ſuch Goods, " or any other Perſon or Perſons, be or be not in ſuch Houſe or Out-houſe, " or ſhall aſſiſt or aid any Perſon or Perſons to commit any ſuch Offence, " being thereof convicted or attainted by Verdict or Confeſſion, or being " indicted thereof ſhall ſtand mute, or ſhall peremptorily challenge above " the Number of twenty returned to be of the Jury, ſhall be abſolutely " debarred of and from the Benefit of the Clergy, *&c. Provided*, that no- " thing in this Act ſhall extend to Apprentices under the Age of fifteen " Years, who ſhall rob their Maſters as aforeſaid."

By the 22 *Car.* 2. *cap.* 5. it is enacted, " That no Perſon who ſhall be " indicted for felonioufly cutting and taking, ſtealing or carrying away of " any Cloth or Woollen Manufactures from the Rack or Tenter in the " Night-time, and thereupon found guilty by Verdict of twelve Men, or " ſhall confeſs the ſame on Arraignment, or will not anſwer directly to the " ſame according to the Law of the Realm, or ſhall ſtand wilfully of " Malice mute, or challenge peremptorily above the Number of twenty, " or ſhall be upon ſuch Indictment outlawed, ſhall be admitted to the Be- " nefit of the Clergy; and by the ſame Act to ſteal or embezzle any of his " Majeſty's Sail, Cordage or any other his Majeſty's Naval Store, is ex- " cluded the Benefit of the Clergy."

That all Perſons, who ſhall ſteal any Goods out of any Pariſh Church, or other Church or Chapel, are in all Caſes excluded the Benefit of the Clergy. *Vide* 2 Hawk. P. C. 351.

(H) Where the Offender is to be tranſported.

IT is enacted by 4 *Geo.* 1. *cap.* 11. and 6 *Geo.* 1. *cap.* 23. " That where " any Perſon or Perſons ſhall be convicted of Grand or Petit Larceny, " or any felonious ſtealing or taking of Money, Goods or Chattels, either " from the Perſon or in the Houſe of any other, or in any other Manner, " and who by the Law ſhall be intitled to the Benefit of the Clergy, and " liable only to the Penalties of Burning in the Hand or Whipping, (except " Perſons convicted for receiving or buying ſtolen Goods, knowing them to " be ſtolen,) it ſhall and may be lawful for the Court before whom they " were convicted, or any Court, held at the ſame or any other Place, with " the like Authority, if they think fit, inſtead of ordering any ſuch Offenders " to be burnt in the Hand, or whipt, to order and direct that ſuch Offenders " ſhall be ſent, as ſoon as conveniently may, to ſome of his Majeſty's Colo- " nies and Plantations in *America* for the Space of ſeven Years; and that " Court before whom they were convicted, or any ſubſequent Court, with " like Authority as the former, ſhall have Power to convey, transfer and " make over ſuch Offenders, by Order of Court, to the Uſe of any Perſon " or Perſons who ſhall contract for the Performance of ſuch Tranſportation " to him or them, and his and their Aſſigns, for ſuch Term of ſeven " Years; and where any Perſon ſhall be convicted for any Crimes, for " which they are excluded their Clergy, and the King ſhall extend his " Mercy to them upon Condition of Tranſportation to any Part of *Ame-* " *rica*, and ſuch Intention of Mercy be ſignified by a Principal Secretary " of

By 16 Geo. 2. *cap.* 15. Directions are given for Trial of Offenders who return from Tranſportation, or do not tranſport themſelves. By 16 *Geo.* 2. *cap.* 15. *ſect.* 3. a Reward is offered for convicting ſuch Offenders. By 20 Geo. 2. *c.* 46. Rebels tranſported and returning or going into *France* or *Spain*, are guilty of Felony without Benefit of Clergy.

" of State, it ſhall be lawful for any Court, having proper Authority to " allow ſuch Offenders the Benefit of a Pardon, to order and direct the " like Tranſportation to any Perſon, who will contract for the Perform- " ance thereof, of any ſuch Offenders; as alſo of any Perſon convict
* Page 479 " * of receiving or buying ſtolen Goods, knowing them to be ſtolen, for " the Term of fourteen Years, in caſe ſuch Condition of Tranſportation " be general, or elſe for ſuch other Term as ſhall be made Part of ſuch " Condition; and ſuch Perſon ſo contracting, and his Aſſigns, ſhall have " an Intereſt in the Service of the ſaid Offenders for ſuch Term of Years; " and if any ſuch Offender return into *Great Britain* or *Ireland*, before " the End of his Term, he ſhall be liable to be puniſhed as any Perſon " attainted of Felony, without the Benefit of Clergy, *&c.* Provided, that " the King may pardon and diſpenſe with any ſuch Tranſportation, and " allow of the Return of ſuch Offender, paying his Owner, at the Time, " ſuch Sum as ſhall be adjudged reaſonable by any two Juſtices of the " Peace, where ſuch Owner dwells, and where any ſuch Offenders ſhall " be tranſported, and ſhall have ſerved their Terms, ſuch Services ſhall " have the Effect of a Pardon, as for the Crimes for which they were " tranſported."

And it is further enacted, " That every ſuch Perſon, to whom any ſuch " Court ſhall order any ſuch Offenders to be transferred or conveyed, " ſhall, before ſuch Offenders ſhall be delivered to them, contract with " ſuch Perſon as ſhall be appointed by ſuch Court, and ſhall give ſufficient " Security, to the Satisfaction of ſuch Court, for the Tranſporting ſuch " Offenders to ſome Plantation in *America*, to be ordered by ſuch Court, " and the procuring an authentic Certificate from the Governor, or " chief Cuſtom-houſe Officer, of the Place of the Landing of ſuch Of- " fenders, *&c.* and their not returning by the wilful Default of ſuch " Contractor."

And it is further enacted, by 6 *Geo.* 1. *cap.* 23. " That the Court may " nominate two or more Juſtices of the Peace, for the Place where ſuch " Offenders ſhall be convicted, who ſhall have Power to contract with any " Perſon or Perſons for the Performance of the Tranſportation of ſuch Of- " fenders, and to order ſuch and the like Security, as the ſaid former Act " directs, to be taken by Order of Court, and to cauſe ſuch Felons to be " delivered to ſuch Contractors; which ſaid Contracts and Security ſhall be " certified by the ſaid Juſtices to the next Court, held with like Authority, " to be filed, *&c.*"

And it is further enacted, " That all Charges, in or about ſuch Contracts, " *&c.* ſhall be born by each County, *&c.* for which the Court was held, " and that the reſpective Treaſurers ſhall pay the ſame; and that all Secu- " rities for Tranſportation ſhall be by Bond, in the Name of the Clerks of " the Peace, *&c.* and the Money recovered ſhall be to the Uſe of the re- " ſpective Counties."

And it is further enacted, " That the Perſons ſo contracting, *&c.* may " carry ſuch Offenders towards the Sea-port, *&c.* and that if any Perſon " ſhall reſcue ſuch Offenders, or aid them in making their Eſcape, *&c.* " they ſhall be deemed guilty of Felony without Clergy; and that if any " Felon ordered for Tranſportation ſhall be afterwards at large within any " Part of *Great Britain*, without ſome lawful Cauſe, before the Expiration " of his Term, and be lawfully convict thereof, he ſhall ſuffer Death with- " out Clergy, and may be tried before Juſtices of Aſſiſe, *Oyer* and *Termi-* " *ner*, or Gaol-Delivery, for the County where he ſhall be apprehended, " *&c.* or from whence he was ordered to be tranſported, *&c.* and that the " Clerk of Aſſiſe, and Clerk of the Peace, where ſuch Orders of Tranſ- " portation ſhall be made, ſhall, on Requeſt of the Proſecutor, *&c.*

" certify

" certify briefly a Tranſcript, containing the Tenor of every Indictment,
" Conviction and Order of Tranſportation, to the Juſtices of Aſſiſe, &c.
" which ſhall be ſufficient Proof of ſuch Conviction and Order of Tranſ-
" portation."

* Felo de ſe.

* Page 480

A Perſon who wilfully deſtroys himſelf is termed a *Felo de ſe*, and is ſaid to be guilty of the worſt Sort of (*a*) Murder, as he acts againſt the firſt Principle of Reaſon, which is that of Self-preſervation.

Plow. 261. Dame *Hales*'s Caſe.

(*a*) Yet in ſome Caſes it is conſidered as a different Offence; and therefore if the King pardons all Crimes, except Murder, this Offence ſhall be pardoned; for though in a ſtrict Senſe it may be called Murder, yet according to the common Acceptation of Words, the Offence of a Perſon who murders another, and that of *Felo de ſe*, are conſidered as diſtinct Offences, and as ſuch are diſtinctly treated of by Authors who have wrote of theſe Matters; as Stam. P. C. 183, &c. Beſides, the End of excepting Murder ſeems to be, that the Offender might be brought to Juſtice, and that the Law of God and Nature, which require Blood for Blood, might be ſatisfied; but the diſcharging a Chattel, or pardoning a Forfeiture, is not of any ſuch Conſequence; alſo it hath been held by Divines, that pardoning Murder draws *Periculum Animarum* with it, as being contrary to the Law of God, which requires Blood for Blood. *The King* ver. *Ward*. Lev. 8. Sid. 150. Keb. 66, 548. S. C. adjudged.——It is alſo in common Parlance taken as a diſtinct Offence from other Felonies; and therefore a Grant of *Bona & Catalla Felonum* will not carry the Goods of a *Felo de ſe*. Sid. 420. Vent. 32. Saund. 274. adjudged.

In treating of this Offence it will be neceſſary to conſider:

(A) Where a Perſon ſhall be ſaid to be a Felo de ſe. 480.
(B) Of the Manner of finding him ſuch. 481.
(C) What he ſhall forfeit for this Offence. 482.

(A) Where a Perſon ſhall be ſaid to be Felo de ſe.

NO Perſon can be *Felo de ſe*, who is under the Age of Diſcretion, or *non compos* at the Time he commits the Fact; and therefore if an Infant kill himſelf under the Age of Diſcretion, or a (*b*) Lunatic during his Lunacy, he cannot be a *Felo de ſe*.

Crom. 30, 31. H. P. C. 28. 3 Inſt. 54.

(*b*) In 3 Mod. 100. It is ſaid to be

the prevailing Opinion, that a Perſon who kills himſelf muſt be *non compos* of Courſe, on this Suppoſition, that it is impoſſible a Man in his Senſes ſhould do a Thing ſo repugnant to Nature and Reaſon; but in Hawk. P. C. 67. this Notion is juſtly exploded.——And in Comb. 2, 3.

Not

44 E. 3. 44. 44 Aſſ. 55. Bro. Coron. 12, 14. Dalt. c. 92.

Not only he, who deliberately kills himſelf, but alſo he, who maliciouſly attempting to kill another happens to kill himſelf, is a *Felo de ſe*; as if *A.* diſcharge a Gun at *B.* with an Intent to kill him, and the Gun burſts and kills *A.* or if *A.* ſtrike *B.* to the Ground, and then haſtily falling upon him, wound himſelf with a Knife which *B.* happens to have in his Hand, and die; in both theſe Caſes *A.* is *Felo de ſe*, for he is the only Agent.

* Page 481 Stamf. P. C. 16. H. P. C. 28. Pult. 119. b. Crom. 28. cont. 3 Inſt. 54.

* But if a Man be killed by haſtily running on a Knife or Sword, which a Perſon aſſaulted by him, and driven to the Wall, holds up in his Defence, he ſhall not be adjudged a *Felo de ſe*, but the other ſhall be judged to have killed him *ſe defendendo*.

Kelw. 136.

If one Perſon kills another, though by his Deſire and Intreaty, yet the Perſon ſo killed is not a *Felo de ſe*, but he who killed him is as much a Murderer, as if he had acted out of his own Head; for every Aſſent of that Kind is void, being againſt the Laws of God and Man.

Moor 754. pl. 1041. Hawk. P. C. 68.

But if two Perſons agree to die together, and one of them, at the Perſuaſion of the other, buys Ratſbane, and mixes it in a Potion, and both drink of it, and he who bought and made the Potion ſurvives, by uſing proper Remedies, and the other dies, it ſeems the better Opinion, that he who dies ſhall be adjudged a *Felo de ſe*, becauſe all that happened was originally owing to his own wicked Purpoſe, and the other only put it in his Power to execute it in that particular Manner.

(B) Of the Manner of finding of him ſuch.

H. P. C. 29. 3 Inſt. 55.

NO Perſon can be a *Felo de ſe* before he is found ſuch by ſome Inquiſition, which ought regularly to be by the Coroner *ſuper viſum Corporis*, if the Body can be found.

3 Inſt. 55. H. P. C. 20. 2 Lev. 141. Hawk. P. C. 69.

But if the Body cannot be found, ſo that the Coroner, who has Authority only *ſuper viſum Corporis*, cannot proceed, the Inquiry may be by Juſtices of the Peace, who by their Commiſſion have a general Power to enquire of all Felonies, or in the *King's Bench*, if the Felony were committed in the County where the ſaid Court ſits, and ſuch Inquiſitions are traverſable by the Executors, *&c.*

8 E. 4. 4. a. Bro. Coron. 151. 2 Lev. 141, 152. 2 Keb. 859. 2 Jon. 198. Vent. 278. 3 Keb. 564, 566, 604, 800. Skin. 45. pl. 16.

But it was formerly held, that, with Regard to the high Credit which the Law gives to Inqueſts found before the Coroner, no ſuch Inqueſt found before him could be traverſed; but this has been ruled otherwiſe of late, and it ſeems now ſettled, that ſuch Inqueſt being moved into the *King's Bench* by *Certiorari*, may be there traverſed by the Executor or Adminiſtrator of the Perſon deceaſed, or by the King or Lord of the Manor, *&c.*

Salk. 377. pl. 21.

All Inquiſitions of this Offence, being in the Nature of Indictments, ought particularly and certainly to ſet forth the Circumſtances of the Fact, as the particular Manner of the Wound, and that it was mortal, *&c.* and in the Concluſion add, that the Party in ſuch Manner murdered himſelf.

And

And therefore if either the Premiſſes be inſufficient, as if it be found that the Party flung himſelf into the Water, *& ſic ſeipſum emergit*, which is Nonſenſe, becauſe *emergo* ſignifies only to riſe out of the Water; or if there be wanting the proper Concluſion, *& ſic ſeipſum murdravit*, the Inquiſition is not good. 3 Lev. 140. 12 Mod. 112.

Yet if it be full in Subſtance, the Coroner may be ſerved with a Rule to amend a Defect in Form. *Vide* 2 Lev. 152. Sid, 225, 259. Keb. 907. 3 Mod. 101. Salk. 377. pl. 21. Fitzgib. 6.

* (C) What he ſhall forfeit for this Offence.

* Page 482

A *Felo de ſe* forfeits all Chattels Real or Perſonal which he hath in his own Right, and alſo all ſuch Chattels Real whereof he is poſſeſſed, either jointly with his Wife, or in her Right; and alſo all Bonds, and other Perſonal Things in Action, belonging ſolely to himſelf; and alſo all Perſonal Things in Action, and, as ſome ſay, entire Chattels in Poſſeſſion, to which he was intitled jointly with another, on any Account, except that of Merchandize; but it is ſaid, that he ſhall forfeit a Moiety only of ſuch joint Chattels as may be ſevered, and nothing at all of what he was poſſeſſed of as Executor or Adminiſtrator. Stamf. P. C. 188, 189. H. P. C. 29. Plow. 243, 262. Crom. 31 a. 3 Inſt. 55. 19 H. 6. 47. a. 8 E. 4. 24. b. Raym. 7.

But the Blood of a *Felo de ſe* is not corrupted, nor his Lands of Inheritance forfeited, nor his Wife barred of her Dower. Plow. 261.

Alſo no Part of the Perſonal Eſtate is veſted in the King before the Self-murder is found by ſome Inquiſition, and conſequently the Forfeiture thereof is ſaved by a Pardon of the Offence before ſuch finding. 5 Co. 110. 3 Inſt. 54. Saund. 362. Sid. 150. 162. 2 Mod. 53. 3 Mod. 100, 241. *cont.* Lev. 8. Keb. 67, 68.

But if there be no ſuch Pardon, the whole is forfeited immediately after ſuch Inquiſition, from the Time ſuch mortal Wound was given, and all intermediate Alienations are avoided. Plow. 260. 5 Co. 110.

For Proceſs from the Crown Office againſt a Debtor of *Felo de ſe*, *vide* Saund. 273.

Feoffment.

Spelm. Gloſſ. 510.

AS all Property in Lands began by Occupancy, ſo it ſeems the firſt Method of transferring Property was by Inveſtiture; for as no Man could originally appropriate, but by ſettling himſelf in the Poſſeſſion and Application of it to his own Uſe, ſo no Man could transfer but by a Solemn and Publick Delivering over the Poſſeſſion, and the Ceremony uſed in ſuch Act of Delivery is in our Law called Livery and Seiſin, and is thus defined *Solemnis rei feudalis traditio ſub præſtatione fidei coram Teſtibus Vaſſalo facta.*

The End and Deſign of this Inſtitution was, by this Sort of Ceremony or Solemnity, to give Notice of the Tranſlation of the Feud from one Hand to another; becauſe if the Poſſeſſion might be changed by the private Agreement of the Parties, ſuch ſecret Contracts would make it difficult and uncertain to diſcover in whom the Eſtate was lodged, and conſequently the Lord would be at a Loſs of whom to demand his Services; and Strangers equally perplexed to diſcover againſt whom to commence their Actions for the Proſecution and Recovery of their Right; to prevent therefore this Uncertainty, the Ceremony of Livery and Seiſin was inſtituted.

* Page 483

* This Method of Conveyance was made Uſe of before Men were acquainted with Letters, and therefore it was required to be on the Land, or near the Land, that the other Tenants of the Manor might be Witneſſes of it, who in thoſe Days were called to the Lord's Court, to determine all Controverſies relating to ſuch Tranſlation; and though after the Uſe of Letters a Charter of Feoffment was introduced, yet was not this neceſſary, but only tended to the Authentication or Evidence of it; and ſo our Law determined, before the Statute of Frauds and Perjuries, as is obſerved hereafter.

For the better underſtanding this Method of Conveyance, we ſhall conſider,

(A) The ſeveral Sorts of Livery in our Law. 483.

And herein,

1. Of Livery in Deed. 483.
2. Of Livery within View, or in Law. 484.

(B) The Effect and Operation of Livery. 486.

And herein,

1. The Effect thereof to paſs a future Intereſt. 486.

2. The Operation thereof, where the Feoffor is out of Poſſeſſion. 489.
3. In what Caſes ſeveral Parcels will paſs by one Livery, or where ſeveral Parties may take by Livery to one. 492.

(C) Of the Charter of Feoffment; and herein what Things are neceſſary to the making a perfect Charter, and how far the Charter governs the Livery which is relative to it. 493.
(D) Who may make a Feoffment. 499.
(E) Of making it by Letter of Attorney. 500.

(A) The ſeveral Sorts of Livery in our Law: And herein,

1. Of Livery in Deed.

THE Livery in Deed is the actual Tradition of the Land, and is made either by the Delivery of a Branch of a Tree, or a Turf of the Land, or ſome other Thing, in the Name of all the Lands and Tenements contained in the Deed, or it may be made by Words only, without the Delivery of any Thing; as if the Feoffor being upon the Land, or at the Door of the Houſe, ſays to the Feoffee, I am content that you ſhould enjoy it according to the Deed, or enter into this Houſe or Land, and enjoy this Land according to the Deed; this is a good Livery to paſs the Freehold, becauſe in all theſe Caſes, the Charter of Feoffment makes the Limitation of the Eſtate, and then the Words ſpoken by the Feoffor, on * the Land, are a ſufficient *Indicium* to the People preſent, to determine in whom the Freehold reſides during the Extent of the Limitation; beſides, the Words, being relative to the Charter of Feoffment, plainly denote an Intention to enfeoff.

Co. Lit. 48. a. 9 Co. 137. b. *Thorowgood's* Caſe. 6 Co. 26. *Sharp's* Caſe. 2 Rol. Abr. 7. & *vide* Cro. Jac. 80. which ſeems *cont.*

* Page 484

But if a Man without any Charter, being in his Houſe, ſays, I here demiſe you this Houſe, as long as I live, paying 20 *l. per Ann.* this paſſes no Freehold, but only an Eſtate at Will, becauſe the Word *Demiſe* denotes only the Extent of the Limitation of the Eſtate intended to be conveyed; but bare Words of Limitation, without ſome Act or Words to diſcover the Intention of the Feoffor to deliver over the Poſſeſſion, are not ſufficient to convey the Freehold; for if a Charter of Feoffment be made to a Man and his Heirs, this, without ſome other Act or Words to give the Poſſeſſion, only paſſes an Eſtate at Will, becauſe the Act of Delivery is requiſite to the Perfection of the Charter; but beſides the Charter of Feoffment, there muſt be ſome Act or Words to deliver over the Poſſeſſion before the Feoffee can enjoy it purſuant to the Charter.

6 Co. 26. 2 Rol. Abr. 7. Co. Lit. 48. Cro. Eliz. 482. 9 Co. 138. Moor pl. 632.

But if the Feoffor had delivered the Charter *upon the Land* † in the Name of Seiſin of all the Lands comprized in the Deed, this had been good to execute the Deed, and to give Livery alſo; becauſe the bare Delivery of the

9 Co. 137. b. 138. a. Co. Lit. 48. a. 57. a.

† As to Livery within View, ſee *infra* 485.

2 Rol. Abr. 7. 6 Co. 26. the Deed is good to execute it as a Deed, and the Delivery of the Deed or any other Thing, in the Name of Seiſin of the Land, is ſufficient to give Livery, becauſe the Intention of thoſe ſolemn Acts is only to diſcover to all Perſons in whom the Freehold is lodged; and this End is as effectually anſwered by the Delivery of a Deed, or any Thing elſe in the Name of a Seiſin, as of a Turf or a Twig, the one being equally viſible and notorious as the other.

Moor pl. 286. *Keale*'s Caſe. Cro. Eliz. 25. *A.* being ſeiſed of Lands in Fee, borrows 20*l.* of *B* and for Re payment agrees to aſſure him the Land; and thereupon they both went to the Land, where *A.* ſaid to *B.* I am indebted to you 20*l.* and if I don't pay you before *Michaelmas*, then I bargain and ſell this Land to you, and if I pay you then, I ſhall have my Land again, and then puts *B.* in Poſſeſſion of the Land; this was held a good Livery, becauſe here the Poſſeſſion was actually delivered purſuant to the Agreement of aſſuring the Land for the Security of the Money, which Poſſeſſion was to be reveſted on the Payment of the Money by *A.* the Feoffor.

2. Of the Livery within View, or the Livery in Law.

The Livery within View, or the Livery in Law, is when the Feoffor is not actually on the Land, or in the Houſe, but, being in Sight of it, ſays to the Feoffee, I give you yonder Houſe or Land, go and enter into the ſame, and take Poſſeſſion of it accordingly; this Sort of Livery ſeems to be made at firſt only at the Court Barons, which were anciently held *ſub die* in ſome open Part of the Manor, from whence a general Survey, or View, might have been taken of the whole Manor, and the *Pares Curiæ* eaſily diſtinguiſhed that Part which was then to be transferred.

Pollex. 47.

Co. Lit. 48. b. 2 Rol. Abr. 3. 7. Vent. 186. Moor 85. Pollex. 48. But this Sort of Livery is not perfect to carry the Freehold till an actual Entry made by the Feoffee, becauſe the Poſſeſſion is not actually delivered to him, but only a Licence or Power given him by the Feoffor to take Poſſeſſion of it; and therefore, if either the Feoffor or Feoffee die before an Entry made by the Feoffee, the Livery within the View becomes ineffectual and void; for if the Feoffor dies before Entry, the Feoffee cannot afterwards enter, becauſe then the Land immediately deſcends upon his Heir, and conſequently no Perſon can take Poſſeſſion of his Land without an Authority delegated from him who is the Proprietor; * nor can the Heir of the Feoffee enter, becauſe he is not the Perſon to whom the Feoffor intended to convey his Land, nor had he any Authority from the Feoffor to take the Poſſeſſion; beſides, if the Heir of the Feoffee were admitted to take Poſſeſſion after his Father's Death, he would come in as a Purchaſer, whereas he was mentioned in the Feoffment to take as the Repreſentative of his Anceſtor, which he cannot do ſince the Eſtate was never veſted in his Anceſtor.

* Page 485

2 Rol. Abr. 3. Co. Lit. 48. b. But if the Feoffee, in ſuch Caſe, dare not enter into the Land without Peril of his Life, he may claim the Land, as near as he may ſafely venture to go, and this ſhall be ſufficient to veſt the Poſſeſſion in him, and render the Livery within View perfect and compleat; for no Body is obliged to expoſe his Life for the Security of his Property; but when he has gone as far as he may with Safety, the Law very reaſonably looks upon ſuch Intention to be as effectual as the Act itſelf; for otherwiſe it might be in the Power of a Man, by his own Act of Violence, to deprive another of his Right, and thereby to receive an Advantage from an unlawful Act.

2 Rol. Abr. 7. If a Man delivers a Charter of Feoffment to his Feoffee, within View, and ſays, I will that you have the Lands that you ſee there, the which are com-

compriſed in this Charter, according to the Purport of the Charter, this is a good Livery within View; for the Charter of Feoffment fully denotes the Intention to enfeoff, and the Words are a Licence to the Feoffee to enter into the Land, and to take the Poſſeſſion thereof, according to the Charter.

But if the Feoffor had only delivered the Charter of Feoffment within View, and only ſhewed the Feoffee the Lands, without ſaying any Thing, though the Feoffee had actually entered into the Land, and the Feoffor had afterwards agreed to the Entry, yet this it ſeems is no good Feoffment; becauſe the bare ſhewing of the Lands to the Feoffee implies no Authority or Licence from the Feoffor to take Poſſeſſion; and conſequently the Entry being without any Authority cannot veſt the Freehold in him, becauſe there was no ſolemn Act, nor publick Declaration, made by the Feoffor, by which the *Pares* might diſcover a real Intention to change the Poſſeſſion, and the ſubſequent Agreement of the Feoffor can never ſupport an Act which was originally void; for though the Feoffee, after the Delivery of the Charter, might take the Uſufructuary Poſſeſſion as Tenant at Will, yet the Freehold ſtill continued in the Feoffor, for that cannot paſs from one to another, without ſome ſolemn or publick Declaration, that the *Pares* may, upon any Diſpute, determine in whom the Freehold reſides. 2 Rol. Abr. 7. 2 Co. 55. b.

If a Man makes Livery within View, to a Woman, and before ſhe enters the Feoffor marries her, and afterwards never claims any Thing but in Right of his Wife, this is a good Execution of the Livery; for the Huſband claiming the Land, in Right of his Wife, ſhall be ſufficient to reduce the Lands actually into her Poſſeſſion, ſince he is the proper Perſon to tranſact for her; and therefore ſhall be preſumed to have parted with and delivered up the Poſſeſſion to her, ſince after the Coverture he claimed the Land only in her Right. Perk. Sect. 214. 2 Rol. Abr. 3. Bro. Feoffment 57. Vent. 186. Pollex. 53.

So where two Women were Joint-Tenants in Fee, and one of them made a Feoffment to a Man, and Livery within View, by ſaying, go enter and take Poſſeſſion; and before the Man entered he married the Feoffor; his Entry after the Marriage was a good Execution of the Livery, becauſe by the Livery within the View, an Intereſt paſſed to the Feoffee, which was not revocable by the Feme; and his Entry after the Coverture makes the utmoſt Notoriety the Thing is capable of, to diſcover in whom the Freehold is lodged, and his Entry ſhall be intended for his Benefit; and therefore ſhall have a Retroſpect to the Livery in View to make it a perfect Feoffment. Mod. 91. 2 Keb. 872, 880. Vent. 186. *Parſons* and *Perus*. Pollex. 45, to 53.

* The Livery within View may be made of Lands in another County than where the Lands lie, becauſe the Tranſlation of the Feud was often made at the Court-Baron, in the Preſence of *Pares Curiæ*; and theſe Courts being held *ſub die*, the *Pares* could have a diſtinct View of every Part of the Manor; and therefore were proper to atteſt this Sort of Inveſtiture though the Lands were in a different County, for notwithſtanding that, they might have been Part of the ſame Manor for which the Court was held. *Page 486 Co. Lit. 48. b.

(B) The Effect and Operation of Livery: And herein,

1. Of the Effect thereof to paſs a future Intereſt.

Cro. Eliz. 451. 2 Vent. 204. Co. Lit. 217. 5 Co. 94. b.

THIS Ceremony was firſt inſtituted, that the *Pares* of the County may, upon any Diſpute relating to the Freehold, determine in whom it is lodged, and from thence be the better enabled to determine in whom the Right is. Hence therefore it is, that if a Man makes a Feoffment, or Leaſe for Life, to commence *in Futuro*, and makes Livery immediately, the Livery is void, and only an Eſtate at Will paſſes to the Feoffee; for the Deſign of the Inſtitution would fail, if ſuch Livery were effectual to paſs the Freehold; for it would be no Evidence or Notoriety of the Change of the Freehold, if, after the Livery made, the Freehold ſtill remained in the Feoffor; the Uſe of the Inveſtiture would rather create than prevent the Uncertainty of the Freehold, and in many Caſes would put Men to fruitleſs Trouble and Expence in Purſuit of their Right; for by that Means, after a Man had brought his *Præcipe* againſt a Perſon, whom he ſuppoſed to be Tenant to the Freehold, and had proceeded in it a conſiderable Time, the Writ might abate by the Freehold's veſting in another, by Virtue of a Livery made before the Purchaſe of the Writ. Another Reaſon why ſuch future Intereſts cannot be allowed to paſs by any Act of Livery was, becauſe no Man would be ſafe in his Purchaſe, if the Operation of Livery might create an Eſtate, to commence many Years after the Livery was made; and though they have allowed a future Intereſt, to commence by way of Leaſe, yet that had no ſuch ill Effect in making Purchaſes uncertain, becauſe antiently they were under the Power of the Freeholder, who by Recovery might deſtroy them; and now, unleſs ſuch Leaſes were made upon good Conſiderations, they are fraudulent againſt a Purchaſer; and it is not to be preſumed, that Leaſes at great Diſtances ſhould be purchaſed for Value.

2 Co. 55. *Buckler's* Caſe. 2 And. 29. Moor. 423. Cro. Eliz. 450, 585. Hob. 170, 171. 5 Co. 94. Rol. Rep. 261.

Hence, by the way, we may account why a Freehold in Reverſion or Remainder cannot be granted *in Futuro*, † though there no Livery is neceſſary to paſs it; as where *A.* is Tenant for Life, Remainder to *B.* in Fee; *A.* makes a Leaſe for Years to *C.* and afterwards grants the Land to *D. habend'* from *Mich.* next enſuing, for Life; this Grant to *D.* was adjudged void, though *C.* attorned to it after *Michaelmas*, becauſe ſuch future Grants create an Uncertainty of the Freehold, and the Tenant of the Freehold being the Perſon who is to anſwer the Stranger's *Præcipe*, and was anſwerable to the Lord for the Services, it were unreaſonable to permit him, by any Act of his own, to prevent or delay the Proſecution of their Right.

† See *infra* 487, 8.

* Page 487

* But where a Man makes a Leaſe to commence from *Michaelmas*, and after *Michaelmas* makes a Livery and Seiſin, this is ſufficient to paſs the Freehold, becauſe in this Caſe, at the Time of the Livery made, the Poſſeſſion and Freehold were actually transferred to the Leſſee, and did not remain in the Leſſor, after the Notoriety made, which gives Notice of transferring the Freehold.

Hob. 314. Cro. Jac. 563. *Greenwood* v. *Tyler*. Cro Jac. 458. 3 Bulſ. 290.

Yet if the Feoffor had made a Letter of Attorney to give Livery, the Attorney could not give Livery after *Michaelmas*, unleſs an expreſs Authority were therein contained for it, becauſe the natural Import of ſuch Authority is to give Livery immediately, and the Authority of the Repreſentative cannot extend beyond the Delegation. Cro. Jac. 563. Hob. 314.

A. by Indenture demiſed to *B. habend' a die Datûs* (which was the 10th of *June*) *Indenturæ Prædict.* for his Life, with a Letter of Attorney to make Livery; the Attorney made Livery the 23d of *July* following, and the Livery was held to be void, becauſe the Eſtate for Life being by the Indenture to commence the 10th of *June*, the Attorney had no Authority to change the Commencement of the Eſtate; and therefore not having purſued his Authority, by not giving Livery to let the Freehold commence, according to the Deed, what he did afterwards was without any Authority, and conſequently void; but in this Caſe, if the Deed had not been delivered till after the Day of the Date, and the Attorney had given Livery *at the Time of the Delivery of the Deed*, this had been a good Livery, becauſe the Deed of Feoffment was to govern the Livery, but the Deed itſelf had no Effect till the Delivery; and therefore the Attorney making the Livery at the Time the Deed of Feoffment began to operate, which was to govern it, he ſeems thereby to have executed his Authority well enough. Cro. Jac. 153. *Hennings* and *Panchardin.* Moor pl. 876. Cro. Eliz. 873.

If a Man makes a Feoffment to commence after his own Death, or makes a Feoffment in this Manner, being upon the Land, I do here, reſerving an Eſtate for my own and my Wife's Lives, give you theſe my Lands to you and your Heirs, theſe are void Feoffments, becauſe the Poſſeſſion is not delivered at the Time of the Notoriety made; and therefore, if ſuch Feoffments were allowed, the Inveſtiture would be ſo far from being an Evidence, to diſcover in whom the Freehold is lodged, that it would often miſlead the Juries in ſuch Inquiries; beſides, it were abſurd to ſuffer a Man to reſerve a particular Eſtate to himſelf, and thereby in the ſame Contract be both Feoffor and Feoffee. Cro. Eliz. 344, 345. Poph. 47, 48. 2 Rol. Abr. 7. *Callard* and *Callard.* Hob. 170. Co. Lit. 48. Moor 687.

If a Leaſe for Years be made to *A.* the Remainder to *B.* for Life, and Livery is made, the Freehold is well conveyed to *B.* but this Livery cannot be made to *B.* himſelf, becauſe the Poſſeſſion cannot be delivered to him, for that belongs to *A.* during the Term; the Livery therefore muſt be made to *A.* who is to receive the Poſſeſſion, and ſuch Livery actually veſts the Freehold in *B.* becauſe the Preſumption is, that every Man accepts of a Gift, which is for his Intereſt; and *A.* is looked upon as the Attorney of *B.* to take the Livery, becauſe he, having an immediate Intereſt in the Land, is the only Perſon to whom the Poſſeſſion can be delivered; for *B.* has no immediate Right to the Poſſeſſion, and therefore, as he cannot receive it himſelf, by Conſequence he cannot depute another to take it. Lit. Sect. 60. 5 Co. 94. b. Co. Lit. 49. 2 Rol. Abr. 8

But this Livery muſt be made to *A.* upon the Land, for a Livery within the View will not paſs the Freehold to *B.* for this Livery within the View, being anciently made in Court, could only be made by the immediate Homagers of the Court from the one to the other; but *A.* in this Caſe being no Homager to the Court, ſince he was only Leſſee for Years, was not capable of ſuch Livery within View. Co. Lit. 40. b. 2 Rol. Abr. 6.

And this Livery to *A.* muſt be made to him before he actually enters and takes Poſſeſſion, by virtue of the Leaſe, becauſe if the Poſſeſſion be *once filled by the Leſſee for Years, there is no vacant Poſſeſſion to be transferred by the Livery, for *quod ſemel meum eſt, amplius meum eſſe non poteſt*; no Man can receive that from another which is already in his Poſſeſſion. * Page 488 Lit. Sect. 60. Co. Lit. 49. 5 Co. 94. Moor 14. Co. Lit. 216. a. Plow. 156. a.

If

Co. Lit. 49. 5 Co. 94. 2 Rol. Abr. 8. If a Leaſe for Years be made to *A.* and *B.* the Remainder to *C.* in Fee, and Livery is made to *A.* in the Abſence of *B.* whether the Conveyance be by Deed or without, the Livery is good to veſt the Remainder in *C.* becauſe by the bare Demiſe, *A.* and *B.* have an Intereſt in the Land, during the Term, without any further Ceremony, and each being equally intitled to the whole Poſſeſſion, either may inveſt himſelf in the whole Poſſeſſion by Entry, or receive the Poſſeſſion from the Leſſor by the Solemnity of Livery; and therefore when the whole Poſſeſſion is delivered by the Leſſor, and Livery made to *A.* in the Abſence of *B.* in the Name of both, this Livery is ſufficient to veſt the Remainder in *C.* becauſe *A.* had as much Power to receive the Poſſeſſion of the whole, as if the Leaſe for Years had been made to him only, he and *B.* being Jointenants by the Demiſe, and thereby ſeiſed *per my & per tout.*

Co. Lit. 49. b. 5 Co. 94. b. Palm. 23. But if a Leaſe for Life had been made to *C.* to commence immediately, and *C.* had appointed *A.* and *B.* his Attornies to take Livery from the Leſſor; the Livery made to one of them alone had been ineffectual and void, becauſe one only, without the other, had no Authority from the Delegation to receive the Poſſeſſion, and conſequently what is done by a Repreſentative, without an Authority from the Principal, is a Nullity, and void; but otherwiſe it is, if the Letter of Attorney had been jointly and ſeverally, to receive Livery.

Co. Lit. 217. a. If a Leaſe for Years be made to *A.* Remainder to the right Heirs of *B.* and Livery and Seiſin is made to *A.* yet the Freehold does not paſs from the Leſſor; and therefore the Livery is void, becauſe there was no Perſon in Being at the Time of the Livery made, in whom the Freehold could veſt, for *nemo eſt Hæres viventis*; and the Law will not endure ſuch future Operation of the Inveſtiture, becauſe it would create an Uncertainty of the Freehold, which would neceſſarily perplex and delay all Proſecutions againſt the Freehold.

Plow. 156. a. Co. Lit. 217. If a Leaſe for Years be made to begin at *Michaelmas*, Remainder to *J. S.* in Fee, and Livery is made before *Michaelmas*, the Livery is void for the former Reaſon; but *a Leaſe for Years* may be made to commence *in Futuro*, becauſe the Freeholder, who is to anſwer the Stranger's *Præcipe*, is, notwithſtanding ſuch future Intereſt, certain and known, and therefore not within the Reaſon of the former Caſe.

Lit. Sect. 350. Co. Lit. 217. If *A.* makes a Leaſe for *five Years* to *B.* upon Condition, that if *B.* pays him 10 *l.* within two Years, that then he ſhall have a Fee-ſimple in the Lands, and makes Livery and Seiſin to *B.* this paſſes the Freehold immediately, and *B.* has a Fee Conditional, becauſe if the Freehold were not to veſt in *B.* till the Condition performed, it would be difficult to determine in whom the Freehold is, for ſuch Conditions may be inſerted in Deeds, which are perfected privately between the Parties, and therefore not ſo proper to govern the Poſſeſſion and Seiſin of the Freehold, as the ſolemn Inveſtiture by Livery, which is made in the public View of the whole County; therefore, as this Solemnity was firſt appointed to give Notice of the transferring the Freehold, it follows, that from the Reaſon of the Inveſtiture the Freehold muſt paſs at the Time of the Solemnity made, or not at all; but if *A.* had made a Leaſe *for Life*, upon like Condition, to have Fee, the Livery made thereon ſhould not carry the Inheritance till after the Condition performed, becauſe there paſſed a certain Freehold, at all Events, to the Leſſee, and the Livery gave Notice in whom it was lodged, ſo that no Man can pretend Ignorance againſt whom to bring his *Præcipe*, * which would be the Miſchief in the former Caſe, if the Freehold did not paſs at the Time of the Livery made.

* Page 489

2. The Effect of Livery when the Feoffor is out of Poſſeſſion.

It is regularly true, that the Feoffor muſt be actually in the Poſſeſſion of the Land at the Time of the Livery made, or otherwiſe the Livery will be ineffectual and void; becauſe the Deſign of the Livery is to give Notice of the Change made of the Poſſeſſion, and therefore it muſt be a vacant Poſſeſſion that is delivered; but it were abſurd, that a Man ſhould be permitted to transfer to another what he has not in himſelf; wherefore if a Man makes a Leaſe for Years, or Life, of his Land, or has his Land extended by Virtue of a Statute-Merchant, *&c.* and makes a Feoffment and Livery, the Conuzee or Leſſee being in Poſſeſſion of the Land, the Livery is void; becauſe the Land is filled by the Leſſee; and conſequently, during the Continuance of his Intereſt, the Feoffee cannot deliver a vacant Poſſeſſion; and therefore the Livery, which is a Solemnity inſtituted to give Notice of the Change of the Poſſeſſion, muſt be void.

Co. Lit. 48. b. 2 Rol. Abr. 3, 4. 7 H. 4. 19. b. Dyer 33. Cro. Eliz. 322.

Thus, if there be Leſſee for Years of a Houſe and ſeveral Cloſes, and the Leſſee and all his Servants being in the Houſe, the Leſſor enters into one of the Cloſes, and makes a Feoffment of it, and gives Livery, this is a void Feoffment; becauſe the Poſſeſſion of Part of the Thing demiſed is Poſſeſſion of the Whole, for the Impoſſibility that a Man ſhould be in the actual Poſſeſſion of every Part of the Land at the ſame Time; and conſequently the Leſſor cannot take Poſſeſſion of the Cloſe, which was filled by his Leſſee; and therefore the Livery muſt be void, becauſe the Feoffor had no vacant Poſſeſſion to transfer at the Time of the Livery made.

2 Co. 31. b. *Bettyworth's* Caſe. Moor pl. 397. 2 Rol. Abr. 4. Co. Lit. 48. b. Dyer 18. b,

So it is if the Leſſee for Years himſelf had not been in the Houſe, or any Part of the Land, yet if his Wife, Children or Servants had been on any Part of the Land, that were ſufficient; but the Cattle of the Leſſee graſing upon the Land, without either Wife or Servant on the Land, does not fill the Poſſeſſion ſo as to prevent the Leſſor from entring, and making a good Livery to paſs the Freehold, becauſe the Cattle cannot be ſaid to continue upon the Land, *Animo Poſſidendi*, for the Benefit of their Maſter, as a Servant may, and in Duty ought to do.

Co. Lit. 48. 2 Rol. Abr. 4. Dyer 18. Bro. Tit. Feoffment 66. but Moor 11. *cont.*

But if a Man makes a Leaſe for Life of Lands, and afterwards makes a Feoffment of the ſame Lands, and makes Livery and Seiſin upon the Land, by the Aſſent of the Leſſee, and in his Preſence, this is a good Livery to paſs the Inheritance; becauſe the Leſſee's permitting the Feoffor to come upon the Land, and make Livery, is a ſufficient Quitting of the Poſſeſſion to him, either by way of Surrender, or to create a Tenancy at Will in the Feoffor, to make the Feoffment and Livery more effectual and valid.

2 Rol. Abr. 4. Dyer 18. *Shepherd* and *Greg.* Bro. Tit. Surrender 48.

But if the Servant of the Leſſee were only on the Land, the Livery made by the Feoffor, though with the Servant's Permiſſion, had been void if the Servant continued in Poſſeſſion at the Time of the Livery made, for while the Servant continued in Poſſeſſion, it muſt be only for the Uſe and Benefit of him that placed him there; and conſequently the Poſſeſſion of the Servant muſt be looked upon as the Poſſeſſion of the Maſter; and therefore the Livery muſt be void, becauſe it could not deliver a Poſſeſſion which was ſtill filled by the Maſter, and which the Maſter never conſented to part with; and the Permiſſion of the Servant will not admit of ſuch a Conſtruction as was made in the precedent Caſe, becauſe the Servant having no Intereſt, but in Right * of his Maſter, could neither make a Surrender, nor a Tenancy at Will to the Feoffor.

2 Rol. Abr. 5.

* Page 490

Dyer 363. a. 2 Rol. Abr. 5. Moor 91: But it has been held, where a Man made a Leaſe for Years of a Houſe, and afterwards made a Feoffment of it, with a Letter of Attorney to make Livery, and the Attorney came to the Houſe to make Livery in the Abſence of the Leſſee, and finding nobody in the Houſe but the Servant of the Leſſee, who quitted the Poſſeſſion of the Houſe at the Deſire of the Attorney, and then the Attorney made Livery, which the Maſter approved of at his Return, ſaving his Term, that this was a good Livery, becauſe here the Servant actually quitted the Houſe, and thereby the Attorney had a vacant Poſſeſſion to deliver to the Feoffee; ſo if the Attorney had found the Leſſee himſelf upon the Land, and had entred and ouſted him, and then made Livery, that had been good to paſs the Freehold; for though the Ouſter had been a tortious Act, yet the Poſſeſſion became thereby vacant, and conſequently by the Livery might be delivered to the Feoffee.

2 Co. 32. a. 2 Rol. Abr. 4. Dyer 18. b. If there be *A.* Leſſee for Years of ſix Acres, and he makes a Leaſe for Years of three Acres to *J. S.* and he in Reverſion enters upon *J. S.* and makes a Feoffment with Livery, this ſhall paſs the three Acres; becauſe, by the Demiſe of *A.* for Years, the Poſſeſſion became ſeparate and divided, which was united and one under the Leaſe to *A.* himſelf; and therefore *A.*'s continuing in Poſſeſſion of his own three Acres could never be a Poſſeſſion of the other three, which he had no Right to during the Demiſe to *J. S.* but if *A.* had only made a Leaſe at Will to *J. S.* of thoſe three Acres, the Entry and Livery of the Reverſioner had not paſſed them, becauſe *A.* is ſtill ſuppoſed to be in Poſſeſſion of thoſe three Acres, ſince he may enter into them when he pleaſes, by the Determination of his own Will; for no Man can be actually upon every Parcel of the Land, yet the Poſſeſſion of one Acre is very reaſonably conſtrued to be the Poſſeſſion of the Whole.

2 Rol. Abr. 5. 2 Rol. Rep. 260. *Bridgeman* and *Charleton*. Moorpl. 1143. So it is in Caſe of a Tenant at Sufferance; as if Tenant in Tail makes a Feoffment in Fee to the Uſe of himſelf in Fee, and afterwards makes a Leaſe for Years, and dies, by which the Iſſue is remitted before Entry, and conſequently the Eſtate of the Leſſee for Years is determined and changed into a Tenancy at Sufferance, becauſe the Fee-ſimple, out of which it was derived, is vaniſhed by the Remitter; and the Iſſue enters into Part of the Land deſcended, and makes a Feoffment of the Whole, and gives Livery of that Part into which he entered, in the Name of the Whole, this ſhall paſs all the Lands to which the Iſſue was remitted, though the Tenant at Sufferance was in Poſſeſſion of Part; becauſe that Poſſeſſion may be reaſonably ſuppoſed to be in me, which I may actually place myſelf in at my Pleaſure; and therefore the Livery in that Part, in which the Iſſue had actually entered in the Name of the Whole, ſhall paſs all the Lands.

2 Rol. Abr. 5, 6. *Terry* v. *Brown*. *A.* ſeiſed of Land in Fee, held of the Queen in Socage, died, and it was found by Office, that he died without Heir, by which the Lands were ſeiſed as the Eſcheat of the Queen, and *B.* the Heir of *A.* traverſed the Office, upon which Iſſue was joined; and pending the Iſſue, *B.* made a Deed of Feoffment, with a Letter of Attorney; and afterwards the Iſſue being for *B.* Judgment was given *que les meins le R. ſoient amove*, and then the Attorney made Livery, after which the *Amoveas Manum* was executed; this was held a good Feoffment and Livery; becauſe, by the Judgment againſt the Queen, her Poſſeſſion was defeated, and *B.* was reſtored to his Right of Poſſeſſion, which he might have placed himſelf in at his Pleaſure; and therefore might transfer that to another which he might actually inveſt himſelf in at Pleaſure.

2 Rol. Abr. 5. Thus if Land deſcends to *J. S.* who enters but into Part of it, and makes a Feoffment of the Whole, and Livery in that Part in which he entered

entered in the Name of the Whole, all the Land ſhall paſs; for beſides that, in this Caſe, an Entry into Part may be conſtrued an Entry into the Whole, the Feoffor having a Power to reduce the Whole into his actual Poſſeſſion at his Will, the very Act of Feoffment, with the Livery in all theſe Caſes, may reaſonably be taken to be a Determination of his Will to take the Poſſeſſion, ſince the Livery and Feoffment would be invalid, unleſs he were in Poſſeſſion. * Page 491

If Huſband and Wife be ſeiſed of Land in Fee, and the Huſband makes a Feoffment of the Whole, the Wife being upon the Land, yet the Livery ſhall paſs the Land, becauſe the Huſband had the whole Poſſeſſion, either in his own Right, or in Right of his Wife, and therefore could deliver it over by the Inveſtiture, though the Wife ſhould diſagree to it. 2 Rol. Abr. 5. Perk. Sect. 223.

If the Queen be Leſſee for Years, and he in Reverſion enters upon the Land, and makes a Feoffment in Fee, this is void; becauſe the Law preſerves the Poſſeſſion for the Queen, who by conſtantly attending the Buſineſs of the Public, is preſumed not to have Leiſure to take Care of her private Concerns; but if the Queen had made a Leaſe for Years to *J. S.* and he in Reverſion had entered and ouſted him, and made a Feoffment, that had been good; becauſe the Queen had no Right to the Poſſeſſion during the Leaſe to *J. S.* and the Reverſioner having gained the Poſſeſſion by his ouſting *J. S.* might conſequently deliver it by the Inveſtiture. 2 Rol. Abr. 5. & *vide* 2 Co. 53.

If a Man makes a Leaſe for Life to *A.* and after makes a Feoffment and Livery to *A.* of the Land in Leaſe, this is a good Livery and Feoffment; for though the Land was in Leaſe to *A.* yet his Acceptance of the Feoffment and Livery amounts to a Surrender, *ut res magis valeat*, and conſequently the Feoffor has thereby Poſſeſſion to transfer by the Livery to the Feoffee. 2 Rol. Abr. 495. Dyer 358. Moor 636.

If a Man be ſeiſed of two Acres, and makes a Leaſe for Years of one of them, and after makes a Feoffment of both Acres, and Livery of the Acre in his own Poſſeſſion, in the Name of both, the Livery is void and ineffectual to paſs the Acre in Leaſe, becauſe that being full of the Leſſee, the Feoffor had not the Poſſeſſion to transfer by the Livery; *yet ſuch Feoffment is a good Grant of the Reverſion of the Leaſehold Acre, if the Termor attorns*; becauſe every Man's Act is conſtrued moſt ſtrongly againſt himſelf; and therefore the Feoffor ſhall not be admitted to claim any Thing in either of the Acres, ſince the Poſſeſſion of the one was actually transferred by the Livery, and the Reverſion of the other in Leaſe by the Deed of Feoffment, which, with the Attornment of the Tenant, amounts to a Grant. Co. Lit. 49. a. 2 Rol. Abr. 56. Plow. 162.

But if there be a Leaſe for Years to *A.* Remainder to *B.* for Life, and *C.* the Reverſioner in Fee makes a Feoffment in Fee, with Livery to *A.* this is void as a Feoffment, becauſe *C.* had no Poſſeſſion to transfer by the Livery, that being already in *A.* and the Freehold in *B.* by the former Leaſe; and the Acceptance of the Livery by *A.* was neither a Surrender, nor an Attornment; as in the former Caſe it could not amount to a Surrender, becauſe of the intermediate Freehold which was in *B.* nor did the Feoffment amount to a Grant and Attornment; for though, according to the former Caſe, every Man's Conveyance is conſtrued moſt ſtrongly againſt the Grantor; yet in this Caſe the Grant is ineffectual, for Want of Attornment; for *A*'s Acceptance is no Attornment, becauſe he ſhall not bring *B.* within his Fealty, by an Act which was not in its original Intention deſigned to be prejudicial and injurious to *B.* by diſplacing his Remainder. 2 Rol. Abr. 4, 56. Rol. Abr. 482. *Eedes* and *Knotsford.*

If a Man be ſeiſed of two Acres, and, being diſſeiſed of one, makes a Feoffment of both, and Livery in the Acre in Poſſeſſion, in the Name of both, yet the Acre of which he was diſſeiſed does not paſs, becauſe he could not deliver that Poſſeſſion to the Feoffee, which the Diſſeiſor had. So it is if the Diſſeiſor had made a Leaſe at Will, and then the Diſſeiſee 2 Rol. Abr. 6. Dyer 18.

* Page 492 *Diſſeiſee had made a Feoffment of the Acre in his Poſſeſſion, in the Name of both, this had not paſſed both the Acres, becauſe the Poſſeſſion of one Acre was ſtill out of him, and the Feoffment could not be any Determination of the Will of the Diſſeiſor.

Dyer 18. 2 Rol.Abr. 5. But if a Man be ſeiſed of two Acres, and makes a Leaſe at Will of one, and after enfeoffs *J. S.* of both Acres, this ſhall paſs both; becauſe the very Feoffment and Livery is a Determination of the Eſtate at Will, and conſequently the Feoffor has thereby reſumed the Poſſeſſion, in order to convey it by Livery; otherwiſe of a Leaſe for Years, becauſe the Poſſeſſion is in the Termor during the Leaſe.

2 Rol. Abr. 6. 9 H. 7. 25. b. If *A.* be Leſſee for Life of *Black-Acre*, and being likewiſe ſeiſed in Fee of *White-Acre*, makes a Feoffment of both, and gives Livery in *White-Acre*, in the Name of both, this is a good Feoffment of both Acres, becauſe *A.* had the Freehold and Poſſeſſion of both Acres, and therefore might well deliver them over by the Inveſtiture; otherwiſe if *A.* had been only poſſeſſed of *Black-Acre* for Years, for then it ſhould not paſs by the Feoffment, becauſe the Charter of Feoffment paſſes the Intereſt in the Term before the Livery made, and a leſſer Eſtate by Right ſhall be ſuppoſed to paſs, rather than a greater by Wrong; but in the firſt Caſe, where *A.* had the Freehold in both Acres, nothing paſſes till the Livery was made; and therefore the Livery muſt operate to paſs the Fee in both Acres, *ſecundum formam Chartæ*, or elſe it can paſs nothing.

2 Rol. Abr. 4. But if *A.* had been poſſeſſed of *Black-Acre* for Years in *Auter Droit*, as Guardian to an Infant, and had made a Feoffment of both Acres, and given Livery in *White-Acre*, in the Name of both, that had paſſed both Acres to the Feoffee; becauſe the Term being veſted in the Infant, the Guardian could lawfully transfer it as if he had been in Poſſeſſion of it in his own Right, and therefore the Livery muſt operate *to ouſt the Infant* of the Term, and *diſſeiſe him in Reverſion*, or elſe it will have no Effect at all.

3. In what Caſes ſeveral Parcels will paſs by one Livery, or where ſeveral Parties may take by Livery to one.

It ſeems, that anciently the Feoffment and giving Livery was performed before the *Pares* of the Manor where the Lands lay; but this being found too much to ſtreighten the Transferring the Poſſeſſion, it was found neceſſary to admit the Teſtimony of Strangers; and this came afterwards to be eſtabliſhed for the Conveniency of it; and becauſe all Men of the County aſſembled at the County-Court, in order to determine Diſputes relating to the whole County, as the Tenants of the Manor did at their Court-Baron; and becauſe there lay an Appeal from the Court-Baron to the County-Court, ſo that the *Pares* of the County were thereby ultimately to determine of all Things relating to the particular Manors, it ſeemed the more reaſonable to admit the *Pares Comitatus* to atteſt the Inveſtiture, through any particular

Co Lit. 253. a. 2 Rol. Abr. 11. Manor, and indifferently through the whole County; and from hence it came to be admitted, and ſo the Law continues, that if a Man ſeiſed of Lands in ſeveral Villages in one County, makes a Feoffment of the Whole, and gives Seiſin of Parcel of the Lands in one Town, in the Name of all the Lands in that Town and in the other Towns, that all the Lands of the Feoffor lying in that County ſhall paſs, as well as if there had been Livery given in each Town.

Perk. 227. 2 Rol. Abr. 11 But if a Man having Lands in two Counties makes a Feoffment of both, and gives Livery of the Land in one County, in the Name of all, the Land in the other County ſhall not paſs, becauſe there was no Re-

* Page 493 *lation or Dependance between one County and another, as there was between the ſeveral Manors and County Court; for one County having no

Power or Juriſdiction over another, the *Pares* of one were reaſonably preſumed to be ignorant of what was tranſacted in the other; and therefore the Inveſtiture, which paſſed the Land in one County, was ineffectual to carry the Lands in the other, becauſe that Inveſtiture could be only a Notoriety to the *Pares* of the County where it was made; and conſequently, there having been no Notice g ven to the *Pares* of the other County, by any Solemnity of the transferring of the Poſſeſſion, the Poſſeſſion muſt reſide where it was placed by the laſt Inveſtiture.

But if a Manor extends into two Counties, and the Feoffment be made of the whole Manor, and Livery only in the Part lying in one County, in the Name of the whole Manor, yet the whole Manor ſhall paſs, becauſe the Inveſtiture is a Notoriety equally to all the *Pares* of that Manor of the Tranſmutation of the Poſſeſſion; and tho' they live in different Counties, yet they reſide *in eodem territorio ab eodem feudum habentes*; and therefore are preſumed to be conuſant of every Thing done within the Territory or Manor to which they belong. Perk. Sect. 229.

But if the Manor of *Dale* extends into the Counties of *D.* and *S.* and a Feoffment be made of the Manor of *Dale* in *D.* and Livery and Seiſin in *D.* nothing paſſes by this Livery but that Part of the Manor which lies in *D.* becauſe the Feoffment being confined to the Manor of *Dale* in *D.* nothing can paſs that does not lie in the County of *D.* Perk. Sect. 228.

If a Feoffment be made to *A.* and *B.* by Deed, and Livery is made to *A.* in the Abſence of *B.* in the Name of both, the Livery is good to paſs the Eſtate to both; but if the Feoffment had been made without Deed, and the Livery given to one, in the Name of both, it ſhould operate to him only, becauſe *the Parties are united in a Deed*, they all take as one; therefore Livery to one, in the Name of the reſt, is an actual Delivery to them all, but *without Deed they are not ſo united*; and therefore the Delivery to one, in the Name of ſeveral, is no actual Delivery to the reſt, but the whole Eſtate muſt reſide in him to whom it is delivered, and a ſubſequent Aſſent cannot take it out of him, ſuch Aſſent being not ſo ſolemn as the Feoffment; beſides, in the Caſe of the Feoffment by Deed, *A.* may be looked upon as the Attorney of *B.* to receive Livery; and therefore the Eſtate ſhall immediately veſt in *B.* becauſe every Man is preſumed to aſſent to a Grant for his Advantage; but the Feoffment without Deed will admit of no ſuch Conſtruction, becauſe no Man can receive Livery as Attorney to another, without an Appointment by Deed. Co. Lit. 49, 359. 2 Vent. 202, 205. 5 Co. 95. 2 Rol. Abr. 9. 2 Leon. 23. *Mutton's* Caſe

(C) Of the Charter of Feoffment; and herein what Things are neceſſary to the making a perfect Charter, and how far the Charter governs the Livery which is relative to it.

THE Things, which are eſſentially neceſſary to the making a perfect Charter, are but Sealing and Delivery; for if a Man gives Land to another and his Heirs, and ſeals and delivers the Deed, and gives Livery, it is a good Charter, and the Inheritance ſhall paſs as well as if it had all the formal Parts which are generally uſed in Deeds of Conveyance 2 Rol. Abr. 21. Co. Lit. 7.

*Page 494 * But ſince by the Statute of Frauds and Perjuries, the Charter of Feoffment is made equally neceſſary with the Livery and Seiſin, to paſs the Freehold or Inheritance, it being thereby (a) enacted, "That all Leaſes, "Eſtates, Intereſts of Freehold in any Lands, Tenements or Hereditaments, made or created by Livery and Seiſin only, and not put in "Writing and ſigned by the Parties ſo making or creating the ſame, or "their Agents thereunto lawfully authorized by Writing, ſhall have "the Force and Effect of Leaſes or Eſtates at Will only, and ſhall not "either in Law or Equity be deemed or taken to have any other or "greater Force or Effect;" for this Reaſon it may be neceſſary to conſider the formal Parts of the Charter which are generally uſed in this Sort of Conveyance at this Day.

(a) By 29. Car. 2. c. 3.

(b) But for this *vid.* Tit. *Rents.*
(c) *Vide* Tit. *Warranty.*
(d) And note that if the Deed be ſealed, though it wants the Words *in cujus rei Teſtimonium Sigillum meum appoſui*, yet it is good enough; for the Seal appearing, it muſt be preſumed to be ſet there by the Parties to the Deed. 2 Co. 5. Leon. 25. Owen 23. Bendl. 1.

Theſe are, I. The Premiſſes. II. The *Habendum*. III. The *Tenendum*. IV. The (b) *Reddendum*. V. The Clauſe of (c) Warranty. VI. The (d) *Cujus rei Teſtimonium*, comprehending the Sealing. VII. The Date. *And laſtly*, the *his Teſtibus*.

Co. Lit. 6. a. 9 Co. 47. b. Hob. 275, 313. 2 Rol. Abr. 65. Cro. Jac. 564. Cro. Eliz. 58.

I. Of the Premiſſes of the Deed; and their Office is to name the Grantor and Grantee, and the Thing to be granted or conveyed: Of this two Things are obſervable as regularly true; I. That no Perſon, not named in the Premiſſes of the Deed, can take any Thing by the Deed, though he be afterwards named in the *Habendum*, becauſe it is the Premiſſes of the Deed that makes the Gift; and therefore when the Lands are given to one in the Premiſſes, the *Habendum* cannot give any Share of them to another, becauſe that would be to retract the Gift already made, and conſequently to make a Deed contrary and repugnant in itſelf; ‡ thus, for Inſtance, if a Charter of Feoffment be made between *A.* of the one Part, and *B.* and *C.* of the other Part, and *A.* gives Lands to *B.* *Habendum* to *B.* and *C.* and their Heirs; *C.* takes nothing by the *Habendum*, becauſe all the Lands were given to *B.* and conſequently *C.* cannot hold thoſe Lands which are given before to another; but in this Caſe, if the *Habendum* had been to *B.* and *C.* and their Heirs, to *the Uſe* of *B.* and *C.* this had been a good Limitation of a Uſe, and conſequently the Statute would carry the Poſſeſſion to the Uſe, and *B.* and *C.* thereby become Jointenants.

13 Co. 54. Poph. 126.

‡ Generally in Deeds the firſt Grant, and in Wills the laſt Deviſe, take Place.

So if a Deed of Feoffment be made, without naming any Feoffee in the Premiſſes, *Habendum* to *B.* and his Heirs, it ſeems doubtful whether *B.* ſhall take any Thing by this Gift, for though there be not that Repugnancy in this Caſe as in the former, the Lands being given to nobody in the Premiſſes of the Deed, and conſequently the *Habendum* cannot be ſaid to be contrary to the Premiſſes, but rather explanatory in deſcribing who ſhall hold the Lands which were given in the Premiſſes; and for this Reaſon, it ſeems, that my Lord *Coke* (e) holds, that the Gift to *B.* is good; but by the Opinion of (f) others the Gift is void, becauſe the *Habendum* can only limit the Duration of the Eſtate, but no Man can by Virtue thereof hold Lands which were not given to him.

(e) In Co. Lit. 7. a.
(f) Cro. Eliz. 903. 2 Rol. Abr. 66, 67.

2 Rol. Abr. 67. If Lands be given to a Huſband, *Habendum* to him and his Wife, and to the Heirs of their two Bodies, the Wife takes nothing, becauſe ſhe was not mentioned in the Premiſſes; and therefore ſhall take nothing of that which was before given intirely to her Huſband.

But there are theſe four Exceptions from this Rule; 1. That if Lands be given in Frank-marriage, the Woman that is the Cauſe of the Gift may take by the *Habendum*, though ſhe be not named in the Premiſſes; as if Lands be given to *J. S. Habendum in Liberum Maritagium una cum* the Woman who is Daughter of the Donor; this is a good Eſtate in Frank-marriage to them both; becauſe the Gift being totally on her Account, it is neceſſary to the Creation of the Eſtate in the Huſband that the Wife ſhould take.

Co. Lit. 21. Plow. 158. Cro. Jac. 454. Poph. 126. 2Rol. Abr. 67. * Page 495

2. In Grants by Copy of Court-Roll, as if a Copyholder ſurrenders to his Lord, without limiting any Uſe, and then the Lord grants it in this Manner; *J. S. cepit de Domino, Habendum* to the ſaid *J. S.* and his Wife, and the Heirs of their Bodies begotten, this is a good Eſtate-tail in the Wife; for theſe cuſtomary Grants, that are made in purſuance of a former Surrender, are conſtrued according to the Intention of the Parties, as Wills are; beſides that, the Cuſtom of the Manor is the Rule for the Expoſition of ſuch Sort of Grants, and in many Manors ſuch Sort of Form is uſual.

Poph. 125, 126. *Brook's* Caſe. Cro. Jac. 434. 2Rol. Abr. 67. Cro. Eliz. 323. *Downs* and *Hopkins*.

3. That a Man not named in the Premiſſes may take an Eſtate in Remainder by Limitation in the *Habendum*.

2Rol. Abr. 68. Hob. 313. Cro. Jac. 564.

4. In Wills; for if a Man deviſes Lands to *J. S. Habendum* to him and his Wife, this is a good Deviſe to the Wife; becauſe, in Conſtruction of Wills, the Intention of the Deviſor is chiefly regarded; and wherever that diſcovers itſelf it ſhall take Place, though it be not expreſſed in thoſe Legal Forms that are required in Conveyances executed in a Man's Lifetime.

Plow. 158, 414. 2Rol. Abr. 68.

II. Of the *Habendum*; and the Office of this is to limit the Certainty and Extent of the Eſtate to the Feoffee or Grantee, for the *Habendum* need not repeat the Thing granted; it is ſufficient if it be named in the Premiſſes, becauſe it is the Premiſſes that make the Gift, and the Word *Habendum* does of its own Nature refer to Things mentioned in the Premiſſes.

2Rol. Abr. 65. 2 Co. 55. a. 9 Co. 47.

Of the *Habendum* there are theſe Things obſervable; 1. That the *Habendum* cannot paſs any Thing that is not expreſsly mentioned or contained by Implication in the Premiſſes of the Deed; becauſe the Premiſſes being Part of the Deed by which the Thing is granted, and conſequently that makes the Gift; it follows that the *Habendum*, which only limits the Certainty and Extent of the Eſtate in the Thing given, cannot increaſe or multiply the Gift, becauſe it were abſurd to ſay, that the Grantee ſhould hold a Thing which was never given him.

2Rol. Abr. 65.

Hence it is, that if a Man grants a Manor, *Habendum* together with another Manor, or with the Advowſon of another Manor, only the Manor granted in the Premiſſes ſhall paſs.

2Rol. Abr. 65.

But if a private Perſon grants a Manor *Habendum una cum Advocatione*, which belongs to the Manor, this is a good Conveyance of the Advowſon, becauſe it was impliedly given by the Gift of the Manor itſelf.

2Rol. Abr. 65.

2. How far the *Habendum* may alter or abridge the Gift in the Premiſſes; and here it is regularly true, that the *Habendum*, that is repugnant and contrary to the Premiſſes, is void, and ſhall be rejected; becauſe the Rule in the Interpretation of all Deeds is, that all Grants ſhall be taken moſt ſtrongly againſt the Grantor; and therefore he ſhall not be allowed, by any ſubſequent Part of the Deed to contradict or retract that Gift which he made in the Premiſſes; as if a Man gives Lands to *J. S.* and his Heirs, *Habendum* to him for Life, this is a void *Habendum*, becauſe repugnant to the Premiſſes.

2 Co. 23. *Baldwin's* Caſe.

But for the better Explication of this Rule, it will be neceſſary further to conſider it under theſe Exceptions; 1. That if no expreſs Eſtate be given in the

Hob. 170. Co. Lit. 183.

2 Co. 24. a. 55. 2 Rol. Abr. 65, 66. Cro. Eliz. 254. 8 Co. 154. * Page 496

the Premiſſes, as if a Rent be granted generally in the Premiſſes to *J. S.* this creates an Eſtate for Life in *J. S.* by Implication of Law; that is, the Parties having omitted to determine how long *J. S.* ſhall enjoy the Rent, the Law conſtrues the Grant moſt ſtrongly againſt the Perſon that makes it, and therefore gives *J. S.* an Eſtate in the Rent for his own Life; but if the Grantor had by the *Habendum* limited the Rent to *J. S.* for Years, or at Will, this *Habendum* had been good; for the Law creates an Eſtate for Life in *J. S.* only becauſe there was no expreſs Eſtate given by the Grantor; but when upon the Face of the Deed it evidently appears, that the Rent was given but for a determinate Number of Years, or only at the Will of the Grantor, there the Law will never create an Eſtate againſt the expreſs Proviſion of the Parties, or permit *J. S.* to enjoy the Rent beyond the Period of Time poſitively limited in the Deed.

Cro. Eliz. 254. *Hogg* and *Croſs*. Hob. 171. 2 Rol. Abr. 66. 2 Co. 55. *Buckler*'s Caſe. Moor pl. 591. Cro. Eliz. 451, 585. *Vide* Moor 881. *cont.*

So the *Habendum* may fruſtrate and controul the Eſtate by Implication in the Premiſſes, though the Eſtate limited by the *Habendum* be void itſelf; thus if a Deed of Feoffment be made, and the Lands given generally in the Premiſſes, *Habendum* to the Feoffee, and his Heirs, after the Death of the Feoffor the implied Eſtate for Life ſhall not paſs by the Premiſſes, becauſe it is evidently the Intention of the Deed that no Eſtate ſhall paſs till after the Death of the Feoffor, and the Limitation in the *Habendum* is void; becauſe the Livery cannot paſs the Freehold *in Futuro*, for that would create an Uncertainty of the Freehold, and Strangers would be at a Loſs againſt whom to bring their *Præcipe*, as is before obſerved.

2 Co. 23, 24. *Baldwin*'s Caſe. And. 223. Owen 48.

2. If to the Perfection of an Eſtate limited in the Premiſſes there be a Ceremony neceſſary, which is not requiſite to paſs the Eſtate in the *Habendum*; there if the Ceremony be not performed, to carry the Eſtate in the Premiſſes, the *Habendum* ſhall ſtand, though it be repugnant to the Premiſſes; as if a Man covenants, grants, demiſes, and to Farm lets Land to *A.* and *B.* and the Heirs of *B.* *Habendum* to *A.* and *B.* for three hundred Years, this is but a Term for Years in *A.* and *B.* though there be Words of Inheritance; for it was plainly the Intention of the Leſſor to create a Term only by his uſing the common Words of Demiſe; beſides, it is evident that the Leſſees by *the Premiſſes* could have but an Eſtate at Will, becauſe the Words of Inheritance in the Premiſſes were not ſufficient to carry the Freehold without Livery, which was not made in this Caſe, and conſequently the *Habendum* does not really contradict but enlarge the Gift in the Premiſſes; it is true my Lord *Coke* ſays, at the End of this Caſe, that if Livery had been made, only a Term for Years ſhould have paſſed; becauſe that the Words of Demiſing and Covenants in the Deed plainly diſcover the Intention of the Parties to create a Term; but Q. of this, becauſe theſe are Words of Inheritance in the Premiſſes; and therefore a Livery purſuant to them ought to be taken moſt ſtrongly againſt the Grantor.

8 Co. 154. b. Co. Lit. 21. a. Lit. Rep. 345.

But though the *Habendum* cannot retract the Gift in the Premiſſes, yet it may conſtrue and explain in what Senſe the Words in the Premiſſes ſhall be taken; for it is upon a View of the whole Deed, that the Intent of the Parties muſt be collected; therefore if Lands be given to a Man and his Heirs, *Habendum* to him and the Heirs of his Body, this is but an Eſtate-tail; becauſe the *Habendum* only expounds the general Word *Heir* in the Premiſſes, and ſuch Expoſition is conſiſtent, and does not deſtroy the Operation of the Words mentioned in the Premiſſes, but only explains in what Senſe they are to be taken, and what Heirs are comprehended.

2 Jon. 4. *Pilſworth* and *Pyett*. 2 Keb. 865. S. C.

A Prebend demiſed Land, of which he was ſeiſed in Right of the Church, to *J. S.* and his Heirs, *Habendum* to him and his Heirs for three Lives, and held to be a good Leaſe againſt his Succeſſor; becauſe the *Habendum* explains in what Senſe and to what Purpoſe the Word *Heirs* was uſed in the Premiſſes, *viz.* to create a Special Occupancy in

the Leſſee; for if the Demiſe had been only to *J. S. Habendum* for three Lives, without inſerting the Word *Heirs*, any Stranger, upon the Death of *J. S.* might have entered and held the Land as a general Occupant, during the Lives of the *Ceſtui que vies*; therefore the Heirs of the Leſſee ſhall enjoy the Land, becauſe they are mentioned in the Premiſſes; but * the *Habendum* explains in what Manner they ſhall enjoy it, and that is as Special Occupants during the three Lives. * Page 497

But it has been held, where a Huſband was ſeiſed of Land in Right of his Wife for her Life, and they both by Deed of Feoffment conveyed the Land to *J. S.* and his Heirs, *Habendum* to him and his Heirs, to the Uſe of him and his Heirs for the Life of the Wife; that the whole Fee-ſimple paſſed to *J. S.* and ſo was a Forfeiture of the Eſtate; for there being a Fee-ſimple conveyed to *J. S.* by the Livery, and the Premiſſes and *Habendum* of the Deed, the Words of Reſtriction for the Life of the Wife refer only to the Limitation of the Uſe, and conſequently the Fee-ſimple remains in the Feoffee; whereas, in the former Caſe, the Conveyance was wholly at Common Law; and therefore the Reſtriction in the *Habendum* muſt relate to that or be void, which is never admitted where they are only explanatory and not repugnant. Cro.Eliz. 131. *Piers* and *Hoe.*

So of a Rent; as if the Grant had been to *J. S.* and his Heirs, Executors and Aſſigns, *Habendum* to him and his Heirs, Executors and Aſſigns, for or during the Life of *J. N.* this is a good *Habendum*, and the Leſſee has only an Eſtate for Life; for the *Habendum* does not defeat, but explain the Operation and Uſe of the Word *Heirs* in the Premiſſes; for as this Caſe ſtands, upon the Death of *J. S.* his Heirs ſhall enjoy the Rent during the Life of *J. N.* as Special Occupants; whereas if the Rent had been granted only to *J. S.* for the Life of *J. N.* it would have determined upon the Death of *J. S.* becauſe there can be no general Occupant of a Rent; and the Heirs of *J. S.* could not take, becauſe not named in the Grant. Moor 876. 2 Rol. Abr. 66. *Wilkins* and *Parrott.* Brownl. 169. Bulſ. 135.

If the Grant had been to him and his Heirs, *Habendum* to him for his Life, and the Lives of three others; this is likewiſe a good *Habendum*, becauſe it does not render the Word *Heirs* in the Premiſſes uſeleſs, but expounds them only to create a Special Occupancy, and thereby to prevent the Determination of the Eſtate by the Death of the Grantee. Bulſ. 135, 136. *Bowles* and *Poor.* Cro. Jac. 282.

But if the Grant in the Premiſſes be of a Rent to a Man and his Heirs, *Habendum* for the Life of the Grantee, this is a void *Habendum*, becauſe it totally defeats the Operation of the Word *Heirs* in the Premiſſes, and conſequently is repugnant and not explanatory, and therefore void. 2 Co. 23, 24.

If a Man makes a Feoffment in Fee in 20 Acres to *A.* and *B. Habendum* one Moiety to *A.* and the other Moiety to *B.* this is good, and the *Habendum* makes them Tenants in Common; for though the Premiſſes be joint, and therefore of themſelves would operate to give a joint Eſtate and Poſſeſſion, yet the *Habendum* explaining the Manner of Poſſeſſing is not inconſiſtent or repugnant, becauſe it makes no Diviſion of that undivided Poſſeſſion which was given in the Premiſſes. Co.Lit. 190.b. 183. b. Hob. 172.

But if the *Habendum* had limited ten Acres to *A.* and the other ten Acres to *B.* this had been void, becauſe the *Habendum*, in this Caſe, contradicts and is repugnant to the Premiſſes; for by the Premiſſes, the intire and undivided Poſſeſſion of the Whole twenty Acres is equally given to both; and therefore the *Habendum* that excludes *A.* out of his Share of ten Acres, and *B.* out of his Share of ten Acres, is contradictory to the Premiſſes, and therefore void. Hob. 172.

If a Leaſe be made to two, *Habendum* to one for Life, Remainder to the other for Life, this is a good *Habendum*, becauſe it explains the Deſign of the Gift in the Premiſſes, and ſhews that they ſhall take the Whole in Succeſſion one after the other. Co. Lit. 183. 190. 2 Co. 55. 2 Rol. Abr. 65.

Dyer 361. Bulſ. 135.

So a Leaſe to the Mother and Son, *Habendum eis pro termino vitæ eorum & alterius eorum diutius vivent', ſucceſſive uni eorum poſt alterum, ſicut nominantur in Charta & non conjunctim*; here the *Habendum* explains in what Manner they ſhall enjoy the Land, nor is the *Habendum* void for the Uncertainty who ſhall take firſt, becauſe they are to take one after another, as they are named in the Deed; and therefore the * Mother was adjudged to be Tenant for Life, the Remainder to the Son.

* Page 498

Hob. 313. *Windſmore* and *Hobert.*

But a Demiſe to *A. Habendum* to him, *B.* and *C. pro termino vitæ eorum & alterius eorum ſucceſſive diutius vivent'*; this is a void *Habendum*, and neither *B.* nor *C.* can take any Thing, not as Leſſees in Poſſeſſion, becauſe not Parties to the Deed, or named in the Premiſſes; nor by way of Remainder, becauſe they cannot take jointly in Remainder, the Limitation being to them *ſucceſſive*; nor can they take in Succeſſion one after the other becauſe *non conſtat* by the Deed who ſhall take firſt in Remainder.

Cro. Eliz. 89, 107. Moor 267. Leon. 217.

A. made a Leaſe to *B. C.* and *D.* for their Lives, *Proviſo*, and it is covenanted and granted, that *C.* ſhall not enjoy the Land during the Life of *B.* and that *D.* ſhould not enjoy the Land during the Life of *C.* this is but a collateral Covenant, which ſhall not alter the Nature of the Eſtate given by the Premiſſes which create the Gift.

2 Rol. Abr. 66. Hob. 171. Moor 881. *Underhay* and *Underhay.* Cro. Eliz. 269 ill reported.

A. made a Leaſe for three Lives, and after grants the Reverſion to *J. S. Habendum* to him for Life, which ſaid Eſtate for Life to begin after the Death of the three firſt Leſſees; this is a good Grant of the Reverſion to *J. S.* during his Life, to commence immediately; for though the *Habendum*, as is already obſerved, may totally control any Implication in the Premiſſes, and defeat the Eſtate therein given by Implication of Law, yet in this Caſe there was an expreſs Eſtate given for the Life of the Grantee, and no ſubſequent Words ſhall defeat that Eſtate which was complete and expreſs by the former Part of the Deed; and therefore the ſubſequent Words, which would limit the Eſtate to commence *in futuro*, are void; becauſe a Freehold cannot be granted *in futuro*, for the Reaſons already obſerved.

Dyer 272. *Lilley* and *Whitney.* 2 Rol. Abr. 66. Hob. 171. Cro. Eliz. 255.

A Termor for Years, reciting by Indenture his Term and Leaſe, grants all his Term, Eſtate and Intereſt, to another, *Habendum ſibi & aſſignatis ſuis, immediate poſt mortem* of the Grantor; this was held a void *Habendum*, becauſe, by the Grant in the Premiſſes, the whole Intereſt was abſolutely conveyed; and therefore the *Habendum*, that retracts the Grant, is void; for it may happen that the Grantor may outlive the Term, and then the *Habendum* defeats and is repugnant to the Grant.

Plow. 147, 148, 160. *Throgmorton* v. *Tracy.*

A. makes a Leaſe for three Lives of Lands, and afterwards demiſes to *J. S.* for ten Years the Reverſion of the Lands, *Habendum* the ſaid Lands from *Michaelmas* next enſuing, after the Death of the Leſſee for Lives; this is a good Demiſe to *J. S.* becauſe the Word *Reverſion*, including not only the Intereſt or Eſtate which *A.* had depending upon the Eſtate for Lives, but likewiſe the Land itſelf, returning after the Determination of the particular Eſtate, the *Habendum*, which explains in what Senſe the Word *Habendum* is to be taken, ſhall ſtand; and therefore in this Caſe *J. S.* was adjudged to have a Term for Years in the Land, to commence upon the Determination of the Freehold.

III. The next formal Part of the Deed is the *Tenendum*, and this, ſince the Statute of *Quia Emptores Terrarum*, muſt be to hold of the Chief Lord of the Fee, if a Fee-ſimple be conveyed; but if an Eſtate-tail be conveyed, it may be to hold of the Donor. [See farther *Perk. ſ.* 635, *&c.*]

[IV. Of the *Reddendum*. A Rent Service being ſomething in Retribution for the Land that paſſes, it muſt be reſerved by ſuch Words as imply a Return of ſomething that was not in the Grantor before, in Lieu of the Land given; and therefore *Reddendo*, *Reſervando*, *Solvendo*, *Faciendo*, *Incheniendo*, and ſuch like, are proper Words by which a Rent may be reſerved.

Co. Lit. 47. *a.* *Perk.* § 625. *Plow.* 142. 2 *Rol. Abr.* 449. See farther 4 V. 341. D. *&c.*

V. Of the Clauſe of *Warranty*. A Warranty is a Covenant real, annexed to Lands or Tenements, whereby a Man and his Heirs are bound to warrant the ſame Lands, and to render in Value, if they are evicted by a former Title. *Co. Lit.* 365. a.—And Warranty is *expreſs* or *implied*, *Id.* No Word in Law makes an *expreſs* Warranty except the Word *Warrantizo*. *Lit. Sect.* 733. But a *Feoffment* by the Word *Dedi*, implies a Warranty to the Feoffee and his Heirs during the Life of the Feoffor. *Co Lit.* 384. *a.*—And before the Stat. *quia Emptores Terrarum*, 18 *Ed.* 1. *c.* 1. if the Feoffment was by *Dedi Tenendum of the Feoffor and his Heirs*, the Heirs as well as the Feoffor himſelf were bound to Warranty in reſpect of the Tenure. *Co. Lit.* 384. a.—So in Exchange the Word *Excambium* imports a mutual Warranty. *Co. Lit.* 384. *a.*—But *Conceſſi* does not imply a Warranty. *Co. Lit.* 384. a. See farther *Com. Dig.* 3 V. 430.

VI. Of the *Cujus rei Teſtimonium*, comprehending the Sealing. The Clauſe in *Cujus rei Teſtimonium* is not neceſſary. *Co. Lit.* 6. *R.* 1. *Leon.* 25.——Seals were uſed *Temp. Reg. Edgar*, though they were not common in the Time of the *Saxons*. *Co. Lit.* 7. *a. Seld. Off. Chan.* 3. *Dub. Vide the Diſſertat. prefixed to Madox's Form. Ang.* 27. And afterwards in the Time of *Edward* the *Confeſſor* and *William* the *Conqueror*. *Co. Lit.* 7. *a.*——The Seal is eſſential to the Deed. *Co. Lit.* 6. *a.* 7. *a.*———And therefore regularly it is not the Deed of him who has not ſealed it. 2 *Rol. Abr.* 23. *l.* 25.——And *per ſcriptum ſuum* is not ſufficient, without ſaying, that it *was ſealed*, or *was his Deed*. 1 *Leon.* 310. *Com. Dig.* 5 V. 220.——But it is not material with what Seal the Deed is ſealed; for the Seal of a Stranger is ſufficient. 2 *Rol. Abr.* 23. *l.* 35. *Perk.* § 130, 132. 2 *Rol. Abr.* 22. *l.* 1.——And if twenty ſeal with the ſame Seal, it is the Deed of all. 2 *Rol. Abr.* 23. *l.* 30.——And it need not be mentioned in the Deed *Sigillum appoſui*. *R.* 2. *Co.* 5. *a.* 2 *Rol. Abr.* 21. *l.* 50. 22. *l.* 3. See farther *Com. Dig.* 3 V. 325, 6.

VII. Of the *Date*. The Date is not eſſential to a Deed; for if it has not any Date, or a falſe or impoſſible Date, the Deed ſhall be good, and ſhall take Effect from the Time of Delivery. *Co. Lit.* 6. *a.* *R.* 2. *Co.* 5. *a.* 2 *Rol. Abr.* 21. *l.* 41. *P.* 2. 3 *Leon.* 100. *Keilw.* 34. *b.* *R. Yelv.* 193. *Vide the Diſſert. prefixed to Mad. Form. Ang.* 30.——So if it hath the Day of the Month, but no Year is mentioned; for that is a void Date. 2 *Rol. Abr.* 27. *l.* 22.———Where a Deed has a void Date, it may be pleaded that it was delivered at ſome other Day than that mentioned in the Deed. 2 *Rol. Abr.* 27. *l.* 25. *Yelv.* 194. *& vide* 3 *Lev.* 348. *Cro. Eliz.* 890. *&* *Com. Dig.* 3 V. 328.

VIII. *Laſtly*, of the *His Teſtibus*. Witneſſes are not eſſential to a Deed. *Com. Dig.* 3 V. 328.——Though the Clauſe of *His Teſtibus* continued in the Deeds of Subjects till the Time of *H.* 8. 2 *Inſt.* 78.——And was uſed in the King's Patents *Temp. H.* 3. *Ed.* 1, 2, 3. and before. 2 *Inſt.* 77.]

* (D) Who may make a Feoffment.

* Page 499

IF a Perſon *Non Compos* makes a Feoffment, and gives Livery himſelf, this is allowed on all Hands to be good to bind himſelf, † ſo that he can by no Proceſs or Plea avoid the Feoffment, and reſtore himſelf to the Poſ-

2 Rol. Abr. 2. Co. Lit. 247. 4 Co. 125. a. Show. Parl. Caſes 153 &

† See *infra*, as to his *Heir*.

vide Tit. *Ideots and Lunatics.*

Poſſeſſion; the ſame Law of an Ideot; and the Reaſon is, becauſe the Inveſtiture being made before the *Pares Curiæ*, their ſolemn Atteſtation could not be defeated by the Perſon himſelf, becauſe it is preſumed they are competent Judges of the Ability of the Feoffor to make ſuch Feoffment.

4 Co. 125. 2 Rol. Abr. 2. 8 Co. 42, 43. *Whittingham's* Caſe.

But if an Infant makes a Feoffment, and makes Livery himſelf, this ſhall not bind him, but he himſelf may avoid it by Writ of *Dum fuit infra ætatem*; yet the Feoffment of the Infant is not void in itſelf, as well becauſe he is allowed to contract for his Benefit, as that there ought to be ſome Act of Notoriety to reſtore the Poſſeſſion to him, equal to that which transferred it from him.

8 Co. 45. Co. Lit. 247. a. 4 Co. 125. a. 2 Rol. Abr. 2. Show. Parl. Caſes 153.

But if an Infant makes a Feoffment, and a Letter of Attorney to make Livery, that is void; ſo if a Perſon *Non compos* makes a Surrender or Releaſe, this is void in Law; ſo if he makes a Letter of Attorney to give Livery; but the Heir at Law, after the Death of the Perſon of *non ſane* Memory, or Ideot, may avoid his Feoffment; and ſo may the King upon an Office found of his Lunacy during his Life.

4 Co. 125. 2 Rol. Abr. 2. 8 Co. 42, 43, 45. Cro. Jac. 617. *Gardiner* and *Norman*. Perk. Sect. 183.

As the Infant's Feoffment is voidable by *Dum fuit infra ætatem*, when he comes of full Age, ſo it is voidable by him by Entry during his Nonage, but his Letter of Attorney is merely void; and the ſame Law ſeems to be of a Feme Covert, for if ſhe makes a Feoffment upon the Land, it is voidable by her Huſband; but if ſhe makes a Letter of Attorney to give Livery, it is abſolutely void in Law; and the Reaſon is, becauſe the Contracts of thoſe that are diſabled by Law to contract were void Contracts; but their Infeudations were not in themſelves void, becauſe they were made *coram paribus Curiæ*, who were preſumed not to atteſt Contracts of Perſons diſabled by the Law to contract, eſpecially ſince ſuch Contracts were made for Military or Socage Service, which were for the good of the Commonwealth; and by thoſe Infeudations a Stranger was directed to bring his *Præcipe* againſt the Perſon that was actually inveſted in the Land, wherefore the Infant's Feoffment was good till it was avoided by an Act of equal Notoriety, to wit, by his Entry *coram paribus*, which was equally ſolemn with the Act of Feoffment, or by bringing his *Action at full Age*, when the Law had enabled him, by Action in a Court of Record, to ſet aſide the Feoffment that he had made during Minority; but the Law enabled him by Entry to ſet aſide the Acts *coram paribus* during Minority, becauſe the *Pares* might undo what was done *in pais*; but the Courts of Juſtice were not to deſtroy the Act *in pais* till the Infant, by his own Diſcretion, had choſen to avoid them, becauſe it was derogatory to the Dignity of the Courts of Juſtice to ſet aſide the ſolemn Acts *in pais*, till the Infant had come to ſuch Age of Diſcretion as might make it fully appear that the Feoffment was made during his Diſability; for the Infant was not received to diſable himſelf during the Time of his Diſability; but during ſuch Diſability he might, by equal Solemnity *in pais*, diſable himſelf, ſince ſuch an Act was only *coram paribus*, in the ſame Manner as the Feoffment itſelf was made, but the Warrant of Attorney of the Infant was *ipſo facto* void; and therefore ſuch Feoffee was a Diſſeiſor, as if no Authority had been committed to the Attorney to make the Feoffment; but in the Caſe of the *Non Compos* he was not admitted to ſtultify himſelf, becauſe there was no

* Page 500

* ſtated Time when ſuch Perſons returned to Senſe and Underſtanding, and therefore they could not be preſumed to be conſcious themſelves of their own Follies or Defects; but the King, who had the Care of all his Subjects, might, by ſolemn Office found, avoid ſuch Acts of Inſanity, and ſo might the Heir at Law after their Death.

(E) Of making it by Letter of Attorney.

A Man may either give or receive Livery by his Attorney; for ſince a Contract is no more than the Conſent of a Man's Mind to a Thing, where that Conſent or Concurrence appears, it were moſt unreaſonable to oblige each Perſon to be preſent at the Execution of the Contract, ſince it may as well be formed by any other Perſon delegated for that Purpoſe by the Parties to the Contract. Co. Lit. 52. 2 Rol. Abr. 8.

But ſuch Delegation or Authority, to give or receive Livery, muſt be by Deed, that it may appear to the Court, that the Attorney had a Commiſſion to repreſent the Parties that are to give or take Livery, and whether the Authority was purſued. Co. Lit. 48. b. 52. a. 2 Rol Abr. 8. *Palfreman* and *Grobie*.

For if the Letter of Attorney be to make Livery upon Condition, as to make a Feoffment conditional, and the Attorney delivers Seiſin abſolutely, the Livery is not good, becauſe the Attorney had no Authority to create an abſolute Fee-ſimple; and therefore ſuch abſolute Feoffment ſhall not bind the Feoffor, becauſe he gave no ſuch Authority; and hence in ſome Books the Attorney is called a Diſſeiſor. 11 H. 4. 3. 2 Rol. Abr. 90. Co. Lit. 258. Perk. Sect. 188.

But if the Letter of Attorney had been to make Livery abſolutely, and the Attorney had made it upon Condition, this ſeems a good Execution of his Power, and the Feoffment good; becauſe when the Attorney had once delivered Poſſeſſion, he fully executed his Power; and the Condition annexed to it, being without Authority, is void; and therefore ſhall not deſtroy the Operation of the Livery. 26 Aſſ. 39. 2 Rol. Abr. 8. Co. Lit. 258. Perk. Sect. 192.

If a Warrant of Attorney be given to make Livery to one, and the Attorney makes Livery to two, or if the Attorney had Authority to make Livery of *Black-acre*, and he made Livery of *Black-acre* and *White-acre*, though the Attorney has in theſe Caſes done more, yet there is no Reaſon that ſhould vitiate what he has done purſuant to his Power, ſince what he did beyond it is a perfect Nullity, and void. Perk. Sect. 189.

But if the Attorney were to deliver Seiſin to two, and he had made Livery only to one, † that had been void, becauſe he had no Authority to deliver the whole Poſſeſſion to one excluſive of the other, and therefore it is void for the Whole. Perk. Sect. 188. † See *infra*, the laſt Caſe in this Page.

An Attorney cannot make Livery within View, becauſe ſuch Livery is made by Signs or Words, inſtead of the Act of Delivery; beſides, the Power of the Attorney is to deliver the Poſſeſſion, but that Power is not executed by the Livery in View, becauſe the Poſſeſſion is not in the Feoffee till actual Entry made by him, and conſequently the Attorney has not executed his Authority. Co. Lit. 52. 2 Rol. Abr. 9.

If a Letter of Attorney be given to two jointly to *take* Livery, and the Feoffor makes Livery to one in the Abſence of the other, in the Name of both, this is void; becauſe they being appointed jointly to receive Livery are conſidered but as one. Co. Lit. 49. 2 Rol. Abr. 8.

But if *a Feoffment be made* to *A.* and *B.* and the Feoffor gives a Letter of Attorney to deliver Seiſin, and *J. S.* gives Livery to *A.* in the Abſence of *B.* in the Name of both; this is a good Livery, for though the intire Poſſeſſion be delivered to one only, yet they being Joint-tenants by the Deed of Feoffment, ſuch Livery to one makes no Alteration or Change in the Poſſeſſion, becauſe, if the Livery had been made to both, each had been placed in the Poſſeſſion, beſides that, every Man being preſumed to accept a Gift for his Advantage, *A.* is looked upon as the Attorney * Page 501 Co. Lit. 49. 2 Rol. Abr. 8.

torney of *B.* to receive the Poſſeſſion for him; and therefore the Livery to *A.* enures to the Benefit of *B.* till he diſagrees to it.

Dyer 62. Rol. Abr. 326. But if a Letter of Attorney be made to three *conjunctim et diviſim*, and two only make Livery, this is not good, * becauſe not purſuant to their Authority, for the Delegation was to them all three, or to each of them ſeparately; yet if the third was preſent at the Time of the Livery made by two, though he did not actually join with them in the Act of Livery, yet the Livery is good; becauſe when they all three are upon the Land for that Purpoſe, and two make Livery in the Preſence of the Third, there is his Concurrence to the Act, though he did not join in it actually, ſince he did not diſſent from it.

* *Sed qu. de hoc?*

Co. Lit. 52. b. Poph. 103. Dyer 131. a. 340. a. 2 Rol. Abr. 9. If a Letter of Attorney be given to *A.* to make Livery of Lands already in Leaſe, the Attorney may enter upon the Leſſee in order to make Livery; becauſe, while the Leſſee continues in Poſſeſſion, the Attorney cannot deliver Seiſin of it; and therefore, to execute the Power given him by the Letter of Attorney, it is neceſſary he ſhould have a Power to enter upon the Leſſee; but by *Rolle*, it is the ſafer Way to inſert a Clauſe in the Letter of Attorney, for the Attorney to enter *& omnes alios inde expellend'*.

Co. Lit. 52. a. 2 Rol. Abr. 9. If *A.* be diſſeiſed of *Black-Acre* and *White-Acre*, and gives a Letter of Attorney to enter into both, and make Livery, if the Attorney enters into one Acre only, and makes Livery *ſecundum formam Chartæ*, this is not good, becauſe the Attorney has not purſued his Authority; for the Eſtate of the Diſſeiſſor cannot be defeated without an Entry into both Acres, and till the Eſtate be defeated, the Attorney cannot execute his Power in the Manner it was delegated; and therefore what he did in this Caſe was void.

2 Rol. Abr. 9. Co. Lit. 52. Perk. Sect. 183. This Power of the Attorney muſt be executed during the Life of the Perſon that gives it, becauſe the Letter of Attorney is to conſtitute the Attorney my Repreſentative for ſuch a Purpoſe, and therefore can continue in Force only during the Life of me, that am to be repreſented. And hence it is, that if *J. S.* make a Letter of Attorney to deliver Seiſin after my Death, it is void; becauſe he cannot deliver Seiſin during my Life, for that were plainly without any Authority from me; nor can he do it after my Death for the former Reaſon.

2 Rol. Abr. 8, 9, & *vide* Co. Lit. 52. This Authority to give Livery may be delegated by Deed indented, tho' the Attorney be not Party to the Deed, becauſe the Attorney takes nothing by the Deed, but has only a naked Authority delegated to him; and therefore, ſince a Man may take an Eſtate in Remainder, though he is not Party to the Deed, *a fortiori* one not Party to the Deed may receive a naked Authority or Power by it.

11 H. 7. 19. 14 H. 8. 3. Co. Lit 52. b. 2 Rol. Abr. 12. But if any Corporation Aggregate, as a Mayor and Commonalty, or Dean and Chapter, make a Feoffment and Letter of Attorney to deliver Seiſin, this Authority does not determine by the Death of the Mayor or Dean; but the Attorney may well execute the Power after their Death, becauſe the Letter of Attorney is an Authority from the Body Aggregate, which ſubſiſts after the Death of the Mayor or Dean, and therefore may be repreſented by their Attorney; but if the Dean or Mayor be named by their own private Names, and die before Livery, or be removed, Livery after ſeems not good.

Co. Lit. 52. Perk. Sect. 187. There are few or no Perſons excluded from exerciſing this Power of delivering Seiſin, for Monks, Infants, Femes Covert, Perſons Attainted, Outlawed, Excommunicated, Villeins, Aliens, *&c.* may be Attornies; for this being only a *naked Authority*, the Execution of it can be attended with no Manner of Prejudice to the Perſons under theſe Incapacities * or Diſabilities, or to any other Perſon, who by Law may claim any Intereſt of ſuch diſabled Perſons after their Death.

*Page 502

A Feme

A Feme Covert may be an Attorney to deliver Seiſin to her Huſband,† and ſo may he in Remainder be an Attorney to make Livery to the Tenant for Life. Co. Lit. 52. a. Perk. Sect. 198.

† So a Huſband may be Attorney for his Wife. Co. Lit. 52. a.

If Leſſee for Life make a Deed of Feoffment and Letter of Attorney to his Leſſor to deliver Seiſin, if the Leſſor makes Livery accordingly, it is a good Feoffment; but the Leſſor, notwithſtanding he gave Livery himſelf, may enter for the Forfeiture of the Tenant for Life; becauſe the Freehold being in the Tenant for Life, the Leſſor was only his Repreſentative to transfer it; but if the Tenant had been only Leſſee for Years, and the Leſſor had made Livery, that had been no Forfeiture of the Term; becauſe, the Freehold being only in the Leſſor, he could not be the Repreſentative of the Termor to convey what the Termor had not; and therefore the Freehold, which paſt by the Livery, muſt proceed from the Leſſor himſelf, and conſequently ſhall bind him. Co. Lit. 52. Perk. Sect. 200.

If *A.* makes a Leaſe for Years to *B.* and after makes a Deed of Feoffment with a Letter of Attorney to *B.* to deliver Seiſin, and *B.* makes Livery accordingly, this ſhall not extinguiſh or affect his Term, becauſe the Livery was made to paſs the Freehold, and that he did as Repreſentative to the Leſſor; and therefore, ſince the Feoffee can claim nothing from the Leſſee, the Intereſt of the Leſſee remains as it was, unaffected by the Feoffment. Co. Lit. 52.

Fines and Amercements.

IT ſeems that originally all Puniſhments were Corporal; but that after the Uſe of Money, when the Profits of the Courts aroſe from the Money paid out of Civil Cauſes, and the Fines and Confiſcations in Criminal ones, the Commutation of Puniſhments was allowed of, and the Corporal Puniſhment, which was only *in Terrorem*, changed into the Pecuniary, whereby they found their own Advantage.

This begot the Diſtinction between the greater and leſſer Offences; for in the *Crimina Majora* there was at leaſt a Fine to the King, which was levied by a *Capiatur*; but upon the leſſer Offences there was only an Amercement, which was affeered, and for which a *Diſtrtngas* or Action of Debt only lay.

But for the better underſtanding hereof we ſhall conſider,

(A) Who have ſufficient Authority to fine and amerce. 503.

(B) For what Offences the Party is to be fined or amerced. 504.

(C) In

Fines and Amercements.

*Page 503 * (C) In what Actions or Proceedings there ought to be a Fine or Amercement. 506.

And herein,

1. Of the Nature of the Action, in which there ought to be a Fine or Amercement. 506.
2. At what Time to be awarded. 508.
3. Whether to be awarded when the Party is acquitted as to Part. 509.
4. Whether to be awarded where there are ſeveral Parties, and ſome of them only acquitted. 510.
5. Of awarding Fines and Amercements jointly or ſeverally. 511.
6. Whether the Party can be twice amerced in the ſame Action. 512.

(D) Where a Fine ought to be awarded, and not an Amercement, & vice verſa. 513.

(E) Who, in Reſpect of their Perſons, are not to be fined or amerced. 515.

(F) Of the Reaſonableneſs of the Fine, and herein of mitigating or aggravating it. 517.

(G) Of the Reaſonableneſs of an Amercement, and the Affeerment thereof. 517.

And herein,

1. Of the Neceſſity of an Affeerment. 517.
2. By whom the Affeerment is to be. 519.

(H) Of the Manner of recovering Fines and Amercements. 519.

(A) Who have ſufficient Authority to fine and amerce.

8 Co. 39. Dalt. 400. (a) But no Court, unleſs of Record, can fine or impriſon. 11 Co. 43. b. Godb. 381. S. P. adjudged. Co. Lit. 117.—that all Courts of Common Law that have Power given them to fine and impriſon, are thereby made Courts of Record. Salk. 200. pl. 1.

REGULARLY all Courts of (a) Record may fine and impriſon an Offender, if the Nature of the Offence be ſuch as deſerves ſuch Puniſhment.

2 Inſt. 142. 8 Co. 38.

Therefore the Sheriff in his *Torn* may impoſe a Fine on all ſuch as are guilty of any Contempt in the Face of the Court, and may alſo impoſe what

what reaſonable Fine he ſhall think fitting upon a Suitor refuſing to be ſworn, or upon a Bailiff refuſing to make a Panel, &c. or upon a Tithingman neglecting to make his Preſentment, or upon one of the Jury refuſing to preſent the Articles wherewith they are charged, or upon a Perſon duly choſen Conſtable refuſing to be ſworn.

* Alſo the Steward of a Court-Leet may by Recognizance bind any Perſon to the Peace who ſhall make an Affray in his Preſence, ſitting the Court, or may commit him to (*a*) Ward, either for Want of Sureties, or by Way of Puniſhment, without demanding any Sureties of him; in which Caſe he may afterwards impoſe a Fine according to his Diſcretion.

* Page 504

F. N. B. 82. Dalt. c. 1. Lamb. c. 3. 10H. 6. 10. b. Cromp. 7.

2 Hawk. P. C. 4. (*a*) But in 11 Co. 43. it is ſaid, that ſome Courts may fine but not impriſon; as the Leet. Rol. Rep. 74. S. P. by my Lord *Coke*; and in Rol. Rep. 35. it is ſaid by *Coke*, that this is the only Court that can fine but not impriſon.

Alſo the Sheriff in his *Torn*, and the Steward of a Court-Leet, have a diſcretionary Power, either to award a Fine or Amercement for Contempt to the Court; as for a Suitor's refuſing to be ſworn, &c. and the (*b*) Steward of a Court-Leet may either amerce or fine an Offender, upon an Indictment for an Offence not capital, within his Juriſdiction, without any farther ‡ Proceeding or Trial; eſpecially if the Crime were any Way enormous; as an Affray accompanied with Wounding.

Keilw. 66. Kitchin 43, 51.

(*b*) But the Statute 1 E. 4. c. 2. reſtrains the Sheriff from levying any Fines or Amercements on Indictments found before him.

‡ *Qu. de hoc?*

It is ſaid, that ſome Courts may impriſon but not fine, as the Conſtables at the Petit Seſſions.

11 Co. 44. Rol. Rep. 74.

Alſo ſome (*c*) Courts cannot fine or impriſon, but amerce, as the County, Hundred, &c.

11 Co. 43. b.

(*c*) *A.* was ſeiſed of the Manor of *Graveſend*, and preſcribed for a Water Court within his Manor, for Reformation of the Diſorders amongſt Watermen; and whether this Court was not in nature of a Leet, and not a Court-Baron, ſo that the Steward, without any Special Preſcription, might aſſeſs a Fine, Leon. 216. *dubitatur*.

But ſome (*d*) Courts can neither fine, impriſon, nor amerce; as (*e*) Eccleſiaſtical Courts held before (*f*) the Ordinary, Archdeacon, &c. or their Commiſſaries, and ſuch who proceed according to the Canon or Civil Law.

11 Co. 44. a.

(*d*) No *Engliſh* Court can fine for not appearing to anſwer a Bill there. Rol. Rep. 336. Nor can the Chancellor for Breach of a Decree. 4 Inſt. 84. (*e*) Their Proceedings are only by Eccleſiaſtical Cenſures. 4 Inſt. 324. *Vide* 16 Car. 1. c. 11. par. 4. 13 Car. 2. c. 12. Noy 17. (*f*) But whether the High Commiſſion Court (while ſtanding) could fine and impriſon, was *vexata Quæſtio*. *Vide* Poph. 60. Cro. Car. 582. 4 Inſt. 324, &c. 332. fully conſidered, and that they could not, 16 Car. c. 11. par. 2. Such Fines and Impriſonment recited to have been uſed to the Oppreſſion of the Subject.—That they uſed to fine and impriſon, which was illegal; yet the Parties were remanded on a *Habeas Corpus*. Comb. 306. *per Holt* C. J.

(B) For what Offences the Party is to be fined or amerced.

EVERY Court of Record may injoin the People to keep Silence under a Pain, and impoſe reaſonable Fines, not only on ſuch as ſhall be convicted before them of any Crime on a formal Proſecution, but alſo on all ſuch as ſhall be guilty of any Contempt in the Face of the Court; as by giving

11 H. 6. 12. b. Rol. Abr. 219. 8 Co. 38. 11 Co. 43. Cro. Eliz. 581. Sid. 145.

giving opprobrious Language to the Judge, or obſtinately refuſing to do their Duty as Officers of the Court.

40 Aſſ. 10. for this *vide* Head of *Juries*.

If any of the Jury give their Verdict to the Court, before they are all agreed of their Verdict, they may be fined.

* Page 505

8 Co. 38. b. *Grieſly's* Caſe. Sav. 93.

* If Time out of Mind a Conſtable hath yearly been elected, and preſented by the Jury at a Leet, and *J. S.* by them is elected and preſented Conſtable, and being (*a*) in Court, and by the Steward required to take his Oath accordingly, refuſes and departs in Contempt of the Court, the Steward may impoſe a Fine on him.

(*a*) That the Steward may impoſe a Fine upon a Perſon who is elected by the Homage, if he is preſent at the Leet, and refuſes to be ſworn to execute the Office; but if the Perſon is not preſent, the Steward cannot fine him, but he may be amerced, which muſt be preſented at the next Court, and affeered; but the Party ought to be ſummoned, and a Time and Place ought to be appointed under a Penalty, when and where he ſhall come, and before whom to take the Oath; and it is not ſufficient to alledge in general that he had Notice, for though he be an Inhabitant, yet he may be eſſoined. 5 Mod. 130. adjudged.

8 Co. 38. b. So if a Tithing-man refuſe to make a Preſentment in a Leet, the Steward may impoſe a reaſonable Fine on him.

8 Co. 38. b. So if one of the Jury in a Leet depart without giving his Verdict, he ſhall be fined by the Steward.

3 Inſt. 53. If one is preſent when a Murder is done, and does not his beſt Endeavour to apprehend the Murderer, he ſhall be fined and impriſoned.

Noy 50. So if two are fighting, and others looking on, who do not endeavour to part them, if one is killed, the Lookers on may be indicted and fined to the King.

4 Inſt. 297. If at a Juſtice-Seat, held within a Foreſt, a Man makes a falſe Claim of Privilege he ſhall be fined.

Keb. 278. 2 Hawk. P. C. 48. If a dead Body in Priſon, or other Place, whereupon an Inqueſt ought to be taken, be interred, or ſuffered to lie ſo long, that it putrify before the Coroner hath viewed it, the Gaoler or Townſhip ſhall be amerced.

3 Inſt. 53. 4 Inſt. 183. Cro Car. 252. 3 Leon. 207. 2 Inſt. 315. Dyer 210. If any Homicide be committed, or dangerous Wound given, whether with or without Malice, or even by Miſadventure, or Self-defence, in any (*b*) Town, or in the Lanes or Fields thereof, in the (*c*) Day-time, and the Offender (*d*) eſcape, the Town ſhall be amerced; and if out of a Town, the Hundred ſhall be amerced.

(*b*) By the Statute 3 E. 1. *caſ.* 6. no City, Borough or Town ſhall be amerced without reaſonable Cauſe, and according to the Quantity of the Offence, *& vide* Cro. Car. 252. Where an Information was exhibited againſt the Mayor and Commonalty of *London*, for that *J. S.* was killed in a Tumult there, and none of the Offenders taken, nor any Perſon known or indicted for the Felony; upon which they appeared and confeſſed the Offence, and were fined 1500 Marks. (*c*) Where the Stroke was given in the Day-time, but the Party did not die till Night. Leon. 107. 3 Leon. 207. *dubitatur.* (*d*) Of which the Coroner may inquire upon View of the Body; or the Juſtices of the Peace may inquire of ſuch Eſcapes, and certify them into the *King's Bench*. 4 Inſt. *& vide* 3 H. 7. *cap.* 1.

3 Inſt. 52. 7 Co. 6. b. 7 a. Alſo ſince the Statute of *Wincheſter*, *cap.* 5. ordains, that walled Towns ſhall be kept ſhut from Sun-ſetting to Sun-riſing, if the Fact happen in any ſuch Town by Night or by Day, and the Offender eſcape, the Town ſhall be amerced.

4 Inſt. 294. If by the Foreſt Law, Hue and Cry is made for a Treſpaſs in Veniſon, any Townſhip or Village with the Foreſt, which does not follow the Hue and Cry, ſhall be amerced at the Juſtice-Seat.

13 H. 4. 9. Rol. Abr. 211. Yelv. 186. If the Deciners ought to pay Rent at the Leet (*e*) *pro certo Letæ*, this is not (*f*) properly a Rent, but a Sum in *Groſs*; and if they do not

S. P. a Cuſtom being laid. Brown. 190. 6 Co. 77.—But if not warranted by the Cuſtom, perhaps it is otherwiſe. *Godfry's* Caſe. 11 Co. 44 b. Rol. Rep. 32, 73. (*e*) For the Original thereof *vide* 6 Co. 77. 2 Inſt. 71. (*f*) But for

not pay it, they may be amerced, for this is due and payable at the Leet.

for a Rent distrainable, no Amerce-

ment ſhall be in a Leet. 11 H. 4. 89. b. Rol. Abr. 211.

A Man ſhall not be amerced in (*a*) a Leet for Treſpaſs to the Lord himſelf, for he ſhall not be his own Judge.

12 H. 4. 8. b. Leon. 242. S. P. *per*

Gawdy. Raym. 160. Sand. 135. 2 Keb. 139. 3 Keb. 744. S. P. adjudged.

(*a*) But ſuch private Treſpaſs may be preſented there for the Lord's Information. Sand. 135. 2 Keb. 139.

* If a Man arreſts another in *London*, coming to the Common Pleas to anſwer a Writ at the Suit of the (*b*) ſame Man, becauſe he ought to have his Privilege, the Plaintiff ſhall be fined for the Contempt of the Court.

* Page 506

9 H. 6. 55. Rol. Abr. 218. S. C. 8 Co. 60.

S. C. cited. (*b*) But if another Man had arreſted him, who was not Plaintiff in the Writ in *Banco*, he ſhould not be fined. 9 H. 6. 55.

So if the Plaintiff, in a Suit *in Banco* be arreſted at the Suit of the Defendant in *London*, (*c*) before the Return of the Writ *in Banco*, this is a Contempt to the Court; and for this he ſhall be fined and impriſoned. †

11 H. 6. 22. Rol. Abr. 218. S. C.

(*c*) Where one under Countenance of Law is guilty of double Vexation; as if he ſues in *B.* and, pending this, ſues in *London* for the ſame Cauſe, he ſhall be fined. 8 Co. 60. a. Goulſ. 30. pl. 5.

† *Sed qu.* If this is now Law? as the Defendant may have juſt Cauſe of Action againſt the Plaintiff notwithſtanding the prior Suit pending.

(C) In what Actions or Proceedings there ought to be a Fine or an Amercement: And herein.

1. Of the Nature of the Action in which there ought to be a Fine or Amercement.

IT ſeems that regularly there was a Fine or Amercement in all Actions; for if the Plaintiff or Demandant did not prevail, it was thought reaſonable that he ſhould be puniſhed for his unjuſt Vexation; and therefore there was Judgment againſt him, *quod ſit in Miſericordia pro falſo clamore.*

2 Co. 39. F. N. B. 75.

Hence, when the Plaintiff took out a Writ, the Sheriff, before the Return of it, was obliged to take Pledges of Proſecution, which, when Fines and Amercements were conſiderable, were real and reſponſible Perſons, and anſwerable for thoſe Amercements, (*d*) but being now ſo very inconſiderable, that they are never levied, they are only formal Pledges entered, *viz. John Doe* and *Richard Roe.*

Vide Tit. *Bail.*

(*d*) Sand. 227

(*e*) In all Actions, where the Judgment is againſt the Defendant, it was to be entered with a *Miſericordia*, or a *Capiatur*; and herein the Difference is, that if it be an Action of Debt, or founded on a Contract, the Entry is *ideo in Miſericordia*, without aſſeſſing any Sum in certain, which was afterwards aſſeered by the Coroners in the proper County; but if it were

(*e*) 8 Co. 60. Rol. Abr. 212, 219. Cro. Eliz. 844. Cro. Jac. 255.

were in an Action of Treſpaſs, the Court ſet the Fine and levied it by a *Capiatur*. ‡

‡ But ſee *infra* 507, the Stat. 5 & 6 W. 3. c. 12.

8 Co. 59. Rol.Abr.222. And therefore in all Actions *Quare vi & armis*, as Reſcous, Treſpaſs, *&c.* the Defendant ſhall be fined.

8 Co. 41. a. 60, b. 11 Co. 43. F. N. B. 73. So in a Writ of Recaption in the Common Pleas, if Judgment be given againſt the Defendant, he ſhall be fined and impriſoned; but in a Writ of Recaption in the County-Court, if the Defendant be convicted he ſhall only be amerced.

Rol.Abr.212. In a Real Action, ſo in an Attaint againſt him who recovered in the firſt Action, if the Plaintiff recovers, the Defendant ſhall be (*f*) amerced.

(*f*) But in 8 Co. 60. it is ſaid, that if the Attaint paſs againſt the Defendant, if he was Party to the firſt Record, he ſhall be fined and impriſoned; otherwiſe if he was not Party to the firſt Record.

* Page 507 40 Aſſ. 20. Rol.Abr.212. * If a Man recovers in an Aſſiſe, and dies, and his Wife is endowed, in an Attaint againſt his Wife, if he recovers, the Wife ſhall be (*g*) amerced.

(*g*) But not fined, becauſe not Party to the firſt Record. 8 Co. 61.

30 Aſſ. 38. Rol.Abr.219. (*h*) 52. H. 3. *cap.* 4. which ſee explained. In an Action upon the (*h*) Statute of *Marlebridge*, for driving a Diſtreſs into another County, the Defendant ſhall be ranſomed, (which admits that he ſhall be fined.)

2 Inſt. 106.

33 H. 6. 206. Rol.Abr. 219. In an Aſſiſe of Rent, if the Tenant be found guilty of a Diſſeiſin with Force, becauſe of a Reſcue done by him without *vi et armis*, he ſhall be fined, though this be not within the Statute.

8 Co. 61. a. (*i*) That a Man ſhall not be fined in an *Audita Querela*. In all Judicial Writs, if the Plaintiff is barred, nonſuit, or his Writ abates, the Plaintiff ſhall not be amerced, (*i*) becauſe the Proceſs is founded upon a Record.

12 H. 4. 15. b. Rol. Abr. 219.

But as Fines and Amercements in thoſe Actions, by not being levied, became Matter of Form, it was thought hard, that for any Irregularity herein, a Judgment ſhould be arreſted; and therefore,

For which *vide* Tit. *Amendment* and *Jeofail*. By the 16 & 17 *Car.* 2. *cap.* 8. it is enacted, "That no Judgment after "Verdict, Confeſſion by *Cognovit actionem*, or *relictâ verificatione*, ſhall be "reverſed for Want of a *Miſericordia*, or a *Capiatur*, or becauſe one is put "for the other."

And by the 5 & 6 *W.* 3. *cap.* 12. reciting that divers Suits and Actions of Treſpaſs, Ejectment, Aſſault and falſe Impriſonment, brought by Party againſt Party in the reſpective Courts of Law at *Weſtminſter*; and upon Judgment entered againſt the Defendant or Defendants, in ſuch Suits or Actions, the reſpective Courts aforeſaid do *ex Officio* iſſue out Proceſs againſt ſuch Defendant and Defendants for a Fine to the Crown for a Breach of the Peace thereby committed, which is not aſcertained, but is uſually compounded for a ſmall Sum of Money, by ſome Officer in each of the ſaid Courts, but never eſtreated into the *Exchequer*; which Officers, or ſome of them, do very often outlaw the Defendants for the ſame, to their great Damage; therefore it is enacted, "That no Writ or Writs, commonly "called *Capias pro fine*, in any of the ſaid Suits or Actions, in any of the

" ſaid Courts, ſhall be ſued out or proſecuted againſt any of the ſaid Defend-
" ant or Defendants, or any further Proceſs thereupon, but the ſame Fines,
" and all former Fines, yet unpaid, are and ſhall hereby be remitted and
" diſcharged for ever; yet nevertheleſs the Plaintiff or Plaintiffs, in every
" ſuch Action, ſhall (upon Signing Judgment therein, over and above the
" uſual Fees for Signing thereof) pay to the proper Officer, who ſigneth
" the ſame, the Sum of ſix Shillings and eight Pence, in full Satisfaction
" of the ſaid Fine, and all Fees due for or concerning the ſaid Fine, to
" be diſtributed in ſuch Manner as Fines and Fees of this Kind have
" uſually been, and not otherwiſe; which ſaid Officer and Officers ſhall
" make an Increaſe to the Plaintiff or Plaintiffs of ſo much in their Coſts,
" to be taxed, againſt the ſaid Defendant or Defendants."

But though this Statute takes away the *Capiatur* Fine, yet it is ſaid to be the Practice of the Court of *Common Pleas*, to make a Special Entry of the Judgment in this Manner, *Nihil de fine quia remittitur per ſtatutum* in the ſame Manner as where the Fine was pardoned, in which Caſe the Entry was *nil de fine quia pardonatur*. Salk. 54. pl. 2. Comb. 387.

But it was ruled on Debate in the *King's Bench*, that this Statute having taken away the Fine, there was no Judgment of *Capiatur* to be * entered againſt the Defendant, nor any Thing in Lieu thereof, but that that Clauſe was totally to be left out of the Judgment, for that it was not like the Caſe of a Pardon, which does not alter the Law, but only excuſes that Party. So *nihil de fine quia pardonatur*. * Page 508 Cart. 390. *Lindſey* ver. Sir *Talbot Clerk*. Salk. 54. Comb. 387. S. C.

2. At what Time to be awarded.

If in a (*a*) Real Action the Tenant comes the firſt Day and renders the Land, he ſhall not be amerced. Co. Lit. 126. 5 Co. 49. Cro. Eliz. 65. Cro. Car. 564. 8 Co. 61.

So in Detinue for a Box of Charters by the Heir, upon the Delivery of his Father; if the Defendant comes the firſt Day, and ſays, that he hath been always ready to tender them, and yet is, if the Plaintiff does not traverſe this, the Defendant ſhall not be amerced. 38 E. 3. 20. Rol. Abr. 212.

In a *Cui in vita*, if the Tenant vouches, and the Vouchee comes the firſt Day of the Summons, and tenders, yet he ſhall be amerced; for when the Tender is not at the firſt Day of the Original, an Amercement is due to the King. 1 4 E. 3 16 Rol. Abr. 212.

In an Account, if the Defendant comes the firſt Day and tenders the Money, and the Plaintiff accepts it, none of them ſhall be amerced. 2 R. 2. 45. Rol. Abr. 213.

So in an Account, as Receiver of 10 *l.* if the Defendant pleads never his Receiver, and this is found againſt him, by which he is adjudged to Account; and after he comes and tenders the 10 *l.* and makes Oath, that after the Time that the Money was delivered to him, he could not find any Thing to buy for Profit, this ſhall be a good Diſcharge of the Defendant, and neither he nor the Plaintiff ſhall be amerced. 46 E. 3 40. Rol. Abr. 212.

In Dower, if the Tenant, after he is (*a*) eſſoined, renders Dower, and avers, that he hath always been ready, &c. the Tenant ſhall not be amerced. 22 E. 3. 2. Rol. Abr. 212.

(*a*) But if the Tenant tenders to the Demandant her Dower, after ſhe hath taken a Day *prece partium*, he ſhall be amerced, though this Delay was by the Aſſent of the Demandant. 18 E. 3. 39. Rol. Abr. 212. S. C. but a *Quære* is added.

18 E. 3. 14. Rol.Abr.212. In a Writ of Dower, if the Tenant vouches the Heir of the Baron, and the Vouchee demands the Lien; and upon this the Vouchee enters into Warranty, as he who hath nothing by Deſcent, &c. and the Tenant ſays that he hath Aſſets by Deſcent; upon which Judgment is given, that the Demandant ſhall recover againſt the Tenant, &c. the Vouchee ſhall be *in Miſericordia*, though he doth not counterplead the Warranty.

Rol. Abr. 213. *Hobberly* and *Lewis* adjudged. If in an Action of Debt the Defendant comes the firſt Day, and appears by Attorney, and makes Defence, *ſcilicet, defendit vim & injuriam quando, &c.* and after the Attorney pleads *non ſum informatus*, the Defendant ſhall be amerced; for he ought to have acknowledged the Action the firſt Day, not to have made any Defence.

Rol. Abr. 213. Dame *Slaney* ver. *Vawtrey*. So if in Debt the Defendant comes the firſt Day, and imparls till the next Term, and then Judgment is given upon *non ſum informatus*, the Defendant ſhall be amerced.

But if in an Action of Debt, the Defendant comes the firſt Day by Attorney, and ſays, that *non eſt informatus*, and thereupon Judgment is given, the Judgment ſhall be againſt the Defendant for the Debt, Damages and Coſts; but *nihil in Miſericordia quia venit primo die per* * Page 509 *ſummonitionem*, becauſe this is all one, as to the Plaintiff, as if he had confeſſed the Action, for he is not more delayed by this; and this is the Courſe of the *Common Pleas* in ſuch Caſes.

Rol. Abr. 213. *Barecroft* and *Rooks*.
Yelv. 108. S. P. adjudged.

5 Co. 49. *Hall* and *Vaughan* adjudged. Moor 394. pl. 511. S. C. adjudged. Co. Lit. 126. Jenk. Cent. 258. S. P. If in a Writ of Entry, *in le quibus* in *Wales*, the Defendant pleads *Non diſſeiſivit*, and pending this Plea, a general Pardon is made by Parliament, by which all Fines, Amercements, &c. are pardoned, and after Judgment is given for the Demandant, yet the Tenant ſhall not be amerced for the Delay after; for the not rendering the firſt Day, according to the Command of the King's Writ, is the Cauſe of the Amercement, and that is pardoned.

Vent. 96. *Noel* and *Nelſon* adjudged. Sid. 449. S. G. *adjornatur*. Lev. 286. S. C. adjudged, and ſaid it was after Imparlance. If in Debt againſt Executors the Defendants do not appear the firſt Day, but after come and plead *plene adminiſtravit*, and thereupon the Plaintiff prays Judgment *quando aſſets acciderint*, he ſhall have ſuch Judgment, and the Defendants ſhall be amerced; and though in this Caſe it did not appear, by the Record, but that the Defendants pleaded the Day of the Declaration, yet *per Vaughan* C. J. it ſhall not be ſo intended, unleſs entered *venerunt primo die*.

Sand. 226. S. C. adjudged, and there ſaid by *Sanders*, that it was not Law; for though they delayed the Plaintiff, yet by their ſubſequent Plea they excuſed themſelves of the Tort; as if in a *Quare impedit* a Biſhop imparls, and after pleads *He claims nothing but as Ordinary*, he ſhall not be amerced, becauſe he hath excuſed himſelf of the Wrong; but *Quære* of this Reaſon, becauſe in this very Caſe the Biſhop ſhall be amerced, as appears by Hob. 200. Cro. Jac. 93.

Co. Lit. 127. 8 Co. 61. Rol.Abr.219. If the Plaintiff be nonſuit, or if a Writ abates by the (*a*) Act of the Plaintiff or Demandant, or for Matter of Form, the Plaintiff or Demandant ſhall be amerced.

(*a*) But if a Writ abates by the Act of God, the Plaintiff or Demandant ſhall not be amerced. Co. Lit. 127. 8 Co. 61. S. P. So in Treſpaſs for taking his Corn, if upon the Pleading the Right of the Tithes comes in Queſtion, by which the Writ abates, yet the Plaintiff ſhall not be amerced, becauſe there was not any Default in him. 38 E. 3. 6. b. Rol. Abr. 213. S. C.

43 Aſſ. 18. 43 E. 3. 23. Co. Lit. 127. Rol.Abr.213. In an Action brought by two, if the Writ abates by the Death of one of them, the other ſhall not be amerced, becauſe it is by the Act of God, without the Default of the Party.

So

So if two join in a Perſonal Action, and one is nonſuit, which in Law is the Nonſuit of the other, yet the other ſhall not be amerced, becauſe this is not his Fault. 47 Aſſ. 3. 8 Co. 61.

If one Demandant or Plaintiff is nonſuit in ſuch Action, wherein Summons and Severance lies, and the other proceeds therein, he that is nonſuit ſhall not be amerced.——[But now *vide* the *Stat. ante*, 507.] 8 Co. 61. a.

3. Whether to be awarded when the Party is acquitted as to Part.

It ſeems to be a general Rule, that if Part is found for the Demandant or Plaintiff, and Part againſt him, he ſhall be amerced. 8 Co. 61. a.

As if in Action of Covenant for ſeveral Covenants broke, if the Plaintiff be barred for one, he ſhall be amerced for this though he recovers for the other. Rol. Abr. 216. *Waſſel* and *Yelton*. Rol. Rep. 411. S. C.

So in an Action upon the Caſe upon a Promiſe to do two Things, *ſcilicet* to pay ſo much for certain Land ſold, and if the Vendee ſells it again for more than he paid, to pay ſo much more; and the Defendant pleads in Bar a Releaſe, which is adjudged no Bar for Part (*ſcilicet* for the laſt Sum) and a Bar for the firſt Sum; he ſhall be *in Miſericordia* for this Sum of which he is barred, though it be an intire Promiſe; and he could not have an Action but upon both Parts, for he might have acknowledged himſelf ſatisfied of that which he had releaſed. * Page 510 Rol. Abr. 216. Rol. Rep. 411. 3 Bulſ. 230. S. C. adjudged upon a Writ of Error, and the Judgment affirmed accordingly.

If the Plaintiff declares, that he was poſſeſſed of an Hoy, floating at Anchor in the River *Thames*, loaded with Goods, and that the Defendant *ſatis ſciens*, being Maſter of a Ship ſailing in the River, ſo negligently governed his ſaid Ship, that ſhe *in prædict. Naviculam* of the Plaintiff *violenter ruebat, & illam fregit & ſubmerſit*; and upon Not guilty pleaded the Jury find, that *quoad negligentem gubernationem navis præd. Defend. per quod in Naviculam querentis violenter ruebat, & illam fregit & ſubmerſit*, the Defendant is guilty, *& quod reſiduum præmiſſorum* that he is Not guilty, the Plaintiff ſhall not be amerced, for there is no *Reſiduum*, and the firſt Part of the Verdict comprehends all the Injury complained of in the Declaration. Hard. 390. *Muſtard* and *Horndeu*.

In an Action of Waſte *in Domibus & Gardino*, if upon the Writ of Inquiry of Waſte the Defendant be found guilty *in Domibus*, and not guilty *in Gardino*, the Plaintiff ſhall be *in Miſericordia* (*a*) for the Garden. 14 E. 3. 27. Cro. Car 453. S. C. cited and agreed,

becauſe he counts for Waſte in Places where no Waſte was done; but where Waſte is aſſigned in cutting down twenty Trees, and the Waſte is found in cutting down two Trees only, and ſo the Variance in Quantity, it is otherwiſe. (*a*) So if in Caſe the Plaintiff declares he is ſeiſed of two hundred Acres, to which he hath Common Appurtenant, and that the Defendant incloſed, *per Quod, &c.* and the Jury find that he hath only ninety Acres, Parcel, *&c.* he ſhall be *in Miſericordia* for the Reſidue. Palm. 270.

In (*b*) Treſpaſs for the Battery of his Servant, and the Taking of his Timber, if the Defendant be found guilty of the Taking of the Timber, and not guilty of the Battery of the Servant, the Plaintiff ſhall be amerced for this. 22 Aſſ. 76. Rol. Abr. 217. S. C. Moor 692. S. P. Dyer 89.

pl. 111. Like Point. (*b*) So in Debt, where Part is found for the Plaintiff, and Part for the Defendant. 2 Sid. 137. Cro. Eliz. 699.

If in Debt upon the Statute of *H.* 8. for buying of Tithes, the Plaintiff demands 50*l.* for the Value of the Land, and the Jury find the Value but 20*l.* Cro. Eliz. 257. *Savery* and *Tey*.

20 *l.* the Plaintiff ſhall have Judgment, *&c.* but ſhall be amerced *quoad* the Reſidue of the 50 *l.*

Cro. Eliz 257. *per Curiam.* But in Treſpaſs, or other Actions where the Plaintiff declares *ad damnum*, if leſs be found than he declares for, yet the Plaintiff ſhall not be amerced, becauſe the Action is founded upon an Uncertainty.

2 Sid. 136. *per Curiam.* In Replevin, if the Defendant avows the Taking of two ſeveral Diſtreſſes, for ſeveral Cauſes, and Iſſue is joined upon the taking of one Diſtreſs, and found for the Plaintiff, and a *Nolle proſequi* entered as to the other, the Plaintiff ſhall not be amerced. [But now *vide* the *Stat. ante*, 507.]

4. Whether to be awarded where there are ſeveral Parties, and ſome of them only acquitted.

8 Co. 61. If all or Part is found againſt one Tenant or Defendant, and nothing or but Part againſt the other, the Demandant or Plaintiff ſhall be amerced, unleſs there be no Default in him.

44 Aſſ. 33. 44 E. 3. 24. Rol Abr. 217. In an Aſſiſe againſt two, if it be adjudged againſt one upon his Plea, and the Demandant releaſes his Damages, and hath Judgment preſently for the Land againſt him, relinquiſhing his Suit againſt the other, he ſhall not be amerced for the other.

* Page 511 44 Aſſ. 33. 44 E. 3. 24. Rol. Abr. 217. * In Treſpaſs againſt ſeveral, and one is found guilty, and the Plaintiff prays Judgment againſt him, relinquiſhing his Suit againſt the Reſt, he ſhall not be amerced for them.

Rol. Abr. 217. *Warne* and *Player*. Cro. Car. 54. 55. S. C. In Trover and Converſion of 1000 Loads of Coals againſt three Perſons, if one of the Defendants is found Guilty of 100 Loads, and Not guilty of the Reſt, and another Guilty of 100 Loads, and Not guilty of the Reſt, and the third Guilty of 100 Loads, and not of the Reſt, in this Caſe the Plaintiff ſhall not be amerced againſt any of them, becauſe each of them is found Guilty of Part, though ſeverally.

23 Aſſ. 18. Dyer 312. In an Aſſiſe againſt two, if the Plaintiff recovers againſt one, and the other is found Not guilty, the Plaintiff ſhall be amerced as to him.

19 H. 6. 32. Rol. Abr. 216. In a Writ of forcible Entry againſt ſeveral, for entring with Force, and holding out with Force; if ſome are found Guilty of the forcible Entry, and Not guilty of the holding out with Force, the Plaintiff ſhall be *in Miſericordia* for this.

19 H. 6. 32. Rol. Abr. 216. So if ſome are found Guilty of the holding with Force, and that they entered peaceably, the Plaintiff ſhall be amerced for this.

17 E. 3. 46. Rol Abr. 216. S. C. If a Man brings an Aſſiſe againſt the Tenant and Diſſeiſor of a Rent-Service, and the Tenant is acquitted, and the Diſſeiſor found Guilty, the Demandant ſhall be amerced for the Tenant.

31 Aſſ. 31. Rol. Abr. 216. S. C. So in an Aſſiſe of a Rent againſt one Tenant and two Diſſeiſors, if he recovers againſt the Tenant and one Diſſeiſor, and the other is acquitted of the Diſſeiſin, the Demandant ſhall be amerced for him.——[But now *vide* the *Stat. ante*, 507.]

5. Of awarding Fines and Amercements jointly or ſeverally.

11 Co. 43. Rol. Rep. 74. Dyer 211. Lev. 125. If there are ſeveral Defendants, and all of them convicted, a joint Award of one Fine againſt them all is erroneous, for it ought to be ſeverally againſt each Defendant; for otherwiſe one, who hath paid his proportionable Part, might be continued in Priſon till all the others have alſo paid theirs, which would be in Effect to puniſh him for the Offence of another.——[*Vide* the *Stat. ante*, 507.]

If at a Court-Leet twelve of the Inhabitants, Time out of Mind, by the Steward, have been ſworn chief Pledges, who at every Leet have uſed to preſent, that they the ſaid chief Pledges ſhould pay to the Lord of the Leet 10*s. pro certo Letæ*, and accordingly have paid it at the ſaid Leet; if at a Court-Leet, twelve chief Pledges being ſworn to inquire of the Articles of the Leet, refuſe to preſent, that they ought to pay 10*s. pro certo Letæ*, the Steward cannot impoſe one joint Fine upon them all, but muſt fine them ſeverally; for the Refuſal of one is not the Refuſal of the other. 11 Co. 42. *Godfrey's* Caſe. Rol. Rep. 32, 73. S. C.

If in an Aſſiſe againſt two the Diſſeiſin is found with Force, though the Diſſeiſin was joint, yet the Fine ſhall be ſeveral. 11 Co. 43. a.

If in a Plaint two are nonſuited, the Amercement ſhall be ſeveral. 11 Co. 43. a.

And though the Judgment be againſt two, and *ideo in Miſericordia*, yet when it is affeered by the Coroners *in pais*, the Amercement ſhall be laid on them ſeverally. 11 Co. 43. a.

So if there are ſeveral Defendants, and by Law they are to be fined, in the Entry of the Judgment it is *ideo Capiantur*, yet it ſhall be taken *reddendo ſingula ſingulis*, and there ſhall iſſue ſeveral *Capias pro Fine.* † 11 Co. 43.

† See the *Stat. ante*, 507.

Yet in ſome Caſes a Fine or Amercement ſhall be impoſed upon ſeveral jointly, as upon a County, Hundred, and ſo upon a Village, *&c.* as for the Eſcape of a Murderer, *&c.* becauſe of the Uncertainty of the Perſons, and the Infinity of their Number. 11 Co. 43. b.

In Treſpaſs againſt two, if one be found Guilty to Damage *quoad* him, and the other is found Guilty to Damage *quoad* him; in this Caſe each * Defendant ſhall be amerced ſeverally, and the Plaintiff ſhall alſo be ſeverally amerced *quoad* each of them.——[But *vide Stat. ante*, 507.] 5 Co. 58. * Page 512

6. Whether the Party can be twice amerced in the ſame Action.

It is laid down as a Rule, that a Defendant ſhall not be amerced twice in the ſame Action, for that would be to puniſh him twice for the (*a*) ſame Offence. 8 Co. 61. a. Rol. Abr. 218.

(*a*) But where one Defendant may be amerced ſeveral Times for ſeveral Defaults in the ſame Action, *vide* 2 Leon. 4, 5, 185, 186.

In a *Quare impedit*, if the Plaintiff recovers the Preſentation againſt the Defendant, and thereupon Judgment is given upon Demurrer for a Writ to the Biſhop; and upon this the Defendant is amerced, and after a Writ is awarded to inquire of the Damages and the other Points of the Writ, and found accordingly, and Judgment alſo given; for this the Defendant ſhall not be amerced again. 5 Co. 58. b. Rol. Abr. 218.

In one Action againſt the ſame Defendant or Tenant, if the Defendant or Tenant pleads one Plea to Part, and another Plea to the Reſt, or confeſſes Part, and pleads to Iſſue for the other, and ſeveral Iſſues are found againſt him, yet the Defendant or Tenant ſhall not be twice amerced. 5 Co. 58. Rol. Abr. 218.

If in an *Ejectione firmæ* againſt four, three are found Guilty *quoad* Part, and Not guilty for the Reſidue, and the fourth is found Not guilty generally, the Plaintiff may be amerced jointly *quoad* all the Defendants, *ſcilicet*, *pro falſo clamore quoad* the three, for ſo much of which they were found Not guilty, and *pro falſo clamore quoad* the fourth, *quod ſit in Miſericordia*, and the Prothonotaries ſaid the uſual Courſe was ſo, and ſometimes otherwiſe, *ſcilicet*, that *quoad* the three for ſo much, *&c.* he be *in Miſericordia*, and *quoad* the fourth that he be *in Miſericordia* alſo. Cro Car. 178. *Deckerow & al' v. Jenkins.*

In Dower Defendant confeſſes as to Part, and Judgment is given againſt him, *quod ſit in Miſericordia*, and as to the Reſt he pleads in Bar, upon which Salk. 54. pl. 1. 253. pl. 3. Ld. Raym. 72.

Lord and Lady *Gerrard* adjudged. Comb. 352. S. C. and S. P. 5 Mod. 64. S. C. and S. P. Skin. 592. pl. 6.

which there is a Demurrer, and Judgment is given againſt him, *quod ſit in Miſericordia*; and it was objected in Error, that a Man ought not to be twice amerced in the ſame Action; but it was held well enough in this Caſe, becauſe both Judgments are final and independent of one another; but according to the Report of this Caſe in *Salkeld*, it would be otherwiſe where one Judgment is only interlocutory and depends upon another, as (*a*) *quod computet* in Account.

S. C. and S. P. adjudged, becauſe the ſecond Amercement was for a new Delay. (*a*) That in Account, if the Defendant be adjudged to account, Judgment ſhall be preſently before the final Judgment, *quod ſit in Miſericordia quia non prius computavit*; and in this Caſe, if he be afterwards found in Arrearages, Judgment ſhall be again, *quod ſit in Miſericordia*. Rol. Abr. 218. *Parrey*'s Caſe adjudged, and affirmed upon a Writ of Error, and ſaid by the Clerks to be the Courſe of the Court.—[See the *Stat. ante*, 507.]

*Page 513 * (D) **Where a Fine ought to be awarded, and not an Amercement,** & vice verſa.

8 Co. 39. Hob. 180. (*b*) For the various Significations of the Word *Fine*, *vide* 8 Co. 59.

WE have already taken Notice of the Difference made between Offences, and that for the *Delicta majora*, ſuch as Breaches of the Peace, Contempts or Diſturbances committed *in facie Curiæ*, the Court may (*b*) fine and impriſon; but that in Real Actions or Actions of Debt, the Defendant is only to be (*c*) amerced.

Co. Lit. 126.—And that there is no Difference between a Fine and *Ranſom* in a legal Underſtanding; for a Fine makes an End of the Buſineſs, and ſo does a *Ranſom*, becauſe it redeems from Impriſonment; and if they were different Things, it would follow, that where the Books ſay, that where a Man ſhall make a Fine and Ranſom, they muſt be taken to intend, that he ought to pay two different Sums, of which there is no Precedent. Co. Lit. 127. a. but in Dyer 232. pl. 5. it hath been adjudged, that where a Man is to make Fine and *Ranſom*, the Ranſom muſt be treble the Fine at leaſt. (*c*) That if a Sheriff, having returned a *Cepi Corpus* into the *King's Bench* on a *Capias* againſt a Man on an Indictment of Felony, does not bring him in at the Day, it ſeems that he is by the Courſe of the ſaid Court to be amerced, not fined. 40 Aſſ. pl. 42.—So if a Vill or Hundred ſuffer a Felon to eſcape without being arreſted, they are to be amerced, not fined. 3 Inſt. 53. Dyer 210. 4 Inſt. 294.———But whether the Puniſhment inflicted on a Gaoler for ſuffering a Criminal negligently to eſcape, be properly a Fine or an Amercement, *Q. & vide* 8 H. 5. 2. Fitz. Coron. 84, 292. Raſt. Ent. 583. 27 Aſſ. pl. 9.

8 Co. 60. (*d*) So in Replevin it was adjudged for the Avowant,

A Man ſhall be fined and impriſoned for all Contempts (*d*) done to any Court of Record, againſt the Commandment of the King's Writ under his Great Seal, as in a *Quare non admiſit*, *Quare incumbravit*, Attachment upon a Prohibition, *&c.*

a *Returno habendo* awarded, and there the Sheriff returned an *Elongata*, and a *Withernam* was awarded, though the Plaintiff brought the Money into Court, and prayed the Proceſs might be ſtayed; yet the Court would not grant it till they had aſſeſſed a Fine upon the Plaintiff. 2 Leon. 174.

8 Co. 58. *Beecher*'s Caſe. Cro. Jac. 211. S. C. and S. P.

But when the Demandant or Plaintiff, Tenant or Defendant *ſe retraxit*, or *Receſſit in Contemptum Curiæ*; yet this is no Contempt againſt the Commandment of the King by Writ, and therefore he ſhall not be fined in ſuch Caſe, but amerced only.

8 Co. 60. a.

If in Replevin the Defendant claims Property falſly, and this in a *Proprietate probanda* is found againſt him, he ſhall be fined and impriſoned.

8 Co. 60. a.

If one denies a Recovery or other Record to which he himſelf is Party, he ſhall not be fined; for it is not his Act, but the Act of the Court; and he does not deny the Record abſolutely, but *non habetur tale recordum.*

In

In an Aſſiſe, if the Tenant be attainted of a Diſſeiſin with Force, he ſhall be impriſoned. Rol. Abr 222. and ſeveral Caſes there cited out of the Year-Books to this Purpoſe.

But in an Aſſiſe for a Rent-ſeck, if the Defendant be found a Diſſeiſor by Denier only, the Judgment ſhall not be *quod Capiatur*, but only *in Miſericordia*. Rol. Abr. 223.

Alſo in an Aſſiſe of a Rent-charge, againſt ſeveral Tertenants; if it be found the Plaintiff diſtrained for this, and one of the Defendants, without Conſent of the Reſt, made the Reſcous, though the others are Diſſeiſors by the Denier; (*a*) yet they ſhall not be impriſoned, but only he who made the Reſcous. 39 Aſſ. pl. 4. Rol. Abr. 223.

(*a*) For he who made the Reſcous is the only Diſſeiſor with Force. Co. Lit. 161. b.

* In an Aſſiſe, if the Tenant by his Plea does not deny the Ouſter, though he be after found a Diſſeiſor without Force, yet he ſhall be impriſoned. * Page 514. 28 Aſſ. 15. Rol. Abr. 222. S. C.

In an Aſſiſe of Nuſance, if the Defendant be found guilty, he ſhall be impriſoned. 19 Aſſ. 6. Rol. Abr. 222. S. C.

Although in all Actions (*b*) *Quare vi & armis*, as Reſcous, Treſpaſs, *&c.* the Defendant ſhall be fined; yet (*c*) in Actions of (*d*) Treſpaſs upon the (*e*) Caſe, if the Defendant be found guilty, the Judgment ſhall not be *quod capiatur*, but *quod ſit in Miſericordia*. (*b*) 8 Co. 59. b. Rol. Abr. 222. (*c*) 8 Co. 59. Hob. 180.

(*a*) That in Treſpaſs or other Actions, where the Plaintiff declares *ad damnum*, if leſs be found than he declares for; yet the Plaintiff ſhall not be amerced, becauſe the Action is founded upon an Uncertainty. Cro. Eliz. 257. (*e*) So in an Action againſt an Inn-keeper for Goods ſtolen, the Judgment ſhall not be *quod capiatur*. Cro. Jac. 224. adjudged —— [But ſee the *Stat. an* , 507]

But in Treſpaſs, if the Plaintiff declares that he levied a Plaint in *London*, and upon Proceſs *J. S.* was arreſted by a Serjeant, and that the Defendant *Vi & Armis* reſcued him, *per quod* he loſt his Debt; and upon Not guilty pleaded, it is found for the Plaintiff, the Judgment hereupon ought to be *quod defendens capiatur*; for though the Nature of the Action is properly an Action upon the Caſe, as touching the Loſs of the Debt of the Plaintiff; yet this being with Force to the Serjeant who was a Miniſter as well to the Plaintiff as the Court, the Action may be *Vi & Armis*. [*ante*, 507.] Hob. 180. *Wheatly* and *Stone*. Rol. Abr 222. S. C.

If a Man denies his own Deed, and this is found againſt him by Verdict, he ſhall be impriſoned for his Falſity, and Trouble to the Jury. † Rol. Abr. 220, 224. 2 Bulſt. 230. S. P.

† Q. If this is now law? *Vide ante*, 507.

But if a Man, where his own Deed is pleaded againſt him, pleads *Non eſt factum*, and after at the *Niſi prius*, or before Verdict, *relictâ veriſicatione cognovit* this to be his Deed, he ſhall not be impriſoned, but only amerced. But for this *vide* 8 Co. 60. Rol. Abr. 224. Keilw. 42. 2 Rol. Rep. 45. Noy 4. Cro. Jac. 64. Dyer 67. Raym. 202. Mod. 73. 2 Saund. 189. 2 Keb. 678, 688, 694, 734.

If a Man pleads a Deed of the Plaintiff or his Anceſtor, made to the Anceſtor of the Defendant who pleads it, and this is found againſt him, he ſhall not be impriſoned for his Falſity, becauſe he could not know, whether this was his Deed or not, being made to his Anceſtor. 20 Aſſ. 10. Rol. Abr. 224.

In Treſpaſs *contra Pacem*, for trampling his Corn; if it be found that the Cattle of the Defendant eſcaped, but not *contra Pacem*, and trampled the 27 Aſſ. 56. Rol. Abr. 222. S. C.

the Corn, yet the Defendant ſhall be impriſoned, for he ought to keep his Cattle at his Peril. ‡

‡ *Qu. de hoc,* if now law? *Vide ante,* 507.

Rol. Abr. 222-3. In an Action upon the Caſe, upon an *Aſſumpſit*, if the Defendant be found guilty, the Judgment ſhall not be *quod capiatur*, but *quod ſit in Miſericordia.*

Rol. Abr. 223. 8 Co. 59. S. P. becauſe founded upon the Deceit done to the Court in obtaining Judgment. In a Writ of Deceit againſt the Party who recovered in a Real Action, and the Sheriff, if it be found that no Summons was made, he that recovered before ſhall be impriſoned.

8 Co. 60. b. Cro. Jac. 631. Like Point adjudged, 12 Co. 134. like Point reſolved, 2 Inſt. 131. 2 Rol. Rep. 400.——In an Action of *Scandalum Magnatum*, whether the Judgment ought to be *quod defendens capiatur, dubitatur*; *Probee* and the Marquis of *Dorcheſter*, Sid. 233. adjourned, Keb. 813. adjourned upon a Writ of Error. Lev. 148. *dubitatur*, but the Court inclined, that if it was *in Miſericordia*, it was ſufficient.——[See *ante*, 507.] In all Caſes where a Thing is reſtrained by any Statute, the Offender ſhall be fined and impriſoned.

* Page 515 30 Aſſ. 38. Rol. Abr. 222. * As in an Action upon the Statute of *Marlebridge* for driving a Diſtreſs out of the County, the Defendant being found Guilty ſhall be impriſoned. †

† *Qu. de hoc* if now law?

Rol. Abr. 222. So in an Action of Debt upon the Statute of 1 & 2 *Ph. & Mar. c.* 12. of Diſtreſſes, by which the Defendant ſhall forfeit to the Party grieved, for the driving a Diſtreſs out of the Hundred, 5 *l.* and treble Damages; if the Defendant be found Guilty, the Judgment ſhall be *quod capiatur.*

Rol. Abr. 223. *Lovell* and *Bidgood.* In an Action of Debt upon the Statute of Uſury, for treble the Sum lent for taking more than 8 *l. per Cent.* if the Defendant be found Guilty, the Judgment ſhall be *quod capiatur*, becauſe he took it contrary to the Proviſion of the Statute. ‖

‖ *Qu.* of all theſe Caſes, ſince the Statute taking away the *Capias pro fine? Vide ante*, 507.

Rol. Abr. 223. Sid. 233. S. P. *arguendo.* But in an Action of Debt upon the Statute of 2 & 3 *E.* 6. *c.* 13. for not ſetting forth Tithes, if Judgment ſhall be given for the Plaintiff, the Judgment ſhall be *quod ſit in Miſericordia*, and not *quod capiatur*; (*a*) becauſe this is but a Debt given in Recompence of Tithes, and this is the uſual Courſe.

(*a*) In Debt for 5 *l.* upon the Statute of *Miſericordia* only, 1 & 2 Ph. & Mar. c. 12. for taking above 4 *d.* for a Diſtreſs, the Defendant ſhall be *in* becauſe this Action is founded upon the Non-payment, and not upon the Statute. Cro. Car. 560. adjudged.

Cro. Jac. 350. *Oldfield* ver. *The Hundred of Witherly.* So in an Action for a Robbery founded upon the Statute of *Wincheſter*, if the Defendants are found Guilty, the Judgment ſhall be *quod ſint in Miſericordia*; becauſe this Action is not founded upon any *Male-faiſance*, but upon a *Non-faiſance* only.

Cro. Car. 32. *Swayn* and *Rogers* adjudged. In an Action of Treſpaſs for an Aſſault and Battery; if the Battery was done before a General Pardon, by which the Fine is pardoned, yet the Judgment ſhall be entered (*b*) *quod capiatur*; for the Court need not take Conuſance thereof without Demand.

(*b*) The Entry in this Caſe is ſometimes *quod capiatur*, and ſometimes *quod non capiatur quia pardonatur*; but for this *vide* Cro. Eliz. 153. 778. Leon. 300. Brownl. 211. Yelv. 126. 5 Co. 49. Moor 394. Jenk. Cent. 258. Lane 71. Salk. 54. pl. 2.——[*Vide ante*, 507. The Statute taking away the *Capias pro fine.*]

(E) Who in reſpect of their Perſons are not to be fined or amerced.

THE King being Plaintiff or Demandant ſhall not be amerced, nor ſhall the (a) Queen Conſort. Co. Lit. 127. 8 Co. 61. F. N. B. 31.

3 Bulſt. 276. (a) Where the Judgment is againſt the Queen, & *in Miſericordia nihil, eo quod conſors Regis.* Rol. Abr. 215.

An Infant being Plaintiff or Demandant ſhall not be amerced, and this is the Reaſon (b) he ſhall not find Pledges. Co. Lit. 127. 8 Co. 61. 3 Bulſt. 276.

Palm. 518. Rol. Abr. 214, 288. (b) That he ſhall not find Pledges. Cro. Car. 161. adjudged.

But an Infant Defendant ſhall be amerced, if he pleads with the Demandant, and the Matter is found againſt him; (c) but he ſhall be pardoned of Courſe. Rol. Abr. 214. Cro. Car. 410.

(c) And the Entry in ſuch Caſe is *Ideo in Miſericordia ſed pardonatur quia Infans.* 8 Co. 61. Palm. 518. *Nihil in Miſericordia, quia Infans.* Cro. Car. 410.

But if an Infant brings an Action by his *Prochein amy*, and pending the Action comes of full Age, and makes an Attorney, and after is *nonſuit*, he ſhall be amerced. Dyer 338. pl. 41.

* If an Infant brings an Action of Treſpaſs by Guardian againſt two, and the Defendants plead Not guilty, and at the *Niſi prius* the Plaintiff appears in Perſon, and a Verdict is found for the Plaintiff for Part, and Not guilty for the Reſt, and one of the Defendants Not guilty, and Judgment is given for the Plaintiff, for that for which the Verdict is given for him, & *quod nil capiat per billam* for the Reſt, and him that is found Not guilty, *ſed nihil de Miſericordia pro falſo clamore, &c. quia querens tempore tranſgreſſionis prædict' factæ infra ætatem exiſtebat*; yet this is good, and no Error. * Page 516 Rol. Abr. 214. *Methwold* and *Anguiſh* adjudged.

If a *Præcipe* is brought againſt an Infant, and pending the Plea he comes of full Age, he ſhall be amerced for the Delay after he comes of full Age. 5 Co. 49. Moor 394. Rol. Rep. 294. 3 Bulſt. 251.

If Baron and Feme are vouched in the Right of the Feme, and Judgment is given againſt them, and the Feme is to be amerced, they ſhall be amerced, (d) though the Feme be within Age, the Huſband being of full Age. 16 E. 3. 14. Rol. Abr. 14

(d) And this Amercement ſhall not be pardoned of Courſe. 16 E. 3. 14.

In an Action upon the Caſe againſt Baron and Feme for ſcandalous Words ſpoken by the Feme, and Judgment is given againſt both, as well the Huſband as the Wife ſhall be amerced. Hob. 127.

In an Action of Trover and Converſion againſt Baron and Feme, for the Converſion of the Feme during the Coverture; if the Feme be found Guilty by Verdict, and the Baron Not guilty, yet both ſhall be *in Miſericordia*; for the Amercement is not for the Converſion, but for the Delay of the Suit, and the Non-rendering the firſt Day, of which the Baron is as well guilty as the Feme. Rol. Abr. 215. Cro. Jac. 439, 440. Rol Rep. 293. 3 Bulſt. 151. S. C. adjudged.

In a Writ of Dower, if the Tenant vouches the Baron and Feme, as in the Right of the Feme, as Heir to the Huſband of the Demandant, and the Voucher demand the Lien, upon which the Lien is ſhewn, and they Rol. Abr. 215-6.

they enter into Warranty, as thoſe who have nothing by Deſcent; and the Tenant ſays that they have by Deſcent, upon which Judgment is given againſt the Tenant, &c. the Feme only ſhall be amerced without the Baron.

Bro. Appeal 25 8 H. 4. 17. pl. 2. If a Feme Covert ſues a groundleſs Appeal of the Death of her Huſband, known by her to be alive, ſhe ſhall be fined.

37 Aſſ. 1. Rol. Abr. 220. In an Aſſiſe againſt Baron and Feme, if the Feme be received upon the Default of the Baron, and pleads in Bar, and acknowledges an Ouſter, and the Demandant takes Iſſue upon the Bar, and this is found for the Demandant, the Tenant ſhall not be impriſoned for this Confeſſion of an Ouſter, (*b*) becauſe ſhe is a Feme Covert.

(*b*) But if a Feme Covert be found guilty of a Treſpaſs before the Coverture, ſhe ſhall be impriſoned. 22 Aſſ. 87. Rol. Abr. 220.

Rol. Abr. 220. Lord *Stafford*'s Caſe. If a Baron of Parliament be found a Diſſeiſor with Force in an Aſſiſe, the Judgment againſt him ſhall be *quod Capiatur*.

Cro. Eliz. 170. S. C. adjudged, for that it is upon a Diſſeiſin found, upon which a Fine is given by the Statute of *Weſtm.* 1. *cap.* 36. for which *vide* 2 Inſt. 236.—And Hob. 61. that Barons are not ſubject to Impriſonment, but for great Contempt.

Rol. Abr. 220, 221. Earl of *Lincoln* and *Flower*. So in a Debt upon an Obligation againſt a Baron of Parliament, if the Defendant pleads *Non eſt factum*, and the Iſſue is found againſt him, the Judgment againſt him ſhall be *quod Capiatur*.

Cro. Eliz. 503. S. C. adjudged, becauſe a Fine due to the King upon this falſe Plea, and there is Privilege againſt it. [*Vide ante*, 507.]

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* Page 517 * (F) **Of the Reaſonableneſs of the Fine; and herein of mitigating or aggravating it.**

2 Hawk. P. C. 445. *vide* Tit. *Judgment*; and that by *Magna Charta* every Fine muſt be with a *Salvo contenemento*, which ſee explained, 2 Inſt. 28. WHERE a Perſon is convicted of a criminal Offence, and for which he ought to be fined, the Meaſure thereof is left to the Diſcretion of the Judges, who proportion ſuch Fine, ſo as to make it adequate to the Offence, from the Conſideration of the Baſeneſs and Enormity, and dangerous Tendency of it, the Malice, Deliberation and Wilfulneſs with which it was committed, the Age, Quality and Degree of the Offender, &c.

Salk. 55. pl. 5. If a Proſecutor accepts Coſts from the Defendant, he cannot, by the Rules of the Court, aggravate his Fine, becauſe in ſuch Caſes, having no Right to demand Coſts, if he take them at all, he muſt take them by way of Satisfaction of the Wrong; after which it is unreaſonable for him to harraſs the Defendant.

2 Hawk. P. C. 292. *cont.* Salk. 55. pl. 5. But as to thoſe Coſts given by 5 & 6. *W.* & *M. c.* 11. on the removing a Cauſe by *Certiorari*, the Proſecutor is not reſtrained from aggravating the Fine to be ſet on the Defendant, becauſe he has a Right to ſuch Coſts by the expreſs Words of the Statute.

Co. Lit. 260. Cro. Car. 251. Raym. 376. A Fine is under the Power of the Court during the Term in which it is ſet, and may be mitigated as ſhall be thought proper; but after the Term it admits of no Alteration.

If

If a Perſon is indicted and found guilty of a great Nuſance, and a Writ goes to the Sheriff to abate it, if the Party refuſes to abate it at his own Charge, the Court will raiſe the Fine accordingly; *ſecus* if the Nuſance may be eaſily removed, as pulling down a Wall, *&c.* Comb. 10.

Upon a Motion to ſubmit to a ſmall Fine after a Confeſſion of the Indictment, which was for an Aſſault; *Holt* Ch. Juſt. took a Difference where a Man confeſſes an Indictment, and where he is found guilty; in the firſt Caſe, a Man may produce Affidavits to prove *Son aſſault* upon the Proſecutor, in Mitigation of the Fine; otherwiſe where the Defendant is found guilty; for the Entry upon a Confeſſion is only *non vult contendere cum Domino Rege, & ponit ſe in gratiam Curiæ.* Salk. 55. pl. 6. *The Queen* and *Templeman.*

If an exceſſive Fine be impoſed at the Seſſions, it may be mitigated at the King's Bench. Vent. 336.

The Court may aſſeſs a Fine, but cannot award any corporal Puniſhment againſt a Defendant, unleſs he be actually preſent in the Court. † Salk. 56, 400 pl. 4. Comb. 36, 77.

† And therefore the perſonal Appearance of the Defendant in ſuch Caſes is not to be diſpenſed with, unleſs by Rule of Court on Motion, and the Clerk in Court, or ſome other Perſon approved of, undertaking to pay ſuch Fine as ſhall be ſet on the Offender, *&c.*

(G) Of the Reaſonableneſs of an Amercement, and the Affeerment thereof: And herein,

1. Of the Neceſſity of an Affeerment.

BEFORE the Statutes of (*a*) *Magna Charta*, and *Weſtm.* 1 *cap.* 6. the Lords uſed to ſet ſuch exceſſive and grievous Amercements on their Tenants, that under Pretence of ſuch Amercements they uſed to ſeiſe the * whole Profit of the Tenement which they had granted: To prevent this Oppreſſion, and to take away all Fines and Amercements at the Will and Pleaſure of the Lord and his Steward, and likewiſe all exceſſive Fines and Amercements, if they were never ſo certain, the Statutes appoint, that every (*b*) Amercement ſhould be affeered, ſo that though the (*c*) Court or Homage (*d*) do award an Amercement, yet it is to be affeered by the Affeerors, who are ſo called, becauſe they *affeer* or bring in the Quantity of the Amercement.

* Page 518

(*a*) That yet theſe Statutes were in Affirmance of the Common Law. 8 Co. 39. 2 Inſt. 27.

(*b*) An Amercement in *Latin* is called *Miſericordia*, becauſe it ought to be aſſeſſed mercifully, and this ought to be moderated by Affeerment of his Equals, or otherwiſe a Writ *de moderata Miſericordia* lies. Co. Lit. 126. b. for this Writ *vide* F. N. B. 75. Regiſt. 86, 184, 187. (*b*) So that though in the Courts of *Weſtminſter*, where Amerçements were ordered either againſt Plaintiff or Defendant, they were carried down to the Coroner to be ſettled and affeered. 8 Co. 39. Saund. 227. (*d*) In Hob. 129. it is ſaid the Jury muſt amerce to a certain Sum, which may be mitigated and affeered by others, and therefore theſe Offices cannot be confounded; and ſo is 3 Lev 206, that every Award of an Amercement in a Court Leet muſt expreſs a certain Sum; but this Opinion has been over-ruled by a later Reſolution, where it hath been held, that though ſuch Amercement muſt be affeered, yet the Award thereof need not expreſs any particular Sum. Salk. 56. pl. 7. And therefore, in Judgment of Law, the Award of the *Miſericordia* is the Act of the Court only, and the Aſſeſſment of the Sum to be paid the Act of the Affeerors, and ſo ought to be pleaded. Kitchin 51.

Theſe Amercements are to be with a *Salvo contenemento*, and were always held too grievous and exceſſive, if they deprived the Offender of the Means of his Livelihood; as if he were a Sockman, and the Amercement extended 2 Inſt. 27, 28, 169. 8 Co. 39.

to

to take away the Beaſts of his Plough; if he were a military Man, and it extended to take away his Arms; if he was a Merchant, and it extended to take away his Merchandize; if he were a Villein, if it took away his Cart or Wainage; for the Words of *Magna Charta* are, *Liber Homo non amercetur pro parvo delicto, niſi ſecundum Modum illius delicti, & pro magno delicto ſecundum magnitudinem delicti, ſalvo ſibi contenemento ſuo, & mercator eodem modo ſalva merchandiza ſua, & Villanus ulterius quam noſter eodem modo amercetur ſalvo Homagio ſuo, & ſi amercetur ſit in Miſericordia noſtra.*

8 Co. 39. a. b. 2 Inſt. 27. 11 Co. 43. Keilw. 65. Cro. Eliz. 581. Dalt. Sheriff 400.

But a Fine may be ſet without Affeerment, for the Statute of *Magna Charta* does not extend to thoſe Caſes where a Court of Juſtice may impriſon, and where a Fine is ſet by way of Mercy, as a Ranſom and Purgation of the Offence; for the Statute was deſigned in Mercy to the Offenders, and not to hinder them from Mercy, and ſo did not extend to Offences that might be puniſhed by Impriſonment.

Moor 75. pl. 205. 3 Leon. 7, 8. Bendl. 159. S. C. adjudged. Leon. 203. Kitchen 51, 52. Rol. Abr. 468. Cro. Jac. 382. 2 Rol. Abr. 136. Rol. Rep. 201. Allen 78.

If at a Court-Baron, according to the Cuſtom there uſed, a By-Law is made, and the Penalty of 20*s.* laid upon every Offender, and at another Court a Tenant is preſented for a Breach thereof, by which the ſaid Penalty is forfeited, this cannot be affeered.

On the Preſentment of a Nuſance in a Torn or Leet, the Sheriff or Steward may either amerce the Party, and alſo order him to remove it by ſuch a Day, under a certain Pain, or may order him to remove it, under ſuch a Pain, without amercing him at all; and the Party having Notice of ſuch Order ſhall forfeit the Pain on a Preſentment at another Court, that he hath not removed the Nuſance, without any farther Proceeding; and every Pain ſo forfeited may be recovered in like Manner as a Fine or Amercement by Diſtreſs or Action of Debt; (*a*) neither ſhall it be affeered to a leſs Sum than is at firſt ſet.

3 Leon. 7, 8. 5 Mod. 130. Salk. 175. pl. 1. Ld. Raym. 69. 5 Mod. 124. 11 Mod. 215. pl. 3. 12 Mod. 88, 115, 180. Comb. 351. 2 Salk. 502. pl. 2. Skin. 635. pl. 4. (*a*) So where a certain Penalty is given by Statute for an Offence, of which the Leet hath Conuſance, the Steward may impoſe it by way of Fine without Amercement. Carter 28, 29.

*Page 519

* 2. By whom the Affeerment is to be.

8 Co. 40. b. 3 Lev. 206.

The Award of the Amercement is the Act of the Court, but the Taxing or Reducing it to a Certainty muſt be done by (*b*) certain Officers called Affeerors, choſen and ſworn for that Purpoſe; and therefore if an Amercement be impoſed in a Court (*c*) Leet, and affeered by the (*d*) Jury, and not by ſworn Affeerors for that Purpoſe, it is a void Amercement, and the Lord of the Leet cannot maintain his Action for it.

(*b*) That the Amercements on Plaintiffs or Defendants in the Court of Common Pleas were by the Clerk of the Warrants made Eſtreats of, and delivered to the Clerk of Aſſiſe within each Circuit, to deliver them to the Coroners in each County to affeer, and ſuch Aſſeſſment by the Coroners of the reſpective Counties, hath been held a Satisfaction of *Magna Charta, quod nulla prædictarum Miſericordiarum ponatur, niſi per Sacramentum proborum & legalium hominum de vicineto*, the Coroners being elected by the whole County. 8 Co. 39. b. (*c*) So a Juſtification for an Amercement in a Court-Baron, without ſhewing it was affeered, is naught. 3 Lev. 19. (*d*) But it has been held, that if a Jury in a Leet tax an Amercement, this is ſufficient without any other Affeerment, for the Amercement is the Act of the Court, and the Affeerment of the Jury. 8 Co. 40. b. Jon. 301. Cro. Car. 275. *vide* 2 Rol. Abr. 542.

2 Inſt. 28. 6 Co. 54. 8 Co. 40. a. S. C.

Although by the expreſs Words of *Magna Charta, Comites & Barones non amercientur niſi per Pares, &c.* yet long Uſage hath prevailed againſt it, for the Amercement of the Nobility is reduced to a Certainty, *viz.* a Duke 10 *l.* an Earl 5 *l.* a Biſhop who hath a Barony 5 *l. &c.*

28 Aſſ. 26. Rol. Abr. 212.

In an (*e*) Aſſiſe, if the Plaintiff does not appear, nor any for him, yet three of the Aſſiſe may be ſworn to affeer the Amercement, and ſhall do it.

(*e*) So upon a Nonſuit after the Jury are ready to give their Verdict, the Court may cauſe the Amercement to be immediately affeered by the ſame Jurors. 8 Co. 35. b. 11 Co. 43. b.—[*Vide ante*, 507.]

In (e) Treſpaſs if the Defendant, as Bailiff, &c. juſtifies, for that the Plaintiff was preſented, &c. and ſets forth, that the Amercement was affeered by two Affeerors, he ought to ſhew their (f) Names.

Keilw. 66.

(e) So in Debt for an Amercement, 3 Keb. 362. (f) So if alledged, that at a Court-Baron *coram ſectatoribus ejuſdem Curiæ*, it was preſented, &c. the Names of the Suitors ought to be ſhewn. 3 Leon. 7, 8. Moor 75. Bendl. 159.

(H) Of the Manner of recovering Fines or Amercements.

BY the Common Law, the King or Lord may, at their Election, diſtrain or bring an Action of (g) Debt for a Fine or Amercement.

Cro. Eliz. 581. Savil 93. Raſt. Ent. 151, 553, 606. 2 H. 4. 24. b. 10 H. 6, 7. Raym. 68.

(g) And the Defendant ſhall not be allowed to wage his Law in any ſuch Action, becauſe it is grounded on the Act of a Court of Record. 10 H. 6. 7. Co. Lit. 295. 2 Rol. Abr. 106.

But every Avowry or Declaration of this Kind ought expreſsly to ſhew, that the Offence was committed (b) within the Juriſdiction of the Court, for if it were not, all the Proceedings were *coram non judice*, and a Court ſhall not be preſumed to have a Juriſdiction where it doth not appear to have one.

Hob. 129. Raſt. Ent. 553. Co. Ent. 572.

(b) But that it need not be alledged in the Preſentment itſelf. Hob. 129.——Yet *per* 2 Hawk. P. C. 59. it is moſt adviſeable to have ſuch an Allegation, and that perhaps may ſupply the Want of the Averment of Juriſdiction in the Pleadings.

* Alſo it is adviſeable to alledge, that the Offence was committed as well as preſented, and to ſhew the Names of the Preſentors and the Affeerors in ſetting forth a Preſentment or Affeerment, and alſo to ſhew that proper Notice was given of holding the Court.

* Page 520

But for this *vide* 2 Hawk. P. C. 59, 60. and ſeveral Authorities there cited.

Of common Right, a Diſtreſs is incident to every Fine and Amercement in a Torn or Leet, for Offences of common Right within the Juriſdiction thereof; but if the Offence was only the Neglect of a Duty created by Cuſtom, and of a private Nature, it is clear, that there muſt be a Cuſtom to warrant a Diſtreſs, and perhaps ſuch Cuſtom is alſo neceſſary though the Duty be of a public Nature.

2 Hawk. P. C. 60. and the Authorities there.

Alſo the Sheriff or Lord may for ſuch Fines or Amercements diſtrain the Goods of the Offender, even in the Highway, or in Land not holden of the Lord, unleſs ſuch Land be in the Poſſeſſion of the Crown.

Rol. Abr. 670. 2 Inſt. 104.

But ſuch Fines and Amercements being for a Perſonal Offence, no Stranger's Beaſts can lawfully be diſtrained for them, though they have been Levant and Couchant upon the Lands of the Offender.

Owen 146. Noy 20.

If ſuch Court is in the King's Hands, the Diſtreſs may be ſold of common Right, after it hath been kept for a reaſonable Time, as the Space of ſixteen Days; and it ſeems the better Opinion, that where any ſuch Court is in the Hands of a common Perſon, if the Goods were diſtrained for an Offence of a public Nature, they may be ſold of common Right, without any Special Cuſtom for that Purpoſe.

Hetley 62. Finch 476. 8 Co. 41. Rol. Rep. 76. Noy 17. Bulſ. 53.

No Bailiff can lawfully diſtrain for any ſuch Fine or Amercement without a Special Warrant for ſo doing, which muſt be ſet forth by him in an Avowry or Juſtification of ſuch a Diſtreſs.

Cro. Eliz. 698, 748. Moor 574. pl. 789, 607, pl. 839. 2 Keb. 745. Salk. 107. pl. 2.

Fines and Recoveries.

Spelman describes it thus: *Finis eſt ſolemnis ritus transferendorum Prædiorum in Curia Regis Civilium Cauſarum, quo nihil Sanctius vel Auguſtius ad Alienationes & hereditates ſtabiliendas. Spel. Gloſſ.* 228.

A Fine is an Agreement of the Parties on Record, by which Lands are transferred from Conuſor to Conuſee, with or without a Render; and this is eſteemed a Conveyance of greater Security than a Feoffment, or the Inveſtiture by Livery, being not only equivalent to the Notoriety of Livery, but having the conſtant and undoubted Credit of a Court of Record to protect and ſupport it; and this farther Convenience and Security, that it does not only transfer the Right of the Vendor, and all claiming under him, but likewiſe extinguiſhes the Right of others who omit to make their Claim in due Time.

Fines ſeem originally to have been invented and allowed of for different Ends and Purpoſes than they are now applied to, for they were at firſt no more than a friendly Compoſition and Determination of the Matters in Debate between the Demandant and Tenant in the Lord's Court; and this Way of compoſing Differences was eaſily admitted in thoſe Days, * becauſe the Suitors of the Court, who were Judges of all Suits, were by theſe amicable Compoſitions the ſooner diſmiſſed from their Attendance at the Court; nor did the Lord of the Manor ſuffer by them, becauſe, on theſe Agreements, the Parties litigating paid him a Fine for his *Conge de accorder*, as they do the King at this Day, which was equivalent to Amercements, which were paid him in Adverſary Suits.

* Page 521

Theſe Fines were not only thought uſeful to private or particular Perſons, but ſuch as eſtabliſhed the publick Peace of the Kingdom; and *Spelman* ſays, *Fines hujuſmodi maxime placuere, quod propter teſtationis magnificentiam non ſolum ad ſtabiliendas etiam lites maxime valebant; ideoque ab emptoribus terrarum tanquam ſacra Anchora Culta & Admirata. Spelm. Gloſſ. Verb.* Finis 228.

From an Obſervation of the peculiar Benefit and Security from Fines, and from the Countenance and Encouragement they receive from the Courts of Juſtice, Men began to engage themſelves, and oblige each other by Covenants to compoſe their Differences; and they were the eaſier drawn into this amicable Way, becauſe it was not attended with the uſual Expences of Adverſary Suits, which being generally proſecuted with Warmth and Animoſity, by the Parties litigating, muſt neceſſarily involve one or both Parties into Difficulties, which ſuch friendly Compoſitions are free from; and the Judges, conſidering theſe Agreements as the publick Acts of the Court, allowed them ſome Sanction with their own Judgments; and hence they came to be improved into that uſeful and common Aſſurance which we find them to be at this Day, as they ſtand upon the Statutes of 4 *H.* 7. *cap.* 24. and the 32 *H.* 8. *c.* 36.

But for the better Underſtanding of the Doctrine of Fines, we ſhall diſtinguiſh this Head into the following Branches, under which the particular Caſes may be comprehended.

Fines and Recoveries.

(A) Of the ſeveral Parts of a Fine, and when they begin to operate. 522.

(B) The ſeveral Sorts of Fines. 524.

(C) Who may levy Fines. 526.

(D) Of the Dedimus Poteſtatem. 527.

(E) Of the Operation of a Fine in barring the Iſſue in Tail. 528.

(F) Of the Operation of a Fine, in barring Strangers, or thoſe who have but an uncertain Intereſt, as a Term for Years, or barely an equitable Intereſt. 532.

(G) Of the Remedies given to Strangers, by Claim and Entry, for the Preſervation of their Right. 536.

(H) Of erroneous Fines, and the Manner of Reverſing them. 537.

Of what Things a Fine may be levied, and by what Name, and what ſhall be a ſufficient Deſcription of the Thing, without naming either Vill, Hamlet or Pariſh, ſee in the next Head of *Recoveries*, of what Things a Recovery may be ſuffered. 544, &c.

*(A) Of the ſeveral Parts of a Fine, and when they begin to operate.

*Page 522

THE firſt Part of a Fine is the original Writ, and without this the Fine is erroneous, and may be reverſed for Error in *B. R.* this being abſolutely neceſſary to bring the Parties within the Juriſdiction of the Court; and though at this Day the Original is generally a Writ of Covenant, yet Fines are taken on all Writs in which Lands are demanded, or are to be charged, or which any Way relate to them; for the Law having provided different Remedies for the ſeveral Grievances of the Subject, it was but reaſonable in the Judges to allow of theſe Compoſitions, whatever Method the injured Perſon took to recover his Right.

Co. Reading 3, 10. Plow. 394. 2 Rol. Abr. 14. 2 Inſt. 510. 5 Co. 38. A Fine may be levied on a Writ of Right Cloſe, or in any Real Action,

But not in an Original in a Perſonal Action; and the common Writ of Covenant, on which a Fine is levied, is not a Perſonal but a Real Action; for though it is to have Damages for Breach of Covenant, as in Perſonal Actions, yet it is to have an Execution and Performance of the Covenants. Salk. 340. reſolved *per Curiam.*

The Practice now is for the Conuſor to make the Conuſance, and acknowledge the Fine, before any Original ſued out; and this has ſo far obtained, that the Judges have reſolved ſuch Fines ſhould ſtand, though the Conuſor died before the Writ of Covenant was taken out; but in theſe Caſes the Originals were ſued out, and made returnable, as of a Term precedent the Conuſance, for they are ſtill neceſſary to make the Fine a perfect and complete Conveyance, though for the greater Expedition they have allowed of this Variation from the antient Courſe.

1 H. 7. 9. Hob. 330. *Farmer's* Caſe. 2 Vent. 47.

Co. Reading 10. 2 Rol. Abr. 16. So if a Writ of Covenant be

If in a *Warrantia Chartæ* againſt *B.* to warrant one Acre, if he levies a Fine of that Acre and another, the Fine operates to convey only all his Right in that Acre he was called to defend, for the other was not mentioned in the Original.

brought *de terris*, and the Defendant makes Conuſance of Paſture, Meadow, or Wood, this Fine is not good, nor *e contra*; for theſe being of a different Nature from ploughed Land (which *terra* properly implies) are not contained in the Writ, and conſequently there does not appear to the Court any Contention about them. 2 Inſt. 514. Co Lit. 4, a. 2 Rol. Abr. 16.

2 Rol. Abr. 15, 16.

Hence it is, that if the Conuſance be of the Manor of *Dale*, the Conuſee cannot make a Render of the Manor of *Sale*; or if the Conuſance be of the third Part, the Render cannot be of the Whole; becauſe the Court can determine the Right only of that about which the Parties contended, and the Conuſee demanded in his Original; but if the Conuſor acknowledges all his Right, *&c.* to the Demandant, for which Conuſance he grants and renders the Land to the Conuſor for Life; or if he grants a Common in the Land, or ſo many Loads of Wood off it, this is a good Fine; becauſe the Determination is wholly of the Thing in Diſpute, one Party taking the Property, and the other a Profit ariſing from it, and comprehended in the Original, for which Thing in Diſpute it was brought.

2 Rol. Abr. 15. Co. Reading 11. 2 Inſt. 514.

Therefore if the Grant and Render had been of a Rent *de novo*, that had been good; becauſe the Rent iſſuing out of the Land muſt be implied in a Demand of the Land; and conſequently the Concord and Agreement of the Parties is received and allowed for that only which they litigated.

So if the Writ of Covenant be of Land, he may grant the Reverſion. 2 Rol. Abr. 16.

* Page 523

* As nothing can paſs by the Fine but what is expreſſed or implied in the Covenant, ſo no one can take an immediate Eſtate by it who is not mentioned in the Writ of Covenant, becauſe none can have any Benefit from the Judgment of the Court that is not judicially before it, and ſues for it; yet a Grant and Render may be made to a Stranger in Remainder; but the Reaſon is, becauſe the Render being only a Conſideration for the Conuſance, a Remainder limited to a Stranger may be as much a Conſideration to the Conuſor, as if the whole Eſtate had been given to himſelf; but there muſt be an immediate Eſtate given back to the Conuſor, becauſe the Render *ex vi termini* implies that it muſt return to him.

Co. Reading 8. 2 Inſt. 514. Bro. Tit. Fines 111. But if a Writ of Covenant be brought againſt *B.* who vouches *C.* the Vouchee may make Conuſance. 2 Rol. Abr. 13. Bro. 105. 2 Inſt. 514.

When the Parties are judicially before the Court by Original, the Counſel for the Conuſee appears with the *Præcipe* and Concord, which is in Nature of a Declaration, ſetting forth the Conuſance which ought to be made by the Tenant in the Writ, after his Appearance is recorded; then follows his Conuſance, which is no more than an Acknowledgment, that the Manor, or other Lands, *&c.* contained in the Writ, belong of Right to the Demandant, as Land which he hath of the Gift of the Tenant, with a general Releaſe and Warranty to the Conuſee and his Heirs. When this Conuſance was taken, they went originally to the Treaſury, but now by the 5 *H.* 4. *c.* 14. they ſtop with the *Cuſtos brevium*, who records it; that Statute providing that all the Parts of the Fine ſhall remain in the ſafe Cuſtody of the Chief Clerk of the *C. B.* before the Chirographer has them out of Court; the Deſign of the Act being thereby to prevent the Inconvenience which frequently happened by the Embezzlement of Fines, when they lay only in the Hands of the Treaſurer and Chirographer, either by their Connivance or Negligence.

Co Reading 3.

5 H. 4. c. 14. 5 Co. 39. b. 2 Sid. 55.

Fines and Recoveries.

The next and moſt material Thing conſiderable in a Fine is the King's Silver; this is entered on the Writ of Covenant, and gives it the Force and Effect of a Fine, and is granted to the King *pro licentia concordandi*, or *Conge de accorder*, in Compenſation of the Amercements, and other Fines, which became due on Judgments and Nonſuits, in Adverſaries Suits; this is always paid by him who takes the Fee-ſimple by the Fine, and on the Entry of it on the Covenant, the Sum given is expreſſed, together with the Plea, and between whom, with Mention of the Land for which it is given.

2 Inſt. 511. 5 Co. 39.

It is likewiſe called the Poſt-Fine, in reſpect of the Primier Fine in the Hanaper, which is due to the King on the Original, and is greater or leſs in Proportion to that; for it is as much as the Primier Fine, and Half as much more; as if the Primier Fine be 6 *s.* 8 *d.* this is 10 *s.*

2 Inſt. 511.

From the Entry of this the Fine is obligatory, and begins to operate; and from thenceforth the Fine ſhall ſtand, though either Party die before the other Parts are recorded.

2 Inſt. 511. 5 Co. 39. Dyer 220. 2 Vent. 47. Barnes's Notes Ld. Raym. 850, 872. 2 Vern. 3. Pre. Ch. 150. 10 Mod. 213. Gilb. Eq. Rep. 108. C. P. 144. 3 Mod. 140.

But if the Conuſor dies before the King's Silver be entered, the Fine is voidable, and may be reverſed by Writ of Error; becauſe this being given *pro licentia concordandi*, the Agreement of the Parties is not to be admitted as the Judgment of the Court till it be paid and entered, and conſequently, if the Conuſor dies before that be done, the Fine is erroneous, as a Judgment given in an Adverſary Suit after the Death of one of the litigating Parties; but this is to be underſtood with this Diſtinction, that where it appears by the Record itſelf, that the King's Silver was paid after the Death of the Conuſor, there the Fine is erroneous; but where after the Conuſance made the Conuſor dies before the King's Silver is paid, and after his Death the Silver was paid, and entered on a Writ of Covenant returnable the Term precedent his Death; as if Baron and Feme make Conuſance * before Commiſſioners the 26th of *March*, the Feme dies the Day following, and upon a Writ of Covenant made returnable the *Hillary* Term precedent, the King's Silver was entered as of that Term, and the Fine was adjudged to ſtand; for where there does not appear an Error on the Face of the Record, the Judges, in Favour to Fines, which ſo much ſtrengthen Men's Titles, and quiet their Poſſeſſions, have always ſupported them, and would not ſuffer the entering the King's Silver, after the Parties Death, to be examined, when it appeared by the Record itſelf, that the Fine was compleated, as a Fine of the Term precedent the Death of the Conuſor.

* Page 524

2 Inſt. 511. 2 Vent. 47. Hob. 330. *Farmer's* Caſe.

The other Parts of the Fine are the Foot and Note of it; the Foot of the Fine runs thus; *hæc eſt finalis concordia facta apud Weſtm. in curia Domini Regis, &c.* and mentions the Day, Year and Place, and before what Juſtices the Conuſance was taken.

5 Co. 39. Co. Reading 3.

The Note of the Fine is no more than a Docket taken by the Chirographer, from which he tranſcribes the Indentures, which are delivered to the Party to whom the Conuſance was made; and when this is done, the Fine is ſaid to be ingroſſed.

5 Co. 39. 2 Inſt. 468. F. N. B. 147.

A Fine was thus; *Hæc eſt finalis concordia facta in curia Regis apud Weſtm. a die ſancti Michaelis in tres ſeptiman' anno decimo Willielmi tertii coram Thom. Trevor, &c. & poſtea in craſt. ſanctæ Trinitat. 1 Annæ conceſſ. & recordat' coram ejuſdem Juſticiar'*; ſo that the Concord of the Fine was of one Term, and the *Recordat.* of the Term following; and the Queſtion was, Of which Term this ſhall be ſaid to be a complete Fine; and it was held to be a Fine of the Term in which the Concord was made, and that the *concordia facta in curia* is the complete Fine.

Salk. 341. pl. 7. *Lloyd* ver. *Viſcount Say and Seal.*

(B) The ſeveral Sorts of Fines.

Co. Reading 4. ALL Fines are either executed, as Fines *ſur conuſance de droit come ceo. &c.* Fines *ſur* Releaſe, and Fines *ſur* Surrender; or executory, as Fines *ſur conuſance de droit tantum*, and *ſur Grant & Render*; the Fine *ſur conuſance de droit tantum* ſeems to be the moſt ancient; for the Conuſance being in the Place of the Judgment, which was always executory in Adverſary Suits, the Demandant was obliged to follow the Rules of the Law, and ſue out Execution; but in Time, when theſe Fines became the common and beſt Way of purchaſing, the Purchaſer, to prevent the Trouble of ſuing out Execution, had Seiſin given him by Livery in the Country, and for his further Aſſurance obliged the Vendor, by Covenant, to levy a Fine; and thus the Fine *ſur conuſance de droit come ceo, &c.* came in Uſe, which ſuppoſes a precedent Gift, by which the Conuſee was put into Poſſeſſion, and conſequently there needed no Execution of what he had already.

Co. Lit. 9. b. Co. Reading 4, 7. This Fine *come ceo, &c.* is moſt commonly uſed, being the ſureſt for the Purchaſer; in which it is to be obſerved, that this Fine and that *de droit tantum*, convey a Fee-ſimple to the Conuſee, without Words of Inheritance; for when the Conuſor acknowledges the Land to be the Right of the Conuſee, it is repugnant and contradictory to his own Acknowledgment, to claim any Right or Intereſt to the Land in Reverſion or Remainder; beſides, in every Judgment a Fee-ſimple was recovered, and the Conuſance coming in Lieu of the Judgment muſt neceſſarily import as much, unleſs the expreſs Acknowledgment of the Parties (*a*) qualify it.

(*a*) And therefore if the Limitation be expreſsly to the Conuſee, and the Heirs of his Body, the Fine paſſes only an Eſtate-tail; for it would be abſurd to give more againſt ſo ſolemn a Declaration of the Parties. Co. Reading 4.

*Page 525 * Upon a Fine *ſur conuſance de droit come ceo, &c.* the Conuſor cannot reſerve a Rent, becauſe the Conuſance ſuppoſing a precedent Gift he cannot charge the Inheritance which he has given intirely away; and ſo the *Reddendum* comes too late when the Fine has mentioned before an abſolute precedent Gift, without any ſuch Clauſe of Reſervation.

Bro. Tit. Fines 30. 2 Rol. Abr. 18. But if the Conuſance be only of an Eſtate for Life, the Conuſor may reſerve a Rent, with Clauſe of Diſtreſs; for that is a Remedy the Law gives for the Recovery of all Rent Services, which this muſt be, being incident to the Reverſion. Co. Reading 5. 2 Rol. Abr. 18.

Rol. Abr. 19. Co. Reading 5, 9. The ſame Law is againſt the Grant of a Reverſion. Bro. Tit. Fines 65. A Fine *ſur conuſance de droit come ceo, &c.* cannot be levied to two and their Heirs; for the End of Fines being not only to ſettle the Poſſeſſion for the preſent, but for ever, the Admittance of ſuch a Fine would not anſwer the End; for beſides the Uncertainty which of the Conuſees ſhould ſurvive and enjoy the Land, the Fine itſelf cannot operate according to the Limitation; for the Survivor, by the Privilege of Jointenancy, ſhall enjoy the Whole, and for ever exclude the Heirs of the other Conuſee; beſides, the Fine being equivalent to a Judgment, ought to decide and ſettle the Right of the Fee.

But if Lands by Fine be granted to two and the Heirs of one of them, this is good; for all Things will continue as the Fine has ſettled them. Bro. Tit. Fines 65.

5 Co. 38. b. *Tye*'s Caſe. 2 Rol. Abr. 18. For the former Reaſon the Judges will not, or at leaſt ought not, to admit of a Fine upon Condition, becauſe ſuch a Fine does not poſitively determine and ſettle the Right of the Fee, it being uncertain whether the Conuſee will enjoy the Land according to the Fine, ſince that depends upon the

the Performance or Non-performance of the Condition; but my Lord *Coke* tells us, that if ſuch Fines be admitted by the Judges they are valid and ſhall ſtand, the Rule, *quod fieri non debet ſed factum valet*, obtaining in this Caſe; becauſe Fines being the private Agreement and Concord of the Parties, it were to trifle with the Authority of the King's Courts, which ever ought to be preſerved ſacred, to ſuffer either Party to recede from their Contract, after their ſolemn Compoſition acknowledged on Record, and received in the moſt ſolemn Manner by the Judgment and Deciſion of a Court of Juſtice.

Bro. Tit. *Fines* 5. Co. Reading, 5.

A. makes a Leaſe for Life, and afterwards grants the Reverſion by Fine to *B.* for Life, the Remainder in Tail in a *quid juris clamat* againſt the Leſſee, he would have ſurrendered to the Conuſee, reſerving a Rent during his Life, but the Court refuſed it; for had this Surrender, with the Reſervation of the Rent, been admitted, it might have happened that the Rent would not continue according to the Limitation of the Fine; for if the Grantee of the Reverſion died before the Tenant for Life, the Remainder Man in Tail ſhould hold the Land diſcharged, and the Tenant for Life could not enjoy the Rent as long as the Fine gave it; but if in this Caſe the Leſſee had ſurrendered to the Grantee for his own Life, with a Reſervation of a Rent, this might have been admitted, for this is no abſolute Surrender; and each Party may enjoy what the Fine gave him, according to the ſeveral Limitations thereof.

Co. Reading, 5.

If the Leſſee for Life, the Remainder for Life, and the Leſſee levies a Fine *ſur conuſance de droit tantum* to him in Remainder, this enures by way of (*a*) Surrender, becauſe by this Fine he only acknowledges all the Right he has in the Land to belong to him in Remainder; but if the Leſſee had levied a Fine, *ſur conuſance de droit come ceo, &c.* to him in Remainder, it had been a Forfeiture of both their Eſtates, and he in Reverſion might enter immediately; and the Reaſon of the Difference is this, the Fine *ſur conuſance de droit come ceo, &c.* always graſps a Fee-ſimple, which paſſes by the precedent Gift as the Fine ſuppoſes; but the Fine *ſur conuſance de droit tantum* only conveys all his Right, which is intended all he can lawfully paſs away.

(*a*) Note, the Forms of theſe Fines *ſur ſurrender* are the ſame with thoſe *ſur conuſance de droit*, only the Clauſe of Warranty is omitted.

* If *C.* ſeiſed in Fee as Heir of the Part of the Mother, and he and his Wife levy a Fine to *A.* and *B.* with Warranty, and *A.* and *B.* by the ſame Fine, grant and render to the Huſband and Wife in Tail, Remainder to the Heirs of the Huſband; though it was urged, that the Seiſin of the Conuſee was fictitious, and that nothing was allowed by the Fine, yet reſolved, that the Conuſee was more than a bare Inſtrument, and that the Eſtate was once in him; and that the Fine and Render is a Conveyance at Common Law, and the Render makes the Conuſor a new Purchaſer, as much as a Feoffment and Re-infeoffment at Common Law.

* Page 526

Salk. 337. pl. 1. *Price* ver. *Langford.*

(C) Who may levy Fines.

AND here it muſt be firſt obſerved, that whatever legal Defects may be in the Conuſor, if the Judge admits his Conuſance, the Fine ſhall ſtand in all Caſes, except that of an Infant, though the Judge omits a very neceſſary Part of his Duty in not rejecting ſuch Fines.

Co. Reading 8. 2 Inſt. 515.

The

Co. Reading 8. But for this *vide* the ſeveral Titles of *Infants*, *Ideots*, and *Baron and Feme*.

The Principal Defects are either want of Diſcretion and Underſtanding, as in Infants, Ideots, and Perſons of *non ſane* Memory; or want of Power, as Femes Covert.

Vide Poſtea, Letter (H) 537, *&c.*

As to Fines levied by an Infant, though ſtrictly ſpeaking all Contracts made by Infants are in their own Nature void, becauſe a Contract is an Act of the Underſtanding, which, during their State of Infancy, they are preſumed to want; yet Civil Societies have ſo far ſupplied that Defect, and taken Care of them, as to allow them to contract for their Benefit and Advantage, with Power to recede from and vacate it when it may prove prejudicial to them; now the Method to ſet aſide ſuch a Contract muſt be by Matter of equal Notoriety with the Manner in which it was made; and therefore if an Infant levies a Fine, which is no more than his own Agreement recorded as the Judgment of the Court, he muſt reverſe it by Writ of Error, and this muſt be brought during his Minority, that the Court of *B. R.* may by Inſpection determine the Age of the Infant; but the Judges by *Adjuncta* may in ſuch Caſes inform themſelves by Witneſſes, Church-Books, *&c.*

Co. Lit. 380. b
Moor 76.
2 Rol. Abr. 15.
Bro. Tit. *Error* 60.
Bro. Tit. *Fines* 74, 79.
2 Inſt. 482.
2 Bulſt. 320.

12 Co. 122. If an Infant brings a Writ of Error to reverſe a Fine for his Nonage, and after Inſpection and Proof of Infancy by Witneſſes dies before the Fine is reverſed, his Heir may reverſe it, becauſe the Court, having recorded the Nonage of the Conuſor, ought to vacate his Contract when he appeared to be under a manifeſt Diſability at the Time he entered into it. Co. Lit. 380. b. Moor 884. An Infant acknowledged a Fine, and the Conuſees omitting to have the Fine ingroſſed till he came of Age, in order to prevent the Infant from bringing a Writ of Error, yet the Court, upon View of the Conuſance produced by the Infant, and upon his Prayer to be inſpected, and his Age examined, recorded his Nonage to give him the Benefit of his Writ of Error, which he muſt otherwiſe loſe, his Nonage determining before the next Term. Moor 74.

4 Co. 124. *Beverley's* Caſe.
Co. Lit. 247.
Bro. Tit. *Fait* 62.
Cro. Eliz. 398, 622.
F. N. B. 202.

As to Ideots and Lunaticks, it is neceſſary to diſtinguiſh between their Acts done *in pais* and thoſe ſolemnly acknowledged on Record; though the Law is clear, that in neither Caſe are they admitted to diſable themſelves, for the Inſecurity that may ariſe in Contracts from counterfeit Madneſs and Folly; but their Heirs and Executors may avoid ſuch Acts *in pais* by pleading the Diſability; becauſe if they can prove it, it muſt be preſumed Real, ſince nobody can be thought to counterfeit it, when he can expect no Benefit from it himſelf.

But in what Caſe they themſelves may have Relief in Equity, *vide* Tit. *Ideots and Lunaticks*.

* Page 527

4 Co. 124.
2 Inſt. 483.
Bro. Tit. *Fines* 75.
Co. Lit. 247.

† Idiocy to be judged of by the Juſtices, on Fine levied. 15 Ed. 2.

* But neither the Lunatic† himſelf, nor his Heir, can vacate any Act of his done in a Court of Record; and therefore if a Perſon *non compos* acknowledges a Fine, it ſhall ſtand againſt him and his Heirs; for though the Judges ought not to admit of a Fine from a Man under that Diſability, yet when it is once received, it ſhall never be reverſed, becauſe the Record and Judgment of the Court being the higheſt Evidence in the Law, preſumes the Conuſor, at that Time, capable of contracting; and therefore the Credit of it is not to be conteſted, nor the Record avoided by any Averment againſt the Truth of it.

2 And. 193. *Hugh Lewis's* Caſe.
4 Co. 124. a. 126. b. *Bro.* Tit. Fines 75. Co. Lit. 247.

So it is in the Caſe of a Fine levied by an Ideot, it ſhall ſtand againſt him and his Heirs; for no Averment of Ideocy can vacate the Fine, nor will an Office finding him an Ideot *a nativitate* be ſufficient to reverſe the Fine

Fine, for that were to leſſen the Credit of Judgments in Courts of Record, by trying them by other Rules than themſelves.

And as Fines ought not to be taken from Lunatics and Ideots, ſo neither from old doting Men who have loſt the Uſe of their Reaſon; but if they be weak or infirm through Age and Sickneſs, that will be no ſufficient Cauſe to refuſe them. West. Fines, ſ. 4.

As to Feme Coverts, from the Intermarriage, the Law looks upon the Huſband and Wife but as one Perſon, and therefore allows of but one Will between them, which is placed in the Huſband as the fitteſt and ableſt to provide for and govern the Family, and therefore gives him an abſolute Power over her Chattels Perſonal, to diſpoſe of as he pleaſes, without her Conſent; but as to her Real Eſtate, has thought fit that no Act of his ſhall prejudice her or her Heirs in it, unleſs ſhe join with him by ſome Matter of Record, and on Examination teſtify her Aſſent to ſuch Diſpoſition. 10 Co. 42. b. 43. a. 2 Inſt. 510. Sid. 11. Rol. Abr. 347. but thoſe Books which ſay, that a Fine ſhall not bind a Woman under Coverture, unleſs ſhe be examined, muſt not be underſtood as if it were in her Power to reverſe the Fine for Want of her Examination, but they are to be underſtood in this Senſe, that the Judge ought not to receive a Fine from a Feme Covert without examining her, leſt it ſhould not proceed from her own Freedom and Choice; but if ſuch a Fine be once admitted, and recorded without any Examination, though the Judge has omitted a very neceſſary Part of his Duty, yet the Fine ſhall ſtand, and neither the Feme, nor her Heirs, ſhall be admitted to aver that ſhe was not examined; for that were to leſſen the Credit of the Judgment of the Courts of Juſtice, which is the higheſt Evidence of the Law; but of Fines levied by the Huſband ſolely, or by the Huſband and Wife jointly, of the Wife's Inheritance, or of Fines levied by the Wife ſolely, of Lands which are of the Proviſion of the Huſband, *vide* Tit. *Baron and Feme*, [and the Statutes 11 H. 7. c. 20. & 32 H. 8. c. 28. & c. 36.——Ideots and Lunatics, or their Committees, by Direction of the Chancellor, enabled to convey Truſt Eſtates and Mortgages. 4 Geo. 2. c. 10. ——Infants, Truſtees, and Mortgagees, enabled to convey by Direction of the Chancery. 7 Ann. c. 19. ——An Infant how to be admitted to a Copyhold, and how compellable to pay his Fine. 9 Geo. 1, c. 29.]

(D) Of the Dedimus Poteſtatem.

THE Statute of 15 *E.* 2. called the Statute of *Carliſle*, introduced the *Dedimus*, which is a Special Commiſſion, granted out of Chancery, to certain Perſons therein named, to take the Conuſance of ſuch Perſons as through Age or Sickneſs are not able to appear in Court in Perſon. By this Statute no Body can be a Commiſſioner but the Judges, and two or one of them, by the Conſent of the Reſt, may receive the Conuſance; and if there go but one of them, he ſhall take with him an Abbot, a Prior, or a Knight, a Man of good Fame and Credit; and Writs of Error have been allowed to reverſe Fines where the Conuſance hath not been taken before ſuch Perſons. Bro. Tit. Fines 120. F. N. B. 146. But the preſent Practice falls ſhort of the Order this Statute preſcribes, and it is ſufficient if one of the Commiſſioners be a Knight, or though neither be a Knight, if one of the Judges of the *C. B.* gives his *Allocatur* to the Caption, by which great Abuſes have happened in taking of Fines, for which ſee the ſecond Branch of this Head.

By the Cuſtom, the Chief Juſtice of *C. B.* may take Conuſances any where out of Court, and certify the ſame without any *Dedimus*; and if * a Serjeant hath a Patent to be *C. J.* he may take Conuſances without a *Dedimus* before he is ſworn. * Page 528 Co. Reading 10. Cro. Eliz. 469.

If a Fine be levied to one of the Juſtices of *C. B.* and the ſaid Juſtice takes the Conuſance of the Fine, it is void, *quia judex in propriâ cauſâ.* Co. Reading 10.

If the *Dedimus* be directed to two jointly, and the Conuſance is taken by one only, the Fine is erroneous; for where two are inveſted with a joint Power, it cannot by any Conſtruction from the Commiſſion be executed by one only. Cro. Eliz. 240. *Downes* ver. *Savage.*

The *Dedimus* contains the Subſtance of the Writ of Covenant, and there-
F. N. B. 146. Cro. Eliz. 677, 740. Co. Reading 10. fore muſt bear *Teſte* after it, otherwiſe it is Error, and muſt be ſigned by the Lord Keeper or Chief Juſtice, or by ſome of the Juſtices of the Circuit where the Lands lie.

Bro. Tit. Fines 116. Rol. Abr. 794. Dyer 220.

F. N. B. 147. If the Commiſſioners refuſe to certify the Conuſance to the Court in convenient Time, which is a Year and a Day, a *Certiorari* is to be awarded againſt them, comprehending the Subſtance of the *Dedimus*, and how they have taken the Conuſance, and commanding them to certify it; and if they ſhall omit to do it, then an *Alias*, a *Pluries* and Attachment ſhall iſſue againſt them.

Co. Reading 10. F. N. B. 147. If the Commiſſioners die before the Conuſance be certified, their Executors muſt certify it upon *Certiorari* to them directed, and upon their Refuſal, like Proceſs lies, as in the former Caſe.

Cro. Eliz. 576, 577. If a *Dedimus* be awarded to take the Conuſance of three ſeveral Perſons, the Commiſſioners may take the Conuſance from each of them, and at ſeveral Times, for it may ſo happen that they cannot meet at one Place at the ſame Time; and if the Commiſſioners return the Conuſance but of two of them, the Court may raſe the Name of the third out of the *Dedimus*, and make the Writ of Covenant agreeable to it; for ſince the third does not join, it can be no Prejudice to him; and therefore it were unreaſonable that his Obſtinacy or Refuſal ſhould impeach the Conuſance of the other duly taken, and ſo prevent their amicable Compoſition of their Differences.

Cro. Eliz. 576, 577. A *Dedimus* was awarded to take the Conuſance of a Fine from Baron and Feme, and the Feme refuſing to join, the Conuſance of the Huſband was only returned; in this Caſe the Court ordered a new *Dedimus* to be awarded, but to be of the ſame Date with the former, and that the Return of the Commiſſioners ſhould be annexed thereunto; for the Refuſal of any one of the Conuſors can be no Reaſon to delay or hinder another to transfer his Right.

(E) Of the Operation of a Fine in barring the Iſſue in Tail.

4 H. 7. c. 24. BY the 4 *H.* 7. *c.* 24. a Fine with Proclamations ſhall conclude all Perſons, both Privies and Strangers, except Women Covert, Perſons under Age, in Priſon, out of the Realm, or of *non ſane* Memory, being not Parties to the Fine; by this general Clauſe all others are bound, but by the firſt Saving,

The Right and Intereſt that any Perſon or Perſons (other than Parties) hath or have at the Time of the Fine ingroſſed, is ſaved; ſo that they or their Heirs purſue ſuch their Right or Intereſt by Action, or lawful Entry, within *five* Years after the Proclamations ſo made; this
* Page 529 * Clauſe ſeems to comprehend only thoſe who have preſent Right, but by the ſecond Saving,

The Right and Intereſt of all Perſons is ſaved which accrues after ingroſſing of the Fine, ſo that the Parties having the ſame purſue it within *five* Years after it ſo accrues; and if at the Time of the Fine ingroſſed, or of ſuch Accruer, the Perſons be covert (and no Parties to the Fine) under Age, in Priſon, out of the Realm, or of *non ſane* Memory, they or their

Heirs have Time to purſue their Action within five Years after ſuch Imperfection removed.

Though this Statute evidently concludes all Perſons under the Words *Privies and Strangers to the Fine*; and the Statute hath Savings for Strangers, but none for Privies; yet it was at firſt doubted, whether a Fine levied by Tenant in Tail could bar the Iſſue by that Statute; for the Intails had continued ſo long, and moſt People were ſo fond of them, that the Judges were very cautious in making ſo large an Expoſition on that Statute as it would well bear; and though at length the Judges reſolved, that a Fine with Proclamations was a Bar, not only to the Tenant in Tail, becauſe he could claim no Right againſt his own Acknowledgment on Record, that it was the Right of another, but alſo againſt the Iſſue in Tail; becauſe the Words and Intention of the Statute place the Privies, that is, the Perſons claiming the Right devolved at any Time on the Conuſor, in the ſame Condition as the Conuſor himſelf, by the Authority of the Legiſlature; and this introduced the Statute of 32 *H.* 8. *c.* 36. which by a Retroſpection confirms the Conſtruction made by the Judges on the 4 *H.* 7. *c.* 24. and declares that

Bro. Tit. Fines 1. Hob. 332. Dyer 3. The Reaſons of this Doubt and the Opinions *pro* and *con.* may be ſeen Co. Lit. 372. 2 Inſt. 516, 517. Moor 250. And. 170. Plow. 373. Jo. 39. 19 H. 8. 6. pl. 5. And. 46. pl. 118. Raym. 271, 287, 321, 345 to 349. 2 Jon. 238. in the Caſe of *Murray* and the Earl of *Derby*.

All Fines levied, by any Perſon or Perſons of full Age, of Lands entailed before the ſame Fine to themſelves, or to any of their Anceſtors in Poſſeſſion, Reverſion or Remainder, or Uſe, ſhall immediately after the Fine ingroſſed, and Proclamations made, be a ſufficient Bar againſt them and their Heirs claiming only by ſuch Intail, and againſt all others claiming only to their Uſe, or to the Uſe of any Heir of their Bodies. 32 H. 8. c. 36.

For the better Explication of theſe Statutes, it is to be obſerved, that the Perſons, whoſe Right is barred by the Fine, are either *Parties*, *Privies*, or *Strangers*; that the *Parties* themſelves are barred is plain, and admits of no Doubt; as to *Privies*, which is the material and operative Word in the 4 *H.* 7. *c.* 24. it is to be noted, that it has a threefold Signification, for it either comprehends a Privity in (*a*) Eſtate, as between Donor and Donee, which ariſes purely from their own Contract, or a Relation between Parties ariſing from (*b*) Blood only, neither of which are meant by the Word *Privies* in the Act; for it were unreaſonable and abſurd to allow any Man to ſtrip me of my Acquiſitions or Inheritances, without any Laches or Neglect of mine, becauſe I happen to be his Heir, or becauſe by a fair Contract I am concerned in Intereſt with him, or am his Tenant.

(*a*) If there be two Jointtenants, and one of them levies a Fine; or if there be Donor and Donee, and one of them levies a Fine, though there be a Privity between each of theſe within the Letter of the Act, yet neither the Jointenant in the one Caſe, nor the Donor in the other ſhall be barred by the Fine unleſs they omit to make their Claim within five Years after their Titles accrue. 2 Inſt. 516. (*b*) So if the Heir apparent be ſeiſed of Lands, and the Father levies a Fine and dies, it ſhall not bar the Heir, becauſe he does not claim or derive any Title to the Land from his Father; and therefore in that reſpect ſhall have five Years to preſerve himſelf from the Fine. 2 Inſt. 523. 3 Co. 89. a.

But the *Privies* underſtood and intended by this Act are thoſe who are privy not only in Blood to the Conuſor, but likewiſe in Eſtate and Title to * the Land of which the Fine was levied; that is thoſe who muſt neceſſarily mention the Conuſor, and convey themſelves through him before they can make out their Title to the Eſtate.

* Page 530

Hob. 333. And hence But the Iſſue in Tail is barred; ſo it is if there be Baron and Feme in Special Tail, and the Baron levies a Fine without the Wife, this ſhall bar the Iſſue though the Son ſurvives, becauſe he muſt neceſſarily, in making out his Title, ſhew himſelf Heir to the Father as well as to the Mother, and conſequently ſhew himſelf privy to the Conuſor within the Statute. Keilw 205. Dyer 251. 2 Inſt. 681. 8 Co. 72. Hob. 257. 9 Co. 139. a. 2 Bendl. 50. Moor 28. So if there be Grandfather and Grandmother Tenants in Special Tail, and the Grandfather dies, and the Father enters upon the Grandmother and levies a Fine, the Son is barred. Hob. 258, 333. 3 Co. 90. Moor 146.

3 Co. 61. Hob. 333. So if Tenant in Tail has Iſſue two Sons, and the eldeſt levies a Fine and dies without Iſſue in the Life of his Father, the ſecond Son ſhall inherit the Intail notwithſtanding the Fine, becauſe he need not mention the Conuſor in making out his Title to the Intail. Cro. Car. 434. Cro. Jac. 689. Moor. 252.

But if Tenant in Tail has Iſſue a Daughter, who levies a Fine, and after a Son is born, the Fine ſhall not bar the Son, becauſe he may make himſelf Heir to the Intail without any Mention of her, and can make out his Title without conveying himſelf through her; and therefore as to the Eſtate he is a Stranger to her, and may plead *quod Partes Finis nihil habuerunt*.

Cro.Eliz,611 Cro.Car.435.

A. deviſed Land to his Wife for Life, Remainder to his Son in Tail, when he ſhould attain to his Age of twenty-five Years; and before that Time he levied a Fine, this barred his Iſſue, though he had nothing in Remainder, as it was allowed he could not have till that Age; for though he was not actually Tenant in Tail when he levied the Fine, but the Veſting of the Eſtate depended on the Contingency of his coming to that Age, yet the Iſſue being obliged to make out his Title through his, muſt be barred as a Privy within the Words of the 4 *H.* 7. *c.* 24. and the Conuſor was a Perſon to whom the Land was intailed, and ſo plainly within the Words of the 32 *H.* 8. *c.* 36.

3 Co. 86. Plow. 430, 437. *Smith* v. *Stapleton.* 2 And. 177. Moor 628.

If Tenant in Tail levies a Fine, and dies before the Proclamations are paſt, though a Right really deſcends to the Iſſue, becauſe the Fine is no Bar till the Proclamations are paſt, yet after the Proclamations the Intail is barred; for the Proclamations diſtinguiſh the Fines which bar the Intail from thoſe at Common Law, which only diſcontinue it; and by the expreſs Words of 32 *H.* 8. *c.* 36. all Fines levied with Proclamations of any Lands intailed to the Perſon ſo levying the ſame, or to any of his Anceſtors, ſhall immediately after the Proclamation made be adjudged a ſufficient Bar againſt the ſaid Perſon and his Heirs, claiming only by Force of the ſaid Intail.

3 Co. 87. *Caſe of Fines.*

Hence it was adjudged, that where *A.* was Tenant for Life, Remainder to *B.* in Tail, and *B.* levied a Fine, and died before all the Proclamations were paſt, his Iſſue being out of the Realm; that after the Proclamations were paſt, though the Iſſue, immediately upon his Return into the Kingdom, made his Claim to the Remainder, yet it availed him nothing, but the Fine was a final Bar to him.

Cro.Eliz.589, 610. *Hunt.* ver. *King.*

So it is if there be Grandfather, Father, and Son; and the Grandfather being Tenant in Tail enfeoffs the Father, and afterwards diſſeiſes him, and then levies a Fine with Proclamations to *J. S.* but before the Proclamations were all paſt the Father entered, and after they were all paſt the Conuſee entered, and then the Grandfather and Father die, and the Son brings his *Formedon*; the Conuſee pleaded the Fine with Proclamations, and the Demandant there upon the Entry of his Father, but could recover nothing, becauſe after the Proclamations paſt, the Fine was a good Bar to the Intail which was made to the Grandfather who levied the Fine.

3 Co. 90. *Purflow's* Caſe. Plow. 435.

And the Law is the ſame in Caſe of Actions brought, as of an Entry made to preſerve the Intail; for if Tenant in Tail levies a Fine, and dies before all the Proclamations are paſt, and the Iſſue in Tail brings a *Formedon*, the Conuſee may plead the Fine with Proclamations, though they were made pending the Writ.

* Page 531 Cro.Eliz.610. Poph. 65, 66.

* And this has been carried ſo far, that tho' a particular Tenant, who is a Stranger to the Tenant in Tail, ſhould enter before the Proclamations were paſt, to preſerve his own Right, yet the Intail is barred; as if *A.* Tenant for Life, Remainder to *B.* in Tail, Remainder to *C.* in Fee, and *B.* diſſeiſes *A.* and levies a Fine; but before the Proclamations are paſt, the Tenant for Life enters and avoids the Fine as to himſelf, and *C.* though in this

this Caſe neither the Eſtate of *A.* or *C.* are affected by the Fine, yet after the Proclamations made, the Intail is barred from the Proclamations made; nor can any Act of the Iſſue preſerve it.

As Tenant in Tail may convey his whole Eſtate by the Fine, ſo may he carve any leſſer Eſtate out of it, which ſhall likewiſe bind the Iſſue after his Death; as if there be *A.* Tenant for Life, Remainder to *B.* in Tail, and *B.* agrees to make a Leaſe for Years to *J. S.* upon Writ of Covenant brought by *B.* againſt *J. S.* he may levy a Fine *come ceo, &c.* to *B.* and *B.* may render the Land to *J. S.* for the Term agreed on, with Reſervation of a Rent; and this Leaſe ſhall continue in Force againſt the Iſſue, becauſe when *J. S.* conveys by the Fine, though he really has no Right, the Tenant in Tail and his Iſſue are eſtopped to ſay otherwiſe than that he took a Fee-ſimple; and conſequently it appearing by the Fine that he was Tenant in Fee-ſimple, he has thence a Power to make a Leaſe to bind his Iſſue. Plow. 430. Bro Tit Fines 106.

But if there be Tenant for Life, the Remainder in Tail, and the Tenant for Life levies a Fine *come ceo, &c.* to the Tenant in Tail, who grants and renders a Rent-Charge out of the Land to the Conuſor, this Fine ſhall not bind the Iſſue, becauſe the Rent was newly created by Tenant in Tail, and not entailed to him or any of his Anceſtors; and the Intail of the Land continuing, no Incumbrance of the Donee can affect the Land any longer than his Life. And. 6. 3 Co. 89. Dyer 213. Plow. 435.

If there be *A.* Tenant in Tail, the Remainder to *B.* in Tail, the Reverſion to the right Heirs of the Tenant in Tail, and the Tenant in Tail bargains and ſells the Lands to *J. S.* and his Heirs, and then levies a Fine to him, this is a Bar to the Iſſue in Tail, but no Diſplacing or Diſcontinuance of the Remainder in Tail, becauſe the Bargain and Sale conveyed no more than what the Tenant in Tail could lawfully grant, which was a deſcendible Eſtate during his own Life, and no Eſtate of Freehold paſſed by the Fine, that being before conveyed by the Bargain and Sale; but yet the Fine had this Effect, though ſubſequent to the Bargain and Sale, to convey the whole Eſtate-tail to the Bargainee, who before had but a deſcendible Eſtate during the Life of Tenant in Tail; becauſe wherever a Fine is levied to a Perſon to whom the Lands were intailed, and whom the Iſſue muſt mention in his *Formedon*, ſuch Fine cuts off the Intail, and bars the Iſſue. 10 Co. 96. *Seymour's* Caſe. Bulſ. 162. S. C.

If Tenant in Tail of a Rent-charge, iſſuing out of a Manor, levies a Fine of the Manor, this, by the Opinion of *Hobart* and *Harvey*, is a Bar of the Rent, becauſe the Fine being levied of the Land incluſively gives the Rent. Cro. Jac. 699. But *Q.* becauſe there appears to be no Fine levied of the Rent, which being the Thing intailed, and not the Land, ſhould, it ſeems, deſcend to the Iſſue, till the Intail thereof be barred by a Fine.

That the Eſtate-tail is preſerved to the Iſſue in Tail, notwithſtanding any Fine levied by the Tenant in Tail, when the Reverſion is in the Crown, and the Eſtate of the Proviſion of the King, by 34 & 35 *H.* 8. *c.* 20. *vide poſt.* 550. *Vide* Title *Recoveries.*

* Page 532

* (F) Of the Operation of a Fine in barring Strangers, or those who have but an uncertain Interest, as a Term for Years, or barely an equitable Interest.

5 Co. 87. Cro. Eliz. 896. Co. Lit. 372. Though the Statutes of 4 H 7. c. 24. and 32 H. 8. c. 36. have made the Operation of Fines stronger against Parties and Privies than they were at Common Law, for by them the Issue in Tail is bound, though not those in Remainder or Reversion; yet have they enlarged the Privilege that Strangers had at Common Law to avoid them, for upon these Statutes they have five Years from the Fine to make their Claim where they have a present Right at the Time of the Fine levied; and where it accrues after the Fine, they have five Years from the Time of such Accruer; whereas by the Common Law in both these Cases a Stranger had only a Year from the Entry of the Silver, at which Time the Land passed.

IF Tenant in Tail be disseised, and the Disseisor levies a Fine, the Disseisee has five Years to make his Claim by the first Saving, because he is the first who has a Right at the Time of the Fine levied; and if he omits to make his Claim in that Time, the Issue is bound for ever.

Dyer 3. 3 Co. 87. b. Cro. Eliz. 896.

If Tenant in Tail bargains and sells his Lands, or discontinues the Tail, the Bargainee or Discontinuee levies a Fine, though five Years pass in the Life of the Tenant in Tail, yet the Issue shall have five Years after his Death to avoid the Fine; for his Father having given all his Right by the Sale, could not claim any Right against his own Gift; the Issue therefore is helped by the second Saving, because he is the first to whom the Right accrued after the Fine levied.

Plow. 373.

If a Mortgagee be disseised, and five Years pass after the Proclamations, the Mortgagee is hereby barred; but if the Mortgagor pays or renders his Money, he has five Years to prosecute his Right by the second Saving in the Act, because his Title did not accrue till the Payment of the Money.

If an Infant Disseisor be disseised, or makes a Feoffment, and the Feoffee or Disseisor levies a Fine, and five Years pass, the first Disseisee is barred of his Right by the first Saving in the Act, because he has a present Right, which he ought to pursue immediately by Action or Entry; but the Infant shall have five Years from his full Age to avoid the Fine, because no Laches are to be imputed to him but from the Time he arrives at his full Age.

Plow. 356. to 372. *Stowel* ver. *Zouch.*

A. seised of *Black-acre* in Fee, is disseised by *B.* who levies a Fine with Proclamations of the said Acre during the Life of *A.* three Years after the Fine levied *A.* dies, and his Right descends to *C.* his Grandson, as his Heir who at the Time of the Descent of such Right was an Infant; and the Question was, Whether *A.* and *C.* having suffered five Years after the Fine levied to pass during his Ancestor's Life and his Minority, without making any Claim, should be barred, or should have other five Years upon his Arrival at full Age to make his claim in; and it was adjudged, that he should not, but that he was barred, and that by virtue of the first Saving in the 4 *H.* 7. *c.* 24. which saves to every Person and their Heirs, other than Parties to the Fine, such Right, Claim and Interest as they have in Lands and Tenements whereof a Fine is levied, so that they pursue such Right by way of Action or lawful Entry within five Years. Now *A.* having a Right to *Black-acre* at the Time the Fine was levied, consequently he and his Heirs must be comprehended in this Saving, but then they cannot take the Benefit of such Comprehension unless they pursue the Method, and the Time prescribed and limited in the said Saving, which they apparently neglected to do, since neither *A.* nor his Grand-

Grandſon made any Claim or Entry, or brought any Action for Recovery of their Right within the five Years; and therefore ſuch Right muſt be barred and extinguiſhed; and *C.* in this Caſe ſhall have no Privilege of Infancy, becauſe the Statute intends that only in Caſes where the Right firſt attached in the Infant, and therefore ſhall have five Years after his Infancy to make his Claim; but here the Right was firſt in *A.* at the Time of the Fine, and the Statute allows but five Years to purſue the Right from the Time it accrues, which was not done in this Caſe. * Page 533

But if *A.* be Tenant in Tail, the Remainder to *B.* in Fee, and *A.* levies a Fine with Proclamations, and then *B.* dies, his Heir within Age, and then *A.* dies without Iſſue, and five Years paſs without any Action brought by the Heir, yet he ſhall either, during his Minority, recover the Land notwithſtanding the five Years lapſed, becauſe the Right firſt accrued to him, *B.* having no Right to the Land by the Remainder, till the Eſtate-tail was ſpent, which did not happen in his Life; or the Heir of *B.* may defer making his Claim till he comes of Age, and then by the expreſs Words of the Act he ſhall have five Years to recover his Right. Dyer 133.

It is a Rule, that Intereſt is barred by a Fine that is not deveſted and turned to a Right; for if the Perſon who has the Right continues in Poſſeſſion at the Time of the Fine levied, he is under no Neceſſity to make his Claim, and cannot be put to his Action or Entry, which are the only Remedies the Act gives to avoid Fines and ſecure one's Intereſt, becauſe he being in Poſſeſſion, and not diſturbed by the Fine, has already all thoſe Remedies it can give him, and therefore it were fruitleſs and unneceſſary to purſue them; as if a Man levies a Fine of Land, out of which I have a Rent, Common or the like, the Fine and five Years Nonclaim ſhall not affect me, becauſe I am ſtill in Poſſeſſion of my Rent or Common, and it were in vain to endeavour to recover what I ſtill enjoy. 2 Inſt. 517. 9 Co. 106. a. Cro. Jac. 60. 5 Co. 124. Vent. 81.

A. leaſes to *B.* for Years, to commence after a former Leaſe *in eſſe*, the firſt Leaſe is determined, and before any Entry by *B.* the Leſſor enters and makes a Feoffment, and levies a Fine, and five Years paſs without any Claim, *B.* is barred of his Intereſt; for by the general Clauſe the Fine concludes all Privies and Strangers, and the firſt Saving includes the Leſſee in Reſpect of the Word *Intereſt*, which a Term for Years may properly be called. 5 Co. 124. *Saffin's* Caſe, Cro. Jac. 60. 9 Co. 105.

But if *B.* who had the future Intereſt, had died before the Determination of the firſt Leaſe, and upon the Expiration thereof the Leſſee had entered and levied a Fine; and after the five Years Adminiſtration was granted, the Adminiſtrator ſhould be allowed five Years to make his Claim, for none had a Right or Title of Entry before, and it accrued to him by the Adminiſtration after the Fine, and conſequently he ſhall be allowed five Years from the Accruer of his Right; but in the former Caſe the Leſſee had a Right of Entry at the Time of the Fine levied,, and therefore could have but five Years from that Time; but if the Leſſor enters upon the firſt Leſſee, and levies a Fine, the ſecond Leſſee ſhall have five Years after the firſt Leaſe is determined, becauſe his Right then firſt accrued. Leon. 99. 2 Leon. 157. Cro. Jac. 61. 5 Co. 124. a.

As if a Man ſettles Land by Fine to the Uſe of himſelf for Life, with a Clauſe in the Deed of Uſes to this Effect; that if he ſhould make a Jointure to his Wife, and a Leaſe for thirty-one Years to commence after his Death, then the Conuſees ſhould ſtand ſeiſed to ſuch Uſes, he made a Leaſe accordingly, and then he and his Wife levied a Fine, the Leaſe is not barred, though five Years ſhould paſs without Entry or Claim, becauſe he having but a future Intereſt was not diſplaced or deveſted by the Fine; conſequently an Entry were fruitleſs to preſerve that which was not touched by the Fine; beſides, this being an *Intereſſe Termini*, the Leſſee had no Right till after the Death of the Leſſor, conſequently muſt have five Years from the Accruer of his Right to preſerve it. Hard. 410, 413, 415. *Edwards* ver. *Slater*.

* Page 534

9 Co. 105. a. *Margaret Podger's* Caſe. 5 Co. 124

* A Copyholder may be barred by a Fine and Nonclaim, becauſe it is an Intereſt within the Statute; ſo Executors, that have Land till Debts and Legacies are paid, may be barred by a Fine and five Years Nonclaim, becauſe they likewiſe have an Intereſt within the Words of the Statute.

But it has been ruled in Chancery, that where *A.* deviſes Lands to *B.* in Tail, Remainder to *C.* in Tail, ſubject to the Payment of Legacies; and *C.* levies a Fine, and five Years paſs without any Claim, that the Legacies are not barred by the Fine; for *C.* having no Title but under the Will, the Purchaſer muſt be preſumed to have Notice thereof, and of the Legacies thereby bequeathed. 2 Vern. 662.

2 Inſt. 517. 5 Co. 134. a. Plow. 374.

If there be Tenant by *Elegit*, Statute Merchant or Staple, and a Fine be levied of thoſe Lands, and five Years paſs without any Claim, they are bound by the Fine, becauſe they have each of them an Intereſt within the Words and Intention of the Statutes, and thereby ſhall be bound if they do not purſue their Rights within five Years.

So it is if an Inquiſition upon an *Elegit* be found, and then a Fine be levied of the Lands, and five Years paſs without any Claim, the Intereſt of the Tenant is barred, becauſe, after the Inquiſition found, the Party before Entry has the Poſſeſſion, and may have an Ejectment or Treſpaſs, and therefore their Intereſt may be diſplaced, and conſequently their Right barred. Mod. 217. *Ognel* ver. *Lord Arlington*. Gilb. Eq. Rep 17, 108. 11 Mod. 103, 210. pl. 1. 12 Mod. 32. 2 Vern. 189, 368, 662. Eq. Caſ. Abr. 256. Will. Rep. 130. pl. 34, 520. 2 Will. Rep. 127. pl. 26. 146. pl. 32. 3 Will. Rep. 310, 372. A naked Power has been held not to be barred by a Fine, becauſe ſome Eſtate muſt be deveſted or gained by Wrong to make a Fine operate. *Willis* ver. *Sherrat*, 24 *Feb.* 1739 in Chancery.

Mod. 217.

But if a Man have a Judgment for a Debt at Common Law, and the Debtor before the Land be extended aliens by Fine, and five Years paſs, the Plaintiff may ſtill have a *Scire facias* and an *Elegit*; ſo it is of a Conuſee of a Statute before Execution ſued; for though the Judgment and Execution be Incumbrances that are chargeable upon the Eſtate, yet before Execution ſued, the Conuſee, *&c.* has no Right to the Land, for his Releaſe of all his Right to the Land will not hinder him from ſuing out Execution, and conſequently they cannot be barred by a Fine, unleſs they omit to make their Claim in five Years after the Extent, for then their Right firſt accrues.

So if a Man has a Decree in Chancery to charge Lands, and the Tenant of the Land, after the Decree, aliens by Fine, and five Years paſs, yet the Plaintiff may have Execution, becauſe till the Decree be executed he has no Right to the Land, and therefore is not obliged to make any Entry or Claim to preſerve it till his Title accrues. *Chan. Caſes* 268. and ſee the above Authorities.

9 Co. 105.

If Leſſee for Years be ouſted, and he in Reverſion diſſeiſed, and the Diſſeiſor levies a Fine, this and five Years Nonclaim ſhall bar both, becauſe the Leſſee for Years may have his Ejectment, and the Leſſor his Aſſiſe.

But if Leſſee for Life be diſſeiſed, the Reverſioner ſhall have five Years after the Death of the particular Tenant, becauſe he can have no Action to recover the Freehold. 9 Co. 105. b. Co. Lit. 250. Plow. 374.

Vent. 241. 3 Keb. 37, 110. Raym. 219. Moor 71. Cro. Eliz. 254. 3 Co. 78. Cro. Car. 157.

If Leſſee for Life or Years makes a Feoffment and levies a Fine, and five Years paſs without Entry or Claim by the Reverſioner, and then the Leſſee dies, the Reverſioner has five Years to preſerve his Right, becauſe he has two different Rights in this Caſe upon the Feoffment and Fine; one immediately accrues by the Act of the Leſſee in committing the Forfeiture; the other upon the Death of the Leſſee or Expiration of the Term, and therefore ſhall not forfeit the laſt by omitting to take Advantage of the firſt; wherefore if the Reverſioner omits to enter upon the Breach of the Condition

But if Tenant in Tail makes a Leaſe for Life, and ſo diſcontinues the Tail, and then levies a Fine with Proclamations, and dies without Iſſue, and five Years paſs without any Entry or Claim, the Remainder-man is barred, becauſe upon the Death of Tenant in Tail without Iſſue his Title commenced, and ſhall be allowed but five Years from thence to preſerve it. Cro. Car. 156. *Salwin* ver. *Clerk*.

dition in Law, yet his old Right, which accrues upon the Death of the Leſſee, or Expiration of the Term, ſtill continuing, is ſaved by the Statute which preſerves future Rights, as well as thoſe *in præſenti*.

*If there be Tenant for Life, the Remainder to *B.* in Tail, and the Leſſee levies a Fine, *B.* being out of the Realm; if *B.* dies beyond Sea, the Iſſue in Tail is at large to avoid the Fine when he pleaſes, for that Clauſe of the 4 *H.* 7. *c.* 24. which gives Perſons out of the Realm, Infants, *&c.* and their Heirs, five Years after their Impediments removed, to purſue their Right, cannot be extended to this Caſe, becauſe *B.* being dead, cannot return into the Realm to make his Claim, and the Clauſe limits five Years to him and his Heirs after his Return, which now is become impoſſible. *Page 536. 2 Inſt. 519.

A Copyholder of a Dean and Chapter levied a Fine with Proclamations, and five Years paſſed without any Claim by him that was Dean at the Time of the Fine, yet the ſucceeding Dean was not bound by the Fine; becauſe if that were allowed, the Statutes of 1 *Eliz.* *c.* 19. & 13 *Eliz.* *c.* 10. would be of little Uſe to reſtrain Alienations; for then by Combination between the Dean and Tenant all Lands belonging to the Chapter might be aliened. Vent. 311. *Howlett* ver. *Carpenter.*

If Leſſee for Years aſſigns his Term in Truſt for himſelf, and afterwards purchaſes the Inheritance and occupies the Land, and then levies a Fine, and five Years paſs without Claim by the Aſſignee, the Term is loſt, for neither the *Ceſtui que Truſt*, nor the Termor, have any Remedy; not the *Ceſtui que Truſt*, becauſe he by the Fine hath acknowledged the Land to be the Right and Inheritance of the Conuſee; and it were unreaſonable to allow him any Pretenſions after ſo ſolemn a Confeſſion to the contrary; nor the Termor, becauſe he having a Right at the Time of the Fine levied, and omitting to make his Claim within five Years, is barred by the expreſs Words of the Statute; ſo it is if Tenant in Fee-ſimple makes a Leaſe for 100 Years to attend the Inheritance in Truſt for himſelf, and ſtill continues in Poſſeſſion, and makes a Leaſe for fifty Years, and levies a Fine *ſur Conuſance de Droit* to confirm it, and five Years paſs without any Claim by the firſt Leſſee, his Intereſt is barred by the Fine; for the ſecond Leaſe and the Fine deveſted the firſt Term out of the Leſſee, and conſequently, if there be no Claim by him in five Years, his Intereſt muſt be barred. Cro Car. 110. *Morris* ver. *Iſham.* Lev. 270. *Freeman* and *Barns.* Sid. 478. Vent. 80. Chan. Rep. 51, 65.

But if a Man purchaſes the Fee-ſimple of *Black-acre*, of which there is a long Leaſe in Being, and the Conveyance is made by Fine, and the Purchaſer, to protect the Inheritance, has an Aſſignment of the Term in Truſt for himſelf, though the Termor makes no Claim in five Years, yet the Term continues; becauſe the Statute of Fines being made for the Security of Purchaſers, they would weaken their Intereſt, if Fines deſtroyed ſuch Leaſes againſt the Intention of all Parties. Sid. 460. Vent. 82. Lev. 272.

Thus if a Man mortgages his Land, and, as is uſual, ſtill continues in Poſſeſſion, and levies a Fine, and five Years paſs, yet the Mortgagee is not barred; for though the Mortgagee be in Reality out of Poſſeſſion, yet when that is done by the Conſent of both Parties, and the Nature of the Contract requires it ſhould be ſo while the Intereſt is paid, it is againſt the original Deſign of the Contract, that any Act of the Mortgagor, except the Payment of the Money, ſhould deprive the Mortgagee of his Security, and is no leſs than a Fraud, which the Law will not countenance. Sid. 460. Vent. 82. Lev. 272. So if the Mortgagee is in Poſſeſſion, and levies a Fine, and the five Years paſs, yet upon Payment of the Money the Mortgagor may enter. 1 Vern. 132. and there ſaid to be a new Way of foreclofing the Equity of Redemption; but *vide* 2 Vern. 189.——[A Fine and Non-claim allowed to be a good Bar to an Equity of Redemption]

Thus it has been adjudged, where a Man was Leſſee for Years of one Part of a Manor, and Tenant at Will of another, rendering Rent, and the Leſſee makes a Leaſe for Life, and then levies a Fine to the Tenant for Life, but 3 Co. 77. *Farmer's* Caſe.

ſtill continues in Poſſeſſion and pays the Rent; this Fine ſhall not bar the Leſſor, becauſe this is viſibly a Fraud and Trick in the firſt Leſſee, which he ſhall reap no Benefit by, and the Leſſor had no Reaſon to make his Claim while the Rent was duly paid him.

* Page 536 Chan. Caſes 268. 2 Chan. Caſes 247. But for this *vide* Vern. 149.

* It is agreed on all Hands, that a Fine and Nonclaim will bar a Truſt, becauſe the *Ceſtui que Truſt* has an equitable Intereſt, and therefore ought to purſue it by proper Remedies to ſecure it; yet this muſt be underſtood with theſe following Reſtrictions.

1. Where the Purchaſer has Notice of the Truſt, though the Truſtee conveys to him by Fine, and five Years paſs without any Claim by the *Ceſtui que Truſt*, yet the Truſt is not barred, becauſe where the Purchaſer has Notice, he ſees the Title of the Vendor, and what Power he has to convey; and therefore, when he takes the Land from him, ſhall be preſumed to hold it in the ſame Plight, and that the Vendor could not make him a better Title than he had in himſelf; and when the Purchaſer takes it upon theſe Terms, the Truſt is undiſturbed, and *Ceſtui que Truſt*'s Intereſt no way affected by the Fine.

2 Chan. Caſes 124-5-6. *Bovey* and *Smith*. Vern. 60. S C.

2. Though the Truſtee ſhould convey by Fine to a Purchaſer, who had no Notice, and thereby and five Years Nonclaim the *Ceſtui que Truſt* ſhould be barred, yet if the Purchaſer ſhould reconvey to the Truſtee, the Bar from the Reconveyance ceaſes, and the Truſt as to him revives again; for he that was originally inveſted with a Truſt ſhall never be allowed to plead his own tortious Act in his own Juſtification, for that were to allow a Man to plead his Crime in his own Defence, and Excuſe of his Treachery.

2 Vern. 368. *Allen* ver. *Sayer*.

If Lands are deviſed to Truſtees till Debts paid, and then to an Infant and his Heirs, and *J. S.* a Stranger, enters on the Lands and levies a Fine, and five Years and Nonclaim paſs, and the Infant, when of Age, brings an Ejectment, but is barred, becauſe the Truſtees ought to have entered; yet Equity will relieve, and not ſuffer an Infant to be barred by the Laches of his Truſtees, nor to be barred of a Truſt Eſtate during his Infancy, and the Infant in this Caſe ſhall recover the meſne Profits.

(G) Of the Remedies given to Strangers by Claim and Entry for the Preſervation of their Rights.

IF a Man has only a Right of Action, and his Entry be taken away, there a Claim or actual Entry on the Land will not preſerve his Right, or avoid the Fine; becauſe though he has a Right to the Land, yet ſince he has not purſued it in the Manner the Law has preſcribed, it is as ineffectual as if he had been quiet.

Moor 450.

A Man that has a Right of Entry may empower another to enter for him, and ſuch Entry is ſufficient to avoid a Fine; for what another does by my Command or Direction, is looked upon to be my own Act.

Poph. 108. *Pollard* ver. *Lutterall*. Co. Lit. 245.

But where a Man enters in my Name, and without my Direction; this does not avoid the Fine, or preſerve any Right, becauſe the Statute preſerves my Right only in caſe I purſue it by Entry, *&c.* in five Years; but what a Stranger does in my Name, without my Direction, is not my Act, and conſequently cannot avoid the Fine; yet in this Caſe, if a Stranger enters without my Direction, and I agree to and approve of the Entry within five Years, this is ſufficient to avoid the Fine, becauſe my ſubſequent Aſſent and

Approbation is equivalent to a precedent Command, and therefore the Act of another by my Direction is my own.

Leſſee for Life levies a Fine *come ceo, &c.* and he in Reverſion, five Years after his Death, brought his Ejectment, and a Stranger by his Direction delivered a Declaration in Ejectment to the Tenant in Poſſeſſion; yet this was adjudged no Entry to avoid the Fine.

Mod. 10. *Clerk* verſus *Rowell* and *Phillips.* Saund. 319. Vent. 42.

* If an Action be brought to recover Lands of which a Fine was levied, and the Demandant diſcontinues, this is no Claim to avoid the Fine, becauſe the Diſcontinuance ſhews no Intent of the Demandant to preſerve his Right.

* Page 537 Dalliſon 116, 107. Vent. 45.

By the 4 & 5 *Ann. c.* 16. the Act for the Amendment of the Law, it is declared, that no Claim or Entry, to be of or upon any Lands, ſhall be of any Force or Effect to avoid any Fine levied, or to be levied, with Proclamations, unleſs upon ſuch Entry or Claim an Action ſhall be commenced within one Year next after the making ſuch Entry or Claim, and proſecuted with Effect.

(H) Of erroneous Fines, and the Manner of Reverſing them.

AND here in the firſt Place it is to be obſerved, that no Perſon can bring a Writ of Error to reverſe a Fine, or any Judgment, that is not intitled to the Land, *&c.* of which the Fine was levied; for the Courts of Law will not turn out the preſent Tenant, unleſs the Demandant can make out a clear Title, Poſſeſſion always carrying with it the Preſumption of a good Title till the right Owner appears; beſides, where the Plaintiff in the Writ of Error cannot make out a Title, he can receive no Damage by the Fine, which the Writ of Error always ſuppoſes to be done, though it ſhould be erroneous; and therefore it is no leſs than trifling with the Courts of Juſtice to ſeek Relief when he cannot make it appear he has received any Injury.

Rol. Abr. 747. Dyer 90. 3 Lev. 36. As if a Man ſettles Land to the Uſe of himſelf and the Heirs of his Body, the Remainder to his own right Heirs, and dies, leaving Iſſue only a Daughter, who levies a Fine and dies without Iſſue; and *J. S.* brings a Writ of Error as Couſin and Collateral Heir of the Daughter, yet he ſhall not reverſe the Fine; for there could no Right deſcend to him from the Daughter, becauſe ſhe had but an Eſtate-tail, which determined by her Death without Iſſue; and it does not appear that the Remainder was in the Daughter as right Heir. Dyer 89 Cro. Eliz. 469. S. C. 3 Lev. 36. S. C. cited. So if Tenant in Tail Female levies a Fine, which happens to be erroneous, and dies, leaving a Daughter and a Son, the Daughter ſhall have the Writ of Error, and not the Son, becauſe ſhe is to enjoy the Land. Rol. Abr. 744. Dy. 90. a. So if a Man releaſes all his Right, or makes a Feoffment of all the Lands, of which an erroneous Fine was levied, he ſhall have no Writ of Error; but if the Releaſe or Feoffment were only of Part, he may bring a Writ of Error to reverſe the Fine, as to the Reſt. Cro. Eliz. 469. Rol. Abr. 788. Moor 413. Jon. 352. Moor 365.

But if there be ſeveral Parties to an erroneous Fine, they ſhall all join with the Party that is to enjoy the Land, though they themſelves can have nothing.

Rol. Abr 747. Dyer 89. This, *Roll* ſays, is only for Conformity; but there ſeems to be ſomething of Juſtice in the Practice, that they who joined in the Fine, and thereby contributed to an illegal Diſpoſition (for ſuch is an erroneous Fine) of what another Man had a Right to, ſhould be inſtrumental and aſſiſtant to the Recovery of it.

Another Rule to be obſerved is, that nothing can be aſſigned for Error that contradicts the Record; for the Records of the Court of Juſtice, being

Rol. Abr. 757.

being Things of the greateſt Credit, cannot be queſtioned but by Matters of equal Notoriety with themſelves; wherefore though the Matter aſſigned for Error ſhould be proved by Witneſſes of the beſt Credit, yet the Judges would not admit of it.

Dyer 89. b. Rol. Abr. 757. Cro.Eliz.469. And hence it is, that, in a Writ of Error to reverſe a Fine, the Plaintiff cannot aſſign that the Conuſor died before the *Teſte* of the *Dedimus Poteſtatem*, becauſe that contradicts the Record of the Conuſance taken by the Commiſſioners, which evidently ſhews that the Conuſor was then alive, becauſe they took his Conuſance after they were armed with the Commiſſion and the *Dedimus* iſſued.

* Page 538 Rol. Abr. 557. * But the Plaintiff in Error may ſay, that after the Conuſance taken, and before the Certificate thereof returned, the Conuſor died; becauſe this is conſiſtent with the Record.

Cro.Eliz.468. If a Conuſance upon a Fine be made in Court, the Plaintiff in Error cannot aſſign for Error, that the Conuſor died before the Return of the Writ of Covenant, for that would directly contradict the Record, becauſe the Conuſance in Court is never made till the Writ of Covenant be returned, the Parties till then not being judicially before the Court.

Rol. Abr. 757. Cro. Jac. 11. Cro.Eliz.468. *Vide* Raym. 462. 2 Jon. 181. *cont.* If the Conuſance be taken before Commiſſioners *in pais*, the Plaintiff cannot aſſign for Error, that the Conuſor died before the Return of the Writ of Covenant, for the *Dedimus* may iſſue the Day after the Writ of Covenant, and may recite it as pending before the Return thereof.

Yel. 33. *Arundell* ver. *Arundell*. Rol. Abr. 757. Cro. Jac. 11, 12. A Conuſance of a Fine was taken before *R. M.* one of the Juſtices of *C. B.* and after in the Proſecution of the Fine the *Dedimus* was directed to Sir *R. M.* he being after the Conuſance made a Knight, who returned the *Dedimus* with his Name and Title, and this was aſſigned for Error, that the Perſon who took the Conuſance was not the ſame that was impowered to take it; but it was not allowed, becauſe it contradicts the Record, which is that the *Dedimus* was directed to Sir *R. M.* and that Sir *R. M.* by virtue thereof took the Conuſance.

Cro.Eliz.240. Yel. 34. If a *Dedimus* be awarded to two, and one only takes the Conuſance of the Fine, this may be aſſigned for Error; becauſe where one of the Commiſſioners only certifies the Conuſance, the Aſſignment does not contradict the Record; but in this Caſe, if the Fine had afterwards been drawn up as a Fine acknowledged in Court, there the erroneous Conuſance taken upon the *Dedimus* ſhall not be aſſigned for Error, becauſe it ſhall be taken as a Fine acknowledged in Court only, and no Averment of the Party ſhall be admitted to diſprove the Record.

Co.Reading9. Cro.Eliz.531. *Hubert's* Caſe. Moor,pl.866. 12 Co. 123. S. C. where the Court may order a Vacat to be entered on the Roll, or a Reconveyance of the Eſtate. If one of my Name levies a Fine of my Land, I may avoid this Fine by ſhewing the Special Matter; as to ſay, that there are two of my Name, one of *Sale* and the other of *Dale*, and that he of *Sale* levied the Fine, and not I, who am of *Dale*; for this is conſiſtent with the Record, becauſe I ſtill admit that one of my Name levied the Fine.

5 Co. 39. *Tey's* Caſe. No Man can have a Writ of Error to reverſe a Fine that took any Eſtate by it.

2 Vent. 30. *Herbert Parrott's* Caſe. Mod. 246. One *Parrot* married *A.* who had an Eſtate of Inheritance of a conſiderable Value, and whilſt ſhe was under Age he prevailed on her to levy a Fine with him

S. C. in *C. B.* *Vide* 12 Co. 121. *Anne Hungate's* Caſe. Rol. Rep. 113, 114. S. C. 12 Co. 123. *Mansfield's* Caſe. 12 Co. 124. *Warcomb* and *Carroll's* Caſe. 2 Salk. 567. pl. 1. Fitzgib. 114. Barnes's Notes, *C. P.* 144. 2 Barnes 176. 10 Mod. 43, 179, 245, 436. 11 Mod. 181. pl. 7. 196. pl. 12. 210. pl. 1. 12 Mod. 444. Vern. 461. Eq. Caſ. Abr. 283. 3 Will. Rep. 206. pl. 51. 208, 235. Ld. Raym. 113. Caſ. Temp. Talb. 41, 167.

him of thoſe Lands, the Uſes whereof were declared to him and her and the Heirs of their two Bodies, Remainder to the Heirs of the Survivor; this Fine was taken in the Country by virtue of a *Dedimus Poteſtatem* to Sir *Herbert Parrott*, his Father, and an ignorant Carpenter; after which the Wife died without Iſſue, and now her Heir at Law prayed the Relief of the Court; upon Examination it did appear, that Sir *Herbert* did examine the Woman, whether ſhe were willing to levy the Fine, and aſked her Huſband and her whether ſhe were of Age or not, and both anſwered that ſhe was; and now her Heir moved that this Fine might be ſet aſide, and a Fine impoſed upon the Commiſſioners for this undue Practice in taking a Fine of one under Age; but all the Court agreed they could not meddle with the Fine; but if the Wife had been alive, and ſtill under Age, they might bring her in by *Habeas Corpus*, and inſpect her, and ſet aſide the Fine upon Motion; for perhaps the * Huſband would not ſuffer the bringing or proceeding in a Writ of Error; and the Court were of Opinion, that it was the Duty of Commiſſioners to inform themſelves of the Party's Age, and that a voluntary Ignorance would not excuſe them; and that if a Commiſſioner to take a Fine do execute it corruptly, he may be fined by the Court; for in relation to the Fine (which is the proper Buſineſs of this Court,) he is ſubject to the Cenſures of it, as Attornies, *&c.* but here it did not appear, that Sir *Herbert Parrot* knew that ſhe was under Age, and therefore the Court would not fine him.

* Page 539

Huſband and Wife, the Wife being but ſixteen Years of Age, levied a Fine, which was taken by virtue of a *Dedimus*, and they being brought into the Court of *C. B.* by Complaint of the Remainder-Man, a Vacat was entered of the Fine *quoad* the Woman, and the Court directed the Remainder-Man to proſecute an Information againſt him who took the Caption of the Fine.

Hutchiſon's Caſe, 3 Lev. 36.

A. having inveigled his Wife to levy a Fine of her Land to him when ſhe lay on her Death-Bed, pretending, as was ſuggeſted, he was to have it only for his Life; a *Dedimus* was ſent into the Country to take the Fine, and the Caption was taken the very Day ſhe died; and becauſe the Fine would not have ſtood, the Party being dead before the King's Silver was paid, the Writ of Covenant was raſed in the Teſte, and made to bear Date ten Days backward, and all the other Parts of the Fine were raſed likewiſe, and made to correſpond with it, and the King's Silver was paid, and ſo all appeared on the Record to have been done before the Death of the Woman; on a Bill brought in the Court of Chancery to have the Fine ſet aſide, or to have a Reconveyance, it was held by the Court, that though Chancery has a Power to relieve as much againſt a Fine obtained by Fraud or Practice, as any other Kind of Conveyance, yet that ſuch Relief was not by decreeing a Vacat of the Fine, but by ordering a Reconveyance; but for any Error in the Fine, or Irregularity or ill Practice in the Commiſſioners, it was a Matter properly cogniſable in that Court where the Fine was levied, and for which that Court may vacate the Fine; but there being Proof of Fraud or Practice in this Caſe, the Bill was diſmiſſed. ‡

Eq. Caſ. Abr. 258. *St. John* and *Turner.*

‡ See *infra* 540

The Manner of reverſing Fines differs from the Method obſerved in reverſing other Judgments; for in all other Caſes, where the Suit is adverſary, the Record itſelf is removed; but in caſe of a Fine the Tranſcript only is removed; for where the Suit is adverſary, the Record itſelf is tranſmitted, that it may be a precedent in like Caſes; but Fines are only a more ſolemn Acknowledgment or Contract of the Parties; and therefore are no Memorials of the Law, and need only be affirmed or vacated; if the former, the Contract ſtands as it was; if the latter, the Juſtices of *B. R.* may ſend for the Fine itſelf and reverſe it, or they may ſend a Writ to the Treaſurer and Chamberlain to take it off the File; beſides, ſhould the Record itſelf be removed and affirmed, it could not be ingroſſed for want of a Chirographer in

Rol. Abr. 752. F. N. B. 20. b. 2 Bend. 51. Dyer 89. Rol. Abr. 753. Co. Read. 12. Salk. 337. By which laſt Book a Writ of Error *coram vobis* lies upon an Affirmance of a Fine in *B. R.*

in *B. R.* and for this Reaſon my Lord *Coke* ſays, a Fine levied in *B. R.* is voidable by Writ of Error.

Leon. 115, 317. 2 Sid. 55. 2 Jon. 182. If there be Tenant for Life, Remainder to an Infant in Fee, and they two join in a Fine, the Infant may bring a Writ of Error and reverſe the Fine as to himſelf, but it ſhall ſtand good as to the Tenant for Life; for the Diſability of the Infant ſhall not render the Contract of the Tenant for Life, who was of full Age, ineffectual.

Rol. Abr. 788. If an Infant brings a Writ of Error to reverſe a Fine for his Nonage, and his Nonage, after Inſpection, is recorded by the Court; but before the Fine reverſed he levies another Fine to another, this ſecond Fine ſhall hinder him from reverſing the firſt, becauſe the ſecond having intirely barred him of any Right to the Land, muſt alſo deprive him of all Remedies which would reſtore him to the Land.

Rol. Abr. 788. But if Tenant in Tail levies an erroneous Fine with Proclamations, and then levies a ſecond Fine, which is alſo erroneous, and dies; if the * Page 540 * Iſſue in Tail brings a Writ of Error to reverſe the firſt Fine, the Defendant may plead in Bar the ſecond; for though there be Error in the ſecond, yet, till that appears judicially to the Court, it muſt be looked upon as a Fine duly levied, and conſequently a Bar to the Plaintiff, becauſe while the ſecond ſtands in Force he cannot have the Land; but if in this Caſe the Plaintiff brings a Writ of Error to reverſe the ſecond Fine, and the Defendant pleads in Bar the firſt Fine, the Plaintiff may reply upon the firſt Writ of Error, that the ſecond Fine was erroneous; and upon the ſecond Writ, that the firſt Fine was erroneous, and ſo be relieved againſt both; for here the Examination of both Fines comes judicially before the Court, and if there appears any Error, the Court will ſet them aſide, and not ſuffer them to ſtand in the Way of the Plaintiff's Right.

Raym. 461. Vent. 353. 2 Sid. 92, 93. 2 Jon. 181. Cro. Jac. 333. Rol. Rep. 36. 2 Bulſ. 244. 2 Inſt. 518. But in a Writ of Error to reverſe a Fine, the Defendant cannot plead the ſame Fine, now endeavoured to be reverſed, and five Years, in Bar of the Writ of Error, no more than in a Writ of Error to reverſe an Outlawry can that Outlawry be pleaded in Bar of the Writ of Error, *quia non valet exceptio iſtius rei, cujus petitur diſſolutio.*

Cro. Car. 415. Rol. Abr. 797. If one that is Sheriff of a County levies a Fine, and the Writ of Covenant is directed to the Coroner, this is no Error, but the proper Method, being to prevent Partiality.

Cro. Jac. 77. Rol. Abr. 794. A Writ of Covenant to levy a Fine ran thus, *Præc' A. quod teneat Conventionem de octo Meſſuag', duobus Toftis, decem gardinis,* and the *Dedimus Poteſtatem* was purſuant to the Writ of Covenant, but the *Præc'*, which was drawn up with the Concord, was *de duobus Meſſuag' pro duobus Toftis*; but this was no Error, becauſe where the Concord was purſuant to the *Dedimus* and the Writ of Covenant, the *Præcipe*, which ſeems to be but a Copy of the Writ of Covenant on Paper, is more than is needful, and therefore no material Error.

Cro. Jac. 77, 78. Rol. Abr. 794. If the Commiſſioners upon a *Dedimus* return thus, *Executio iſtius commiſſionis patet in quodam Panello huic commiſſion' annex'*, where the uſual Form is *in quadam Schedula*; yet this is no Error to avoid the Fine, for whatever Return certifies the Conuſance to be duly taken by the Commiſſioners is ſufficient; and therefore, if the Commiſſioners certify the Conuſance under their Seals, without any Words, it is well enough; ſo if the Return had been made thus, *Executio patet in hac annexa.*

Dyer 216, 182. Hughes's Abr. 938. If a Fine be levied, but the Proclamations thereon are not duly or regularly made, the Writ of Error ſhall reverſe only the Proclamations; for where the Proclamations are not all of them, or not duly made, it is altogether the ſame as if they had never been made, and then the Fine remains good at Common Law to work a Diſcontinuance.

The Court will not reverſe a Fine without a *Scire Facias* returned againſt the Tertenants; for the Conuſees are but nominal Perſons; and though it was otherwiſe in the Precedent in *Co. Ent.* and *Hern's Plead.* and the Law perhaps does not ſtrictly require it, yet the Courſe of the Court does. Salk. 339. pl. 4. 375.

Fines may be avoided where they are obtained by Fraud, Covin or Diſceit, though there be no Error in the Proceſs; and that may be done either by Writ of Diſceit or Averment ſetting forth the Fraud or Covin. Cro. Eliz. 471.

Thus if a Fine be levied of Land in Ancient Demeſne, the Lord ſhall have a Writ of Diſceit againſt the Conuſor and the Tenant, and by that avoid the Fine. F. N. B. 98. a. Moor 6.

The Reaſon why Fines of Ancient Demeſne Land muſt be levied in the Lord's Court is, becauſe thoſe Lands were not originally within the Juriſdiction of the Courts of *Weſtminſter*; and this Privilege the Tenants enjoy, not to be called from the Buſineſs of the Plough by any foreign Litigation; but for this *vide* 4 Edw. 3. 4. Keilw. 43. Rol. Abr. 775. F. N. B. 98. a. Leon. 290. Cro. Eliz. 471. Bro. Tit. Fines 101. 9 H. 7. 12. Salk. 339. pl. 5.

* If a Fine be levied to ſecret Uſes to deceive a Purchaſer, and the Conuſee pleads the Fine in Bar, the Purchaſer may aver the Fraud in Avoidance of the Fine, by 27 *Eliz. cap.* 4. and ſuch Averment is not contrary to the Record, becauſe it admits the Fine, but ſets it aſide for the Covin and Fraud in obtaining it. * Page 541 3 Co. 80. a. Plow. 49. b.

So if a Fine be levied upon uſurious Contract, it may be avoided by Averment, by 13 *Eliz. cap.* 8. becauſe ſuch Fine being levied for Ends the Law has prohibited, the Law will not encourage any Evaſion out of the Act, nor ſuffer ſuch uſurious Contracts to be ſupported by the ſolemn Acts of the Courts of Juſtice againſt the Intention of the Act. 3 Co. 80.

Fines and Recoveries.

A Recovery in a large Senſe is a Reſtitution to a former Right by ſolemn Judgment; and Judgments, whether obtained after a real Defence made by the Tenant to the Writ, or whether pronounced upon his Default or feint Plea, had the ſame Efficacy and Force to bind the Right of the Land in Queſtion; this was the Notion of the Common Law, and from hence Men took an Opportunity of making Uſe of the Deciſions of the Court to their own Advantage, and to the Prejudice of others, who though in ſome Caſes Strangers to the Action, yet were intereſted in the Land for which it was brought. 2 Inſt. 75, 429. See Bur. Rep. 115.

For whilſt theſe Recoveries were governed by the ſtrict Rules of the Common Law, particular Tenants, as Tenant in Dower, Curteſy, in Tail after Poſſibility of Iſſue extinct, and for Life only; alſo thoſe who had made Leaſes for Years, and thoſe whoſe Wives were intitled to Dower, often took Advantage of them, and by ſelling the Lands, and ſuffering their Purchaſers to recover them, thereby defeated the Right of thoſe in Remainder *Vide* Co. Lit. 104. Kel. 109. 2 Inſt. 321. Bro. 69. F. N. B. 468. Plow. 57.

mainder or Reverſion, &c. which were Inconveniencies ſo great, that it was thought neceſſary to provide againſt them by (a) poſitive Laws.

(a) As *Weſtm.* 2. c. 3. which makes Proviſion for him in Reverſion, againſt the Recoveries ſuffered either by the Tenant in Dower, by the Curteſy, or in Tail, after Poſſibility of Iſſue extinct, or for Life; and by c. 4. of this Statute, the Wife is ſecured as to her Dower; and the Statutes of *Glouceſter*, c. 11. and the 7 *H.* 8. c. 4. and 21 H. 8. c. 15. have eſtabliſhed the Right of Termors, and enabled them to falſify ſuch Recoveries. *Vide* Doctor and Student 45.

But there is no expreſs Proviſion made by any Statute to preſerve the Intereſt of the Iſſue in Tail, or of him in Reverſion, againſt a Recovery ſuffered by the Donee; yet it ſeems to have been for two hundred Years after the making of the Statute *de donis*, that they were protected by that Statute; and therefore we find no expreſs Reſolution, where ſuch Recovery was allowed to bar the Iſſue in Tail, or thoſe in Remainder or Reverſion, till the Reigns of *Ed.* 4. and *H.* 7. though in ſome Caſes the Donee in Tail was allowed to (b) charge the Intail, and even to (c) bar it.

(b) Thus in the Caſe of *Octavian Lombard*, in the 44 Ed. 3. it was adjudged, that the Donee in Tail of the Gift of the Diſſeiſor may grant a Rent-charge to the Diſſeiſee, in Conſideration of a Releaſe of all his Right, and the Iſſue in Tail bound by the Grant. Rol. Abr. 342. Co. Lit. 343. 10 Co. 37. Plow. 436. (c) A lineal Warranty with Aſſets has been always allowed as a ſufficient Bar. 2 Inſt. 335. Co. Lit. 374. 4 Leon. 132, 133. But the firſt Caſe we find in which it was attempted to bar the Iſſue in Tail by a Recovery, is *Taltarum*'s Caſe, which *vide* 12 Ed. 4. f. 19. *Vide* Head of *Eſtates-tail.*

* Page 542 Co. Lit 356. a. Co. 15. Vaugh. 51.

* When theſe Recoveries were eſtabliſhed as a common Conveyance, as the beſt and ſecureſt Way of barring the Iſſue in Tail, and thoſe in Reverſion or Remainder, the Tenant for Life began to apply them once more to the Prejudice of thoſe who had the Inheritance; and though the former Statutes gave thoſe who had the Inheritance a Remedy, yet the Proviſion made by them being tedious and expenſive, it was thought proper to make the 32 *H.* 8. *c.* 31. which declares ſuch covinous Recoveries againſt the particular Tenants to be void in reſpect to him in Reverſion or Remainder; and though the Judges very reaſonably determined Recoveries againſt that Act to be not only void, but a Forfeiture of the particular Eſtate, becauſe it was a Manner of Conveyance as much known at that Time as a Fine or Feoffment, and therefore by Parity of Reaſon ought to have the ſame Effect and Operation; yet that Statute did not fully anſwer the End for which it was made.

10 Co. 45. a. Co. Lit. 362.

For if *A.* had been Tenant for Life, and made a Leaſe for Years to *B.* and *B.* had made a Feoffment in Fee, if the Feoffee had ſuffered a Recovery, and vouched the Tenant for Life, this was no void Recovery within the Statute, becauſe *A.* the Tenant for Life, was not ſeiſed at the Time of the Recovery, for the Feoffment of the Termor was a Diſſeiſin to *A.* and him in Reverſion; and the Statute makes Recoveries of Tenants for Life in Poſſeſſion only void againſt them to whom the Reverſion then belongs.

Co. 15. *Pelham*'s Caſe. Leon. 123. S. C.

Yet where Tenant for Life bargained and ſold his Land in Fee by Indenture inrolled, and the Bargainee ſuffered a Recovery, and vouched the Bargainor, this was a void Recovery, and a (d) Forfeiture within the 32 *H.* 8. *c.* 31. for though the Bargain and Sale was of the Inheritance, yet it paſt only an Eſtate for Life of the Bargainor, which was the greateſt Eſtate he could lawfully paſs, and conſequently the Reverſioner was not deveſted; and therefore the Bargainee being a legal Tenant for Life in Poſſeſſion, the Recovery againſt him, though with a Voucher of the Bargainor, was void within that Act againſt him in Reverſion, whoſe Reverſion was not turned to a Right, as in the former Caſe of a Diſſeiſin.

(d) And it has been ſince held, that if Tenant for Life bargains and ſells, and ſuffers a Recovery by coming in as Vouchee, that though afterwards he ſhould reverſe that Recovery for want of an Original, that it is a Forfeiture of his Eſtate. Sid. 90.

The

But the former Defect was cured by 14 *Eliz. c.* 8. which declares all Recoveries (had by Agreement of the Parties or by Covin) againſt Tenant for Life, of any Lands whereof he is ſo ſeiſed, or againſt any other with Voucher over of him, to be void, as againſt the Reverſioners and their Heirs.

Theſe Statutes made no Proviſion for Reverſions or Remainders expectant on Eſtates-tail; and therefore if there be Tenant for Life, Remainder in Tail, Remainder in Fee, and the Tenant for Life ſuffers a Recovery, and vouches the Remainder-Man in Tail, who vouches the common Vouchee; this is ſo far from being a void Recovery within thoſe Statutes, that the Reverſion in Fee is actually barred by it; for the intended Recompence, which the Remainder-Man in Tail is to have againſt the common Vouchee, is to go in Succeſſion, as the Eſtate-tail would have done; and it cannot be a covinous Recovery within the Act, becauſe the Remainder-Man in Tail joined in it, who may at any Time ſuffer ſuch a Recovery to deſtroy the Remainder in Fee.

10 Co. 39. b. 45. *Jenning's* Caſe. Co. Lit. 362. a. 3 Co. 60. b. Cro. Eliz. 562. *Wiſeman* and *Crow*. Moor 690. Cro. Eliz. 570.

Theſe common Recoveries were no ſooner allowed of by the Judges to bar Eſtates-tail, but Men began to improve them into a common Way of Conveyance, and to declare Uſes upon them, as upon Fines and Feoffments. Hence it is, that the Statutes, which provide againſt any Alienations or Diſcontinuances of particular Tenants, provide at the ſame Time againſt their Recoveries; thus 11 *H.* 7. *cap.* 20. declares all Re-
* veries, as well as other Diſcontinuances by Fine or Feoffment of Women Tenants in Tail, of the Gift of their Huſbands, or their Anceſtors, to be void; ſo a Recovery againſt Huſband and Wife of the Inheritance of the Wife, without any Voucher, is declared to be void within 32 *H.* 8. *cap.* 28. though the Statute ſays, ſuffered or done by the Huſband, for this, like a Feoffment by Baron and Feme, in Subſtance is the Act of the Baron only, and ſo within the Statute; but a Common Recovery ſuffered by a Feme Covert, where her Huſband joins with her, is good to bar her and her Heirs.†

* Page 543 Doct. and Stud. 54. Co. Lit. 326. a. 8 Co. 72. 2 Inſt. 342. 2 Rol. Abr. 295. 10 Co. 43.

† Recoveries ſhall be good without the Surrender of the Leſſee for Life. 14 Geo. 2. c. 20.——Purchaſers in Poſſeſſion after twenty Years may give Evidence of a Recovery, by the Deed creating the Tenant to the *Præcipe*. *Id.* ſ. 4.——After twenty Years a Recovery ſhall be good, though the Deed be loſt, &c. *Id.* ſ. 5.——A Deed, &c. executed the ſame Term, ſhall be good to make a Tenant to the *Præcipe*. *Id.* ſ. 6.——Statutes and Executions not avoided by feigned Recoveries. 21 H. 8. c. 15. ſ. 4.

Under this Head we will conſider,

(A) Who may ſuffer a Recovery. 543.
(B) Of what Things a Recovery may be ſuffered, and by what Names. 544.
(C) What Eſtates and Intereſts may be barred by a common Recovery; and herein of the ſingle and double Voucher. 545.
(D) Of erroneous and void Recoveries, who may avoid them, and by what Method. 553.

Fines and Recoveries.

(A) Who may ſuffer a Recovery.

Bulſ. 235. 2 Rol. Abr. 395. Co. Lit. 381. b. 10 Co. 43. Rol. Abr. 731, 742. Sid. 321, 322. Lev. 142. 2 Sand. 94. Cro. Eliz. 471. Hob. 169. Cro. Car. 307. 5 Mod. 209. *Mes* 10 Co. 43. & 2 Rol. Abr. 395. *cont. vide* 2 Salk. 567. where *J. S.* being of the Age of nineteen Years, his Siſter who was next in Remainder, and alſo his Heir, married one of his Footmen, and he petitioned the King for Leave to ſuffer a Recovery, who referred it to the Judges of the Common Pleas, before whom ſeveral Precedents ſuffered by Infants on Privy Seals were produced; but the Judges, obſerving that moſt of them were on the Petitions of their Fathers on their Sons Marriage, and an equal Recompence given, and that there was no ſuch Conſideration in this Caſe, refuſed; but for this *vide* the above Authorities, and Vern. 461.

WHEN Recoveries were improved into a common Way of Conveyance, it was thought reaſonable that thoſe, whom the Law had judged incapable to act for their own Intereſt, ſhould not be bound by the Judgment given in Recoveries, though it was the ſolemn Act of the Court; for where the Defendant gives way to the Judgment, it is as much his voluntary Act and Conveyance, as if he had transferred the Land by Livery, or any other Act *in pais*; and therefore if an Infant ſuffers a Recovery, he may reverſe it, as he may a Fine by Writ of Error during his Minority; and this was formerly taken for Law, as well where the Infant appeared by Guardian, as by Attorney, or in Perſon; but now the Diſtinction turns on this Point, that if an Infant ſuffers a Recovery in Perſon it is erroneous, and he may reverſe it by Writ of Error; but even in this Caſe the Writ of Error muſt be brought during his Minority, that his Infancy may be tried by the Inſpection of the Court, for at his full Age it becomes obligatory and unavoidable; but, in Caſes of Neceſſity, the Court has admitted the Infant to appear by Guardian, and to ſuffer a Recovery or come in as Vouchee; but this too is ſeldom allowed by the Court; and upon Emergencies, when it tends to the Improvement of the Infant's Affairs, or when Lands of equal Value have been ſettled on him, and theſe Recoveries have been allowed and ſupported by the Judges, the Infant could not ſet them aſide or ſhake them; beſides, if ſuch Recoveries be to the Prejudice of the Infant, he has Remedy for it againſt his Guardian, and may reimburſe himſelf out of his Pocket, to whom the Law had committed the Care of him.

* Page 544 Sid. 321. Lev. 142.

* If an Infant ſuffers a Recovery, and appears by Attorney, it ſeems he may reverſe it after his full Age; becauſe here it may be diſcovered, whether he was within Age when the Recovery was ſuffered, becauſe it may be tried *per pais*, whether the Warrant of Attorney was made by him when he was an Infant.

10 Co. 43. a. 2 Rol. Abr. 395.

A Recovery, as well as a Fine by a Feme Covert, is good to bar her; becauſe the *Præcipe* in the Recovery anſwers the Writ of Covenant in the Fine to bring her into Court, where the Examination of the Judges deſtroys the Preſumption of Law, that this is done by the Coercion of her Huſband, for then it is preſumed they would have refuſed her.

(B) Of what Things a Recovery may be ſuffered, and by what Means.

2 Inſt. 353. Poph. 22-23. 2 Vent. 32.

RECoveries, being now ſettled as common Aſſurances to eſtabliſh Men in their Purchaſes, are very much favoured by the Judges, and not compared to Judgments in other Real Actions or Adverſary Suits.

Hence it is, that though the Statute of *Weſtminſter* 2. c. 5. ſays, *non ſint niſi tria brevia originalia* for the Recovery of Advowſons; yet

So

So if a Man be ſeiſed of a reputed Manor, which really is no Manor, and he ſuffers a common Recovery of this by the Name of a Manor, this is a good Recovery of the Lands which conſtituted the reputed Manor; though ſtrictly ſpeaking there is no Manor recovered, becauſe the Law ſupports this, as all other Conveyances, according to the Intention of the Parties; for it would be ſevere to vacate this Conveyance, when the Purchaſer recovered them by the Aſſent of the Vendor under ſuch a Denomination.

2 Rol. Abr. 396. 6 Co. 64. 2 Rol. Rep. 67. 2 Vent. 32. S.P. *vide* Cro. Eliz. 524, 707. and Keb. 591, 691. *cont.*

So if Recovery be ſuffered of a Manor with its Appurtenances, Lands which have been reputed Parcel of the Manor ſhall paſs; for it is but equitable, *quod voluntas Domini volentis rem ſuam in alium transferre rata habeatur*; and though the Recovery does not mention the Lands reputed Parcel of the Manor, but only the Manor itſelf, yet this was ſupplied by the Indenture which was of the Manor, and all Lands reputed Parcel thereof, and though occupied together but two Years.

Sid. 190. Lev. 27. Keb. 591, 691. 2 Mod. 235. S. C. between *Thynn* and *Thynn*; and *Note*, that in all the Books which report this Caſe, it is ſaid, that as to Sir *Moyle Finch*'s Caſe, (which *vide* 6 Co. 63.) all the Judges of *England* gave their Opinions under their Hands, that the Lands in Reputation, belonging to that Manor, ſhould not paſs; but that *Coke*, after he was made Chief Juſtice, got it adjudged otherwiſe, and ſo it hath been held ever ſince; and well it was that it was ſo adjudged, becauſe many Settlements depend thereon.

If a Man having a third Part of a Manor ſuffers a Recovery of a Moiety of the Manor, this is good to paſs his Intereſt in the third Part; for where the Words of a Conveyance (which a Recovery is agreed to be) contain more than the Grantor can convey, it would be an unreaſonable Interpretation to make this void and intirely uſeleſs, when they are ſufficient to convey ſo much as he might lawfully paſs; ſo if the Recovery had been in this Caſe, of the third Part of * the Manor, by the Name of the Moiety, Part and Purparty of the Manor, this had been good for the whole third Part, and not only for a Moiety of the third Part.

Cro. Car. 109, 110. *Iſham* ver. *Morris*.

* Page 545

In Ejectment a Special Verdict was found, that there was a Pariſh of *Ribton*, and the Vill of *Ribton*, but the latter not of equal Extent with the former; and that *J. S.* was ſeiſed of Land in Tail in the Pariſh, but not in the Vill; and bargained and ſold the Land in the Pariſh of *Ribton*, with Covenant to levy a Fine, and ſuffer a Recovery to the Uſes in the Deed; but the Fine and Recovery were only of the Lands in *Ribton*; the Queſtion was, Whether this Recovery would ſerve for the ſaid Land in the Pariſh of *Ribton*; and though it was objected, that where a Place was named in a Record, and no more ſaid, 'tis always intended a Vill; and conſequently, that in this Caſe, the Fine and Recovery being of Lands in *Ribton*, ſhall paſs only the Lands in the Vill of *Ribton*; and though it was further urged, that it was dangerous to extend the Recovery farther than the Words of the Record, becauſe the Deed declares the Intention of the Parties

2 Vent. 31, 32. Sir *John Otway*'s Caſe. 3 Keb. 277. Mod. 250. and 2 Mod. 233. S. C. 3 Keb. 771. But for this *vide* Hutt 105. Godb. 440. Cro. Car. 269, 276. 2 Rol. Abr. 20. Cro. Jac. 574. 120.

Mod. 206. 2 Mod. 47. 8 Mod. 276. Vent. 143, 170. Mod. 78. 2 Keb. 802, 821, 848. Owen 60. and 2 Mod. 236. *Stock* ver. *Fox*, which ſeems againſt this Caſe, but is reconcileable with this Diverſity, that in thoſe Caſes there were Lands upon which the Fine might operate, *viz.* the Lands in the Vill of *Street*, without taking in the Pariſh of *Street* to carry the Lands in *Walton*, a Vill of that Pariſh; but here, if thoſe in the Pariſh ſhould not paſs, there was no other to paſs.

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yet a Writ of Entry in the *Poſt.* has been admitted for an Advowſon in Groſs, becauſe this being the original Writ in theſe common Recoveries, which are ſuffered by the Conſent of Parties, the Judges have allowed Advowſons as well as Rents, and other incorporeal Inheritances, to paſs by Recoveries, *quia conſenſus partium tollit errorem*; ſo it is of Commons in Groſs; and if this ſhould not be allowed, there would be no Method of barring the Remainder or Reverſions depending upon Eſtates-tail, which the Tenant in Tail in every other Caſe has a Power over. 5 Co. 40. *Dormer*'s Caſe.

Parties to paſs the Lands in the Pariſh, in as much as by ſuch Conſtruction no Man could tell what was conveyed by Fines and Recoveries, but muſt for greater Certainty have Recourſe to a Pocket-Deed; yet the Court, in Favour of common Recoveries, extended this Recovery to the Lands in the Pariſh of *Ribton*; and the rather in this Caſe, becauſe the Verdict found, that he that ſuffered the Recovery had no Lands in the Vill, and conſequently that the Recovery muſt be void, if not extended to the Pariſh; and though Pariſhes are not ſo ancient as Vills, and therefore till lately were never inſerted in Writs, yet now they are, and the Law takes Notice of them.

(C) What Eſtates and Intereſts may be barred by a common Recovery; and herein of the Single and Double Voucher.

Hob. 262. IN Reſpect to Eſtates-tail and the Barring of them by Recovery, what is principally to be regarded is, that there muſt be a legal Tenant to the *Præcipe* at the Time of the Writ purchaſed, or at the Return; for ſince Eſtates-tail are only barred on Account of the intended Recompence which is to follow the Deſcent of the Tail, where there happens to be no Tenant to the *Præcipe*, the Demandant can really recover nothing; and conſequently the ſuppoſed Tenant can have no Recompence in Value againſt his Vouchee, for that is only given againſt the Vouchee in Conſideration of what the Tenant loſt.

As if there be Tenant for Life, † the Remainder in Tail, the Remainder in Fee, and the Tenant for Life, with the Remainder in Tail, ſuffer a Recovery, with Voucher over, this ſhall not bar the Remainder in Tail, nor the Remainder in Fee, becauſe the Remainder-Man in Tail was not
* Page 546 Tenant to the *Præcipe*, and conſequently could not have the * intended Recompence, becauſe that was given in Lieu of the Eſtate recovered, which was no greater than the Eſtate for Life, he only being legal Tenant to the *Præcipe*.

2 Rol. Abr. 395. Dyer 252. Cro.Eliz.670. Moor 255, 256. But here we muſt obſerve a Difference between the Tenant in Tail and in Fee-ſimple; for if Tenant in Fee ſimple be diſſeiſed, and after a Diſſeiſin ſuffers a common Recovery, this is good by the Way of Eſtoppel againſt the Diſſeiſee, his Heirs and Aſſigns; for they ſhall not be admitted, againſt their own Act on Record, to vacate the Recovery; nor can the Recoveror have any Thing; becauſe the Tenant to the *Præcipe* was out of Poſſeſſion, and conſequently had nothing to loſe; but if in this Caſe *J. S.* diſſeiſes the Diſſeiſor, the Recoveror may enter upon *J. S.* becauſe the Recovery gave him a Right againſt all Perſons, but the firſt Diſſeiſor, his Heirs or Aſſigns, and therefore, ſince *J. S.* did not claim from the firſt Diſſeiſor, he could not withſtand the Entry of the Recoveror; but where Tenant in Tail ſuffers a Recovery, being out of Poſſeſſion, this is no Bar nor Eſtoppel to the Iſſue, becauſe the Statute *de donis* preſerves the Intail for the Iſſue againſt all Acts of the Anceſtor, and a common Recovery is allowed to dock the Intail on Account of the intended Recompence, which is wanting in this Caſe; becauſe where the Tenant in Tail is not ſeiſed at the Time of the Recovery he can loſe nothing, and conſequently can have no Recompence over. Cro. Car. 388. Rol. Abr. 868.

† Recoveries ſhall be good, without the Surrender of Leſſee for Life. 14 Geo. 2. c. 20. *Vide* the Statute.

2 Salk. 568. pl. 1. *Lloyd* and *Evelin*. In a Writ of Error to reverſe a common Recovery, the Tenant to the *Præcipe* was made by a Fine, the Recovery was ſuffered, and the Fine was reverſed; yet it was held a good Recovery, for there was a good Tenant to the *Præcipe* at the Time.

If

If a Manor be given to a Man and a Woman, and the Heirs of the Body of the Man begotten on the Woman, and they intermarry, and then the Huſband ſuffers a Recovery of the whole Manor; this is good for a Moiety, becauſe the Gift being made before Marriage, they had each an undivided Moiety, which they may transfer, but the Recovery can operate but for a Moiety, becauſe the Huſband only was Tenant to the *Præcipe*, and conſequently the Demandant could recover only his Intereſt in the Manor, which was but a Moiety.

Moor 95. *Brabroke*'s Caſe. If a Huſband Tenant in Tail ſuffers a *Præcipe* to be brought againſt him and his Wife, where ſhe has nothing in the Land; this is a good Recovery to bar the Intail; for though the Feme was made Tenant to the *Præcipe*, yet ſhe ſhall have no Share of the Recompence in Value, becauſe ſhe really loſt nothing; but the whole Recompence recovered againſt the Vouchee ſhall go to the Huſband and his Heirs, as the Eſtate-tail ſhould have done, becauſe he only was ſeiſed of the Land, and could loſe it, yet the Feme ſhall loſe her Jointure or Dower by joining in the Recovery, becauſe ſhe is eſtopped to claim any Thing in the Land againſt her ſolemn Act of Record. Plow. 514. Vent. 358. Hob. 27. 2 Co. 74. Plow. 515.

If Lands are given to a Man and his Wife, and the Heirs of the Body of the Huſband, and a Recovery is had againſt him only, this Recovery will neither bar the Reverſion nor the Tail; for the Recompence being to go in Succeſſion, as the Eſtate which the Tenant loſt would have done, the Huſband could not loſe all the Land, becauſe he was not a legal Tenant to the whole, his Wife being Jointenant with him, who was no Party to the Writ; nor could the Recovery be good for a Moiety, becauſe there are no Moieties between Baron and Feme, but both are conſidered as one Perſon in Law; but if the Huſband had levied a Fine, and the Conuſee ſuffered a Recovery, and vouched the Huſband, who vouched the common Vouchee; this had been a good Bar of the Intail, for here the Huſband came in to defend the Eſtate-tail, which the Wife was a Stranger to, and the Aſſets which he recovered over is a Recompence for the Eſtate-tail, which he only had a Right to without the Feme, and which the Law gives him Power to diſpoſe of.

Moor 210. *Owen* and *Morgan*. 3 Co. 5. 2 Rol. Abr. 395. 4 Leon. 93. And. 162. 2 Salk. 568. pl. 2. *Clithero* and *Franklin*. 3 Co. 5.

In Ejectment, upon Special Verdict the Caſe was, *A.* ſeiſed in Fee of the Lands in Queſtion hath Iſſue *B.* his eldeſt Son, *C.* his ſecond, and *D.* his third Son; upon a Marriage intended between *D.* his youngeſt Son and one *E.* he, before Marriage, covenants to ſtand ſeiſed to the Uſe of himſelf for Life, Remainder to *D* and *E.* and the Heirs Male of their two Bodies, Remainder to *D.* and the Heirs Male of his Body, Remainder to *C.* and the Heirs Male of his Body, Remainder to *B.* and the Heirs Male of his Body, the Remainder to his own right Heirs; *A.* dies, a *Præcipe* is brought againſt one *Upton* as Tenant of the Freehold, and after, before the Return of the Writ, *D* by Bargain and Sale conveys the Land to *Upton* and his Heirs, and the Deed was inrolled after the Return of the Writ, and within the ſix Months; *Upton* vouches *D.* only without his Wife, and a * Common Recovery was ſuffered to the Uſe of *D.* and his Heirs; then *E.* dies, and after *D.* dies without Iſſue Male, having Iſſue four Daughters, and between them and *C.* in Remainder was the Queſtion, what was barred by this Recovery. 1*ſt*, It was agreed on both Sides, that here was a good Tenant to the *Præcipe*, the Bargain and Sale being made to *Upton* (*a*) before the Return of the Writ; and though the Deed was not inrolled before the Return, yet it being inrolled in due Time, the Freehold was in *Upton ab initio*. 2*dly*, That this Settlement being made before Marriage, when the Huſband and Wife took by Moieties and not by Intireties, the Huſband had abſolute Power over his own Moiety, and therefore for that the Recovery was an abſolute Bar, wherein this differs from the

Hallett ver. *Saunders*. 2 Lev. 107. S. C.

* Page 547

(*a*) That if the Tenant to the *Præcipe* gains a Freehold before Judgment, it is ſufficient, for it is not enough in a Counterplea of a Voucher to ſay, the Voucher had nothing in the Lands at the Time of the Voucher, without adding, *Nec unquam poſtea*, and ſo it is of Non-Tenure. 2 Salk. 568. pl. 4. *Lacy* and *Williams*, Carth. 472. S. C. Comb. 425. S. C. Ld. Raym. 227, 475. Show. 347.

Ante 346. the Caſe of *Owen* and *Morgan*, 3 *Co.* 5. † where they took by Intireties. 3*dly*, That this Recovery was no Bar to the other Moiety of *E.* becauſe ſhe was not Party, but her Eſtate-tail in that continued untouched, though it was urged alſo to be a Bar for her Moiety, ſhe dying firſt, and ſo her Huſband in as ſole Tenant of the whole *ab initio*, and that during the Coverture the Huſband had Power to make a good Tenant of the whole; but the Court held otherwiſe. 4*thly*, It was held, that the Eſtate-tail to *D.* and *E.* being determined, the Remainder to *D.* in Tail Male general, and all the other Remainders depending thereon were barred abſolutely by this Recovery; for *D.* coming in as Vouchee, comes in, in Privity and Repreſentation of all the Eſtates he hath or had, and conſequently he comes in Repreſentation of the Remainder to himſelf in Tail Male general, and then the Recompence in Value goes to that, and alſo to all the other Remainders depending thereupon, and by Conſequence all are barred by the Recovery.

Yelv. 51. *Freſhwater* and *Rois*, *vide* 2 Salk. 619. pl. 2. which ſeems contrary. [There adjudged that a Covenant by Tenant in Tail to ſtand ſeiſed to the Uſe of himſelf for Life, Remainder to *A.* in Tail, is void; becauſe the Remainder is to take effect after his Death. And in the Caſe in *Salkeld* the Recovery was adjudged good.]

Tenant in Tail, in Conſideration of his Son's Marriage, covenanted to ſtand ſeiſed to the Uſe of himſelf and his Heirs till the Marriage, and then to the Uſe of himſelf for Life, and after to the Uſe of his Son and his Wife, and the Heirs of their Bodies, and ſuffered a Common Recovery with ſingle Voucher to this Purpoſe, and then died without Iſſue; this Recovery did not bar the Remainder expectant on the Eſtate-tail, for the Covenant had changed the Eſtate-tail into a Fee, and conſequently the Recompence could not be in Lieu of the Intail, ſince the Tenant to the *Præcipe* was not ſeiſed of the Eſtate-tail at the Time of the Recovery ſuffered.

Cro. Eliz. 827. *Peck* verſus *Channel*. Moor 634.

A. Tenant for Life, Remainder to *B.* in Tail, the Remainder to *C.* in Fee, *A.* and *B.* join in a Fine *come ceo*, &c. to a Stranger, who renders it to *A.* for Life, Remainder to *B.* and his Heirs; afterwards *A.* and *B.* ſuffer a Recovery with ſingle Voucher to the Uſe of *B.* and his Heirs; this Recovery did not bar the Remainder in Fee, becauſe by the Render they were ſeiſed of a new Eſtate, and *B.* was not either Tenant in Poſſeſſion, or ſeiſed in Right of the Intail; and conſequently the Recompence being given in Lieu of the Eſtate recovered, the Tail could not be docked, nor the Remainder-man barred by this Recovery, becauſe the Tenants to the *Præcipe* were not ſeiſed of it at the Time of the Recovery ſuffered.

Bro. Tit. Recovery. Yelv. 51. 3 Co. 5. Moor 256.

As to the Uſe of the ſingle and double Voucher, it is to be obſerved, That the Tenant which loſes the Land has, upon his vouching over, a Recompence in Value adjudged againſt his Vouchee, which is to go in the ſame Succeſſion as the Land recovered would have done: Now a Recovery with ſingle Voucher is ſufficient to bar an Eſtate-tail where the *Tenant in Tail* is Tenant to the *Præcipe*, and *ſeiſed* of the Lands in Tail *at the Time* of the *Præcipe* brought againſt him, for the Recompence in Value muſt follow the Deſcent of the Land which the Tenant loſes, and when that proves to be the Eſtate-tail, then the Iſſue is ſuppoſed to have an Equivalent for it, and conſequently not prejudiced by the Recovery; but

* Page 548 * becauſe a ſingle Voucher can bar *only the Eſtate which the Tenant is ſeiſed of at the Time of* the *Præcipe* brought, and not *any Right* which he hath, it was found neceſſary to admit the Uſe of a double Voucher; for ſhould Tenant in Tail diſcontinue the Tail, and take back an Eſtate or diſſeiſe the Diſcontinuee, a Recovery againſt him with a Voucher over could not bar the Eſtate-tail; for the Recompence comes in Lieu of the Land recovered, which was the defeaſible Eſtate, and conſequently the Iſſue has nothing in Value for the Eſtate-tail, without which he cannot be barred.

But

But if in this Caſe the Tenant in Tail, after the Diſſeiſin, had either by Fine, or Leaſe and Releaſe, made a Tenant to the *Præcipe*, and came in himſelf as Vouchee, and then vouched over the common Vouchee; this double Voucher had been ſufficient to bar the Tenant in Tail and his Heirs of every Eſtate which he was at any Time ſeiſed of; for when the Tenant in Tail comes in as Vouchee, it is preſumed he will, and he has an Opportunity to ſet up every Title he had, to defeat the Demandant; and ſince what he offered was not ſufficient to bar the Demandant, the Court takes it for granted, he had no other Title than what he ſet up, and therefore will give him but one Recompence for all.

3 Co. 6. b. Plow. 8. *Maxwell's* Caſe. Cro Eliz. 562. Pop. 100. Moor 362. Hob. 263.

Thus if *A.* be Tenant for Life, the Remainder to *B.* in Tail, and a Stranger diſſeiſes *A.* and enfeoffs *B.* if a *Præcipe* be brought againſt *B.* and a Recovery ſuffered as uſual; this ſhall not affect the Eſtate-tail, becauſe *B.* had only a *Right* to that, and was not ſeiſed of it, and the Recompence was not given in Lieu of the Tail, becauſe the Eſtate-tail was not in Queſtion on the Recovery, for *B.* could not loſe the Eſtate he had not; but if in this Caſe *B.* hath made another Tenant to the *Præcipe*, and came in himſelf as Vouchee, this barred the Intail.

3 Co. 58. b. 2 Rol. Abr. 395.

If *A.* be Tenant for Life, Remainder to *B.* in Tail, and *B.* diſſeiſes *A.* and ſuffers a common Recovery, himſelf being Tenant to the *Præcipe*; this Recovery with a ſingle Voucher, is ſufficient to bar the Eſtate-tail in *B.* becauſe he was actually ſeiſed of that at the Time of the *Præcipe* brought againſt him; for his Diſſeiſin did not deveſt his own Eſtate, but only gave him a defeaſible Eſtate for Life, which was immediately merged in his Remainder, becauſe the Eſtate for Life and his Inheritance could not ſubſiſt together at the ſame Time in him.

2 Rol. Abr. 395.

Thus we ſee how Eſtates-tail are barred by Recoveries, and the Uſe of the ſingle and double Voucher; and in this Reſpect the Operation of a Recovery is correſpondent to that of a Fine; for they are but different Ways of transferring Eſtates-tail for the Security of Purchaſers; but the Operation of a *Fine* differs from a Recovery in Reſpect to *Strangers* who have *Reverſions* or *Remainders expectant on Eſtates-tail*; for a *Fine* does *not* bar them, unleſs they omit to make their Claim within *five* Years after their Reverſion or Remainder is *to execute*; but a Recovery reaches them immediately, and at the ſame Time bars the Eſtate-tail and all Reverſions and Remainders on Account of this ſuppoſed and imaginary Recompence.

Co.Lit.372.a. 2 Rol. Abr. 396. Moor 156. Bro. Tit. Recovery (28, 55.)

And as a Common Recovery ſuffered by Tenant in Tail bars all Reverſions and Remainders expectant, ſo it avoids all Charges, Leaſes and Incumbrances made by thoſe in Reverſion or Remainder, and the Recoveror ſhall enjoy the Land free from any ſuch Charge for ever; as where he in Remainder upon an Eſtate-tail granted a Rent-charge, and the Tenant in Tail ſuffered a Recovery; and it was adjudged, that the Grantee could not diſtrain the Recoveror; for ſince the Rent was only at firſt good, becauſe of the Poſſibility of the Grantor's Remainder coming in Poſſeſſion, when that Poſſibility ceaſes by the Recovery of Tenant in Tail, ſuch Grant muſt then become void.

Moor 158. Cro.Eliz.718. Co. 62. *Capell's* Caſe. 2 Rol. Abr. 396. Moor 154. 4 Leon. 150, &c. Poph. 5, 6.

* If there be Tenant in Tail, Remainder for Years, Remainder in Fee, and the Tenant in Tail ſuffers a Recovery; this bars the Remainder for Years as well as the Remainder in Fee.

* Page 549

Mod. 110. 2 Lev. 30.

But where a Man deviſed Lands to *J. S.* his Son for Life, the Remainder to the firſt Son of *J. S.* and the Heirs Male of the Body of ſuch firſt Son, and ſo to the other Sons, Remainder to *A.* and *B.* for their Lives, to ſecure the ſeveral Remainders before limited, *J. S.* ſuffered a Recovery, yet the contingent Remainders were not barred, nor the Remainders to *A.* and *B.* becauſe the Limitation to *A.* and *B.* being deſigned by the Will to preſerve the contingent Eſtates limited to the firſt and other Sons of *J. S.* the Chancery tranſpoſed the Eſtates to preſerve the Intention of the Will; and therefore the Remainders to *A.* and *B.* were decreed to precede the contingent Eſtate, and by that Means preſerved them from the Recovery. 2 Chan. Caſes 10, 11. *Green* and *Hayman*.

Cro.Eliz.792. *White* ver. *Weſt.* 2 Lev. 30. Mod. 109. If a Gift in Tail be made reſerving Rent, and the Donee ſuffers a Recovery, this is no Bar of the Rent, but it remains a collateral Charge on the Land diſtrainable of common Right; for ſince the Tenant in Tail took the Land ſubject to that Charge by the original Donation, the Recoveror who claims under him can only have the Eſtate, as he who ſuffered the Recovery had it; therefore if there be a Limitation of a Uſe upon Condition, and the *Ceſtui que Uſe* ſuffers a Recovery; this does not deſtroy the Condition; for the Eſtate of him who ſuffered the Recovery being charged with it, he could not make his Purchaſer a better Title than he himſelf had.

Mod. 109. For the ſame Reaſon, if Tenant in Tail grants a Rent-charge, and then ſuffers a Common Recovery, yet the Land is ſtill chargeable with the Rent in the Hands of the Recoveror; for though the Statute *de donis* renders ſuch Charges void as to the Iſſue, where the Eſtate-tail deſcends according to the Form of the Gift; yet that Statute makes no ſuch Proviſion for any Perſon who claims the Land by another Title than the Gift in Tail, and therefore the Recoverer, who is not compriſed in the firſt Donation, muſt take it ſubject to the Charges which lay on it when he purchaſed it.

Cro Eliz.718. *Pledgard* ver. *Lake.* But if there be Tenant for Life, the Remainder to *J. S.* in Tail, and *J. S.* makes a Leaſe for Years, to commence after the Death of Tenant for Life, and the Tenant for Life ſuffers a Common Recovery and vouches *J. S.* this Recovery does not deſtroy the Leaſe for Years, but the Leſſee may falſify ſuch Recovery, for the Tenant in Tail cannot avoid his own Charges or Leaſe, though he may them granted him in Reverſion or Remainder, and the Recoveror cannot avoid them, becauſe he does not claim under the Gift in Tail, as the Iſſue in Tail would have done, if the Recovery had not been ſuffered, and therefore the Recoveror muſt take it ſubject to the Charges of Tenant in Tail.

Hob. 259. 2 Lev. 27. If Baron and Feme be Tenants in Special Tail, the Remainder to *A.* in Tail, the Remainder to *B.* in Fee, and the Huſband levies a Fine to *C.* in Fee, and then dies leaving Iſſue, the Conuſee takes by the Fine a qualified Fee, and ſhall enjoy the Land againſt the Iſſue; but yet upon the Death of the Huſband the Wife is again ſeiſed of the Eſtate-tail, becauſe ſhe being no Party to the Fine could not be barred by it, and the Remainders are again reveſted; and if the Wife ſuffers a Common Recovery, either with ſingle or double Voucher; this ſhall bar the Remainders in *A.* and *B.* becauſe ſhe was ſeiſed of the Tail at the Time of the Recovery, and conſequently the Recompence ſhall go to them when the Tail is ſpent; but this Recovery does not reach the Intereſt which *C.* took by the Fine, becauſe the Huſband had Power to bar the Intail by the Fine, and the Recovery of the Wife cannot transfer that which is already given by the Fine; and therefore if the Wife dies leaving Iſſue, the Conuſee ſhall have the Land while any Iſſue inheritable to the Intail is in Being, and when the Iſſue is ſpent, the Recoveror ſhall have the Land as they in the Remainder ſhould have had, if the Recovery had not been ſuffered.

* Page 550 2 Rol. Abr. 394. If Tenant in Tail be attainted, and the King grant his Land to *J. S.* who bargains and ſells it to *B.* and a *Præcipe* is brought againſt *B.* who vouches *J. S.* and he vouches over the common Vouchee; this is no Bar of the Remainder; becauſe *J. S.* was never ſeiſed of the Eſtate-tail, but was always a Stranger to the firſt Gift; for the King's Grant gave him a qualified Fee, which was the Eſtate he came in to defend, when he was vouched; and the Remainder can never be barred when the Tenant in Tail is not concerned in the Recovery. 2 Rol. Abr. 394.

* If Tenant in Tail be attainted of Treaſon, and after ſuffers a Common Recovery, this ſhall not deſtroy the Remainder; for a Man attainted is not capable of taking any Thing, but for the Benefit of the King; and conſequently the Recompence in Value muſt go to the King, and he in Remainder can have no Benefit by it, and without the Remainder-man cannot be barred; beſides Recoveries being common Conveyances, this Recovery of

of the Perſon attainted ſeems to be void, as any other Conveyance of his would be, and therefore the Remainder cannot be barred.

If a Huſband ſeiſed of Land in Right of his Wife for Life, the Remainder to *A.* in Tail, the Remainder to *B.* in Fee, and the Huſband bargains and ſells the Land to *J. S.* againſt whom a *Præcipe* is brought, who vouches *A.* in Remainder in Tail, and he vouches over the common Vouchee; this is good to bar the Remainder, tho' not the Wife, for here was a legal Tenant to the *Præcipe*, and he in Remainder was called in to defend his Eſtate-tail, and has Recompence in Value for the Loſs of it, which is to go in Succeſſion to *B.* when the Eſtate-tail fails. 2 Rol. Abr. 394.

When Common Recoveries were allowed to be common Conveyances, the Judges would no more allow a Recovery than any other Conveyance, to deveſt the King of his Intereſt in the Land, but preſerved his Reverſion or Remainder, though they ſuffered the Recovery to bar the Eſtate-tail on which it depended; for it were unreaſonable to ſtrip the King of any Part of his Revenue upon the Conſideration of an imaginary Recompence; but yet the Eſtate-tail is barred, becauſe otherwiſe, where the Reverſion or Remainder was in the Crown, the Eſtate in the Subject muſt be perpetuated, which is againſt the Policy of the Law. 2 Rol. Abr. 393, 396. Co. Lit. 372. Moor 195. Bro. Tit. Recovery 31. Tit. Tail 41.

But in the Reign of *H.* 8. there was a Statute made to invalidate Recoveries, even againſt the Iſſue in Tail, where the Reverſion or Remainder was in the Crown; the Intention of the Act was, to perpetuate thoſe Eſtates in Families which the King himſelf had given, or for Money or other Conſideration, had procured to be given to any Subject as a *Præmium* for his Services to the Crown; that the Deſcendants of that Stock might never forſake the Intereſt of the Crown which had ſo liberally rewarded their Anceſtor's Loyalty, that where a generous Emulation of their Actions proved too weak a Tie to engage them openly in the ſame Intereſt, they might at leaſt be prevailed on out of Gratitude and Prudence, not to attempt any Thing to the Prejudice of the Crown, from whom they muſt acknowledge they derived their preſent Support and Splendor; but this Statute does not preſerve all Eſtates-tail where the Reverſion or Remainder is in the Crown; but thoſe only which were *given by* the King himſelf, or (*a*) *procured* to be given for Money or other Conſideration. 34 H. 8 c. 20.

(*a*) As if the King procures *A.* to make a Gift in Tail to *B.* by Deed indented and inrolled, the Remainder to the King in Fee in Tail; this Intail in *B.* cannot be docked by a Common Recovery, becauſe protected by the expreſs Words of the Statute. Co. Lit. 372. b. But if a Reverſioner or Remainder-man upon an Eſtate-tail grant their Reverſion or Remainder to the King, this is no Security to the Iſſue in Tail, becauſe the Eſtate-tail was neither of the Gift or other Proviſion of the King, and conſequently not within the Act. 2 Co. 15. *Wiſeman's* Caſe. Mo. 195. Yelv. 149. S. C. So if the Reverſion on an Eſtate-tail deſcend to the King from any collateral Anceſtor; this does not bring the Eſtate-tail within the Protection of the Act, for the *Intail muſt be created by the King*, and not by a Subject, though the King be his Heir; for the Act ſpecifies only Gifts made *to Subjects*, and none can have Subjects but the King; nor is it ſufficient within the Act, that the King creates the Eſtate-tail himſelf, but the *Reverſion muſt continue in the Crown*; for whenever he grants that over, the Eſtate-tail, though originally of the Gift of the King, is out of the Protection of the Act, and ſubject to a Common Recovery, becauſe the Statute only preſerves them where the Reverſion is in the King. Co. Lit. 372. Donee in Tail of the Gift of the King, the Reverſion being in the Crown, makes a Gift in Tail, the ſecond Donee ſuffers a Common Recovery; and 'twas reſolved by eleven Judges, 13 Car. 1. that his Iſſue was not within the Privilege of 34 H. 8. c. 20. for his Eſtate, as far as it could, diſaffirmed the Reverſion of the King, though it could not take it out of him, and his Poſſeſſion was injurious to the Eſtate given by the King, and therefore no Colour to allow it the Protection of that Act. 2 Jon. 250 1. Earl of *Ormond's* Caſe.

* *H.* 8. gave Lands to *Mich. Stanhope* and his Wife, and the Heirs of their Bodies, in Conſideration of Services; *Mich.* died, and his Son and Heir petitioned the Queen to grant the Reverſion to ſome Perſons in Fee, to the Intent that he might make a Leaſe for ninety-nine Years by way of Mortgage, and entered into a Recognizance to the Queen, conditioned that nothing ſhould be done whilſt the Reverſion was out of the Crown, * Page 551 Raym. 288, 358. 2 Jon. 251. *Gardiner* ver. *Bambridge*.

prejudicial to the Queen, and accordingly the Queen conveyed the Reverſion to the Lord *Burleigh* and Sir *Walter Mildmay* in Fee; then the Son made a Leaſe for ninety-nine Years, and ſuffered a Recovery, and then the Truſtees reconvey to the Queen; and it was reſolved, 1*ſt*, That the Grant of the Queen was good: 2*dly*, That during the Time the Reverſion was out of the Crown, the Son was not reſtrained from aliening within 34 *H.* 8. *c.* 20. and ſo the Recovery good to bind the Iſſues; but a Fine or Recovery after the Regrant to the Queen would not have been good to bind the Iſſue, as it ſeems, becauſe that Act doth not require that the Reverſion ſhould always continue in the King; but it ſufficeth if it be in him at the Time of the Fine levied, or Recovery ſuffered.

Raym. 260, 286, 350, 351, *&c.* 2 Jon. 249, 250, *&c.* Earl of *Derby*'s Caſe, or *Murray* ver. *Eyton.*

Rich. 3. by Letters Patent gave ſeveral Lands to the Earl of *Derby*, and the Heirs Male of his Body, in Conſideration of great Services to the Crown, *&c.* afterwards by a Private Act made 4 *Jac.* 1. ſeveral Alterations were made in this Eſtate, as that *Charles*, then Earl of *Derby*, ſhould hold and enjoy them for his Life, and after his Death to *James* his Son and Heir apparent, and the Heirs Male of his Body, and ſo to the ſecond, third, *&c.* and ſeventh Son of Earl *Charles*, and then to ſeveral others in Tail Male, who by the Limitation of the Letters Patent would have ſucceeded to the Eſtate upon Failure of Iſſue Male of Earl *Charles*, with Power for Earl *Charles*, and the Sons ſucceſſively, to make Leaſes for Lives or Years, and Jointures for Wives; after Earl *Charles*'s Death, his Son Earl *James* levied a Fine of theſe Lands, and ſold them to a Stranger; yet upon Special Verdict in Ejectment brought after his Death by his Son, it was reſolved by all the Judges of *England*, in the Exchequer-Chamber, except Three, that the Fine was no Bar, for that the Reverſion continued in the Crown, and that theſe Eſtates given by 4 *Jac.* 1. were no new Eſtates, but all within the Compaſs of the firſt Eſtate-tail created by the Letters Patent, and only a Diſtribution of the Enjoyment of them, and all to the ſame Perſons who would have been intitled under the Letters Patent; and the Power to make a Leaſe was, with Conformity to the Power of Tenant in Tail; and that to make Jointures was but in Lieu of Dower; beſides, there was a Saving to the King, and all other Perſons, all ſuch Rights, *&c.* ſo as the Prerogative of the King, by his Reverſion, to reſtrain the Tenant in Tail from barring his Iſſues, was ſaved, and the eighth and ninth, and all other Sons inheritable by virtue of the Intail let in, though the Firſt, *&c.* and Seventh only were named, and the Alterations, were only in Accidents, not in the ſubſtantial Parts of the Limitations, and ſo within 34 *H.* 8. *c.* 20.

When Men obſerved the Effect of Recoveries, and that they were conſtrued by the Judges, not only to transfer Eſtates-tail, but even Reverſions and Remainders dependant on them, except thoſe veſted in the Crown; they began to grow as uneaſy under this Liberty, as they formerly were under the Reſtriction of the Statute *de donis*; for they thought it very ſevere, that they could not carve what Eſtate they pleaſed out of their own Inheritance, without any other Security for the Reverſion they reſerved to themſelves than the Generoſity or Promiſe of the Donee. Hence we find Men themſelves endeavouring to create Perpetuities, by annexing Conditions of their own Invention, and reſtraining their Donees from Alienating, under the Penalties of loſing their Eſtates; but the Judges had ſo long ſtruggled with Perpetuities, and found them ſo much againſt the Intereſt of the long Robe, and of the whole Nation in gene-

* Page 552 Co. 84. *Corbett*'s Caſe, 6 Co. 42. Co. Lit. 224. Mo. 73.

* ral, as a great Diſcouragement to Induſtry, that they conſtantly condemned all thoſe Settlements which came before them, and not only reſolved that a Common Recovery is inſeparably incident to an Eſtate-tail, but that it is an undeniable Argument againſt any Settlement, if it be found

found to tend to a Perpetuity, and in ſuch Caſe a Recovery has been allowed to bar them.

But in Caſe of an executory Deviſe, which is to veſt upon a Contingency to happen within a Life in Being, there a Common Recovery will not bar ſuch future Intereſt; as if Lands be deviſed to *A.* and his Heirs, and if he dies without Iſſue, living *B.* then to *B.* and his Heirs; in this Caſe, if *A.* ſuffers a Common Recovery, and dies without Iſſue in the Life of *B.* this Recovery ſhall not bar the future Intereſt of *B.* for *B.* by the Deviſe had only a Poſſibility, and no preſent Intereſt, and the Recompence in Value cannot go to thoſe who were neither Parties to the Recovery, nor had any Intereſt in the Land at the Time of the Recovery ſuffered; nor is there any Danger of a Perpetuity in this Caſe, becauſe here the future Intereſt of *B.* muſt veſt on a Contingency which is to happen within the Compaſs of a Life in Being. †

Cro. Jac 591. Palm. 131. 2 Rol. Abr. 394. *Pell* and *Brown.* Lev. 12. *vide* Tit. Deviſe.

† It was ſaid in this Caſe, if the Perſon to whom the executory Deviſe is limited, come in as Vouchee, in a Common Recovery, that his Poſſibility is thereby given up, and his Heir barred. *Vide Fearne's* Eſſay on Contingent Remainders, third Edition, 307.

If Lands be given to *J. S.* and his Heirs, as long as *B.* has Iſſue of his Body, *J. S.* by Recovery ſhall not bind him that made the Gift, but that upon the Death of *B.* without Iſſue of his Body, the Lands ſhall revert to the Donor, for that the Donor had no Intereſt in the Land, for there can be no Fee upon a Fee; and a Common Recovery againſt Tenant in Fee-ſimple ſhall never bind any collateral Title or Poſſibility, becauſe the Recompence cannot go to thoſe who had no Intereſt in the Land.

Cro. Jac. 593.

So if the Mortgagee in Fee ſuffers a Recovery, this ſhall not bind the Mortgagor's Right of Entry upon Performance of the Condition; but in theſe Caſes, if the Donor or Mortgagor had been Parties to the Recovery, then their Right had been bound, not only on Account of the Recompence; but becauſe they are eſtopped by the Recovery to claim the Land againſt the Recoveror, or his Heirs, when they were called in before the Judgment to defeat his Title, but could not do it.

Palm. 135. Cro. Jac. 593.

If Lands be given to the Uſe of *A.* in Tail, Remainder to *B.* provided that if there be a Failure of Iſſue Male of the Body of *A.* that *J.* ſhall have a Rent-charge out of the Land; *A.* makes a Leaſe of the Land for 100 Years, and then ſuffers a Recovery; it was adjudged, that this contingent Rent was barred, and that *J. S.* ſhould not charge the Land during the Term, for this Grant is ſubſequent to the Eſtate-tail, and cannot take Effect till the Determination of that, and then conſequently can iſſue out of the Remainders when they commence and execute; therefore if the Recovery bars the Remainders dependant on the Eſtate-tail, it muſt alſo deſtroy all Charges which are to iſſue out of them; for when by the Recovery it becomes impoſſible that the Remainders ſhould ever execute, the Rent-charge muſt neceſſarily be loſt, which is to iſſue out of thoſe Remainders when executed.

2 Lev. 26. Mod. 108. *Benſon* and *Baron* and *Hudſon.* 3 Keb. 274, 287, 292.

If Tenant in Tail levies an erroneous Fine, and the Conuſee ſuffers a Common Recovery, in which the Tenant in Tail comes in as Vouchee; Recovery ſhall bar the Tenant in Tail and his Iſſue of a Writ of Error to reverſe the Fine, and the Recoveror may plead the Recovery in Bar of the Writ of Error; for, ſince the Tenant in Tail by coming in as Vouchee is barred of all Right or Title which he can have to the Land, the Writ of Error, which is but a Means to reſtore him to his Right, muſt likewiſe be barred, ſince the Recovery has left him no Right to be reſtored to.

Moor 365. Cro. Eliz. 388. Poph. 100. *Barton's* Caſe.

(D) Of

prejudicial to the Queen, and accordingly the Queen conveyed the Reverſion to the Lord *Burleigh* and Sir *Walter Mildmay* in Fee; then the Son made a Leaſe for ninety-nine Years, and ſuffered a Recovery, and then the Truſtees reconvey to the Queen; and it was reſolved, 1*ſt*, That the Grant of the Queen was good: 2*dly*, That during the Time the Reverſion was out of the Crown, the Son was not reſtrained from aliening within 34 *H.* 8. *c.* 20. and ſo the Recovery good to bind the Iſſues; but a Fine or Recovery after the Regrant to the Queen would not have been good to bind the Iſſue, as it ſeems, becauſe that Act doth not require that the Reverſion ſhould always continue in the King; but it ſufficeth if it be in him at the Time of the Fine levied, or Recovery ſuffered.

Raym. 260, 286, 350, 351, *&c.* 2 Jon. 249, 250, *&c.* Earl of *Derby*'s Caſe, or *Murray* ver. *Eyton.*

Rich. 3. by Letters Patent gave ſeveral Lands to the Earl of *Derby*, and the Heirs Male of his Body, in Conſideration of great Services to the Crown, *&c.* afterwards by a Private Act made 4 *Jac.* 1. ſeveral Alterations were made in this Eſtate, as that *Charles*, then Earl of *Derby*, ſhould hold and enjoy them for his Life, and after his Death to *James* his Son and Heir apparent, and the Heirs Male of his Body, and ſo to the ſecond, third, *&c.* and ſeventh Son of Earl *Charles*, and then to ſeveral others in Tail Male, who by the Limitation of the Letters Patent would have ſucceeded to the Eſtate upon Failure of Iſſue Male of Earl *Charles*, with Power for Earl *Charles*, and the Sons ſucceſſively, to make Leaſes for Lives or Years, and Jointures for Wives; after Earl *Charles*'s Death, his Son Earl *James* levied a Fine of theſe Lands, and ſold them to a Stranger; yet upon Special Verdict in Ejectment brought after his Death by his Son, it was reſolved by all the Judges of *England*, in the Exchequer-Chamber, except Three, that the Fine was no Bar, for that the Reverſion continued in the Crown, and that theſe Eſtates given by 4 *Jac.* 1. were no new Eſtates, but all within the Compaſs of the firſt Eſtate-tail created by the Letters Patent, and only a Diſtribution of the Enjoyment of them, and all to the ſame Perſons who would have been intitled under the Letters Patent; and the Power to make a Leaſe was, with Conformity to the Power of Tenant in Tail; and that to make Jointures was but in Lieu of Dower; beſides, there was a Saving to the King, and all other Perſons, all ſuch Rights, *&c.* ſo as the Prerogative of the King, by his Reverſion, to reſtrain the Tenant in Tail from barring his Iſſues, was ſaved, and the eighth and ninth, and all other Sons inheritable by virtue of the Intail let in, though the Firſt, *&c.* and Seventh only were named, and the Alterations, were only in Accidents, not in the ſubſtantial Parts of the Limitations, and ſo within 34 *H.* 8. *c.* 20.

When Men obſerved the Effect of Recoveries, and that they were conſtrued by the Judges, not only to transfer Eſtates-tail, but even Reverſions and Remainders dependant on them, except thoſe veſted in the Crown; they began to grow as uneaſy under this Liberty, as they formerly were under the Reſtriction of the Statute *de donis*; for they thought it very ſevere, that they could not carve what Eſtate they pleaſed out of their own Inheritance, without any other Security for the Reverſion they reſerved to themſelves than the Generoſity or Promiſe of the Donee. Hence we find Men themſelves endeavouring to create Perpetuities, by annexing Conditions of their own Invention, and reſtraining their Donees from Alienating, under the Penalties of loſing their Eſtates; but the Judges had ſo long ſtruggled with Perpetuities, and found them ſo much againſt the Intereſt of the long Robe, and of the whole Nation in gene-

* Page 552 Co. 84. *Corbett*'s Caſe, 6 Co. 42. Co. Lit. 224. Mo. 73.

* ral, as a great Diſcouragement to Induſtry, that they conſtantly condemned all thoſe Settlements which came before them, and not only reſolved that a Common Recovery is inſeparably incident to an Eſtate-tail, but that it is an undeniable Argument againſt any Settlement, if it be found

found to tend to a Perpetuity, and in ſuch Caſe a Recovery has been allowed to bar them.

But in Caſe of an executory Deviſe, which is to veſt upon a Contingency to happen within a Life in Being, there a Common Recovery will not bar ſuch future Intereſt; as if Lands be deviſed to *A.* and his Heirs, and if he dies without Iſſue, living *B.* then to *B.* and his Heirs; in this Caſe, if *A.* ſuffers a Common Recovery, and dies without Iſſue in the Life of *B.* this Recovery ſhall not bar the future Intereſt of *B.* for *B.* by the Deviſe had only a Poſſibility, and no preſent Intereſt, and the Recompence in Value cannot go to thoſe who were neither Parties to the Recovery, nor had any Intereſt in the Land at the Time of the Recovery ſuffered; nor is there any Danger of a Perpetuity in this Caſe, becauſe here the future Intereſt of *B.* muſt veſt on a Contingency which is to happen within the Compaſs of a Life in Being. †

Co. Jac 591. Palm. 131. 2 Rol. Abr. 394. *Pell* and *Brown.* Lev. 12. *vide* Tit. Deviſe.

† It was ſaid in this Caſe, if the Perſon to whom the executory Deviſe is limited, come in as Vouchee, in a Common Recovery, that his Poſſibility is thereby given up, and his Heir barred. *Vide Fearne's* Eſſay on Contingent Remainders, third Edition, 307.

If Lands be given to *J. S.* and his Heirs, as long as *B.* has Iſſue of his Body, *J. S.* by Recovery ſhall not bind him that made the Gift, but that upon the Death of *B.* without Iſſue of his Body, the Lands ſhall revert to the Donor, for that the Donor had no Intereſt in the Land, for there can be no Fee upon a Fee; and a Common Recovery againſt Tenant in Fee-ſimple ſhall never bind any collateral Title or Poſſibility, becauſe the Recompence cannot go to thoſe who had no Intereſt in the Land.

Cro. Jac. 593.

So if the Mortgagee in Fee ſuffers a Recovery, this ſhall not bind the Mortgagor's Right of Entry upon Performance of the Condition; but in theſe Caſes, if the Donor or Mortgagor had been Parties to the Recovery, then their Right had been bound, not only on Account of the Recompence; but becauſe they are eſtopped by the Recovery to claim the Land againſt the Recoveror, or his Heirs, when they were called in before the Judgment to defeat his Title, but could not do it.

Palm. 135. Cro. Jac. 593.

If Lands be given to the Uſe of *A.* in Tail, Remainder to *B.* provided that if there be a Failure of Iſſue Male of the Body of *A.* that *J.* ſhall have a Rent-charge out of the Land; *A.* makes a Leaſe of the Land for 100 Years, and then ſuffers a Recovery; it was adjudged, that this contingent Rent was barred, and that *J. S.* ſhould not charge the Land during the Term, for this Grant is ſubſequent to the Eſtate-tail, and cannot take Effect till the Determination of that, and then conſequently can iſſue out of the Remainders when they commence and execute; therefore if the Recovery bars the Remainders dependant on the Eſtate-tail, it muſt alſo deſtroy all Charges which are to iſſue out of them; for when by the Recovery it becomes impoſſible that the Remainders ſhould ever execute, the Rent-charge muſt neceſſarily be loſt, which is to iſſue out of thoſe Remainders when executed.

2 Lev. 26. Mod. 108. *Benſon* and *Baron* and *Hudſon.* 3 Keb. 274, 287, 292.

If Tenant in Tail levies an erroneous Fine, and the Conuſee ſuffers a Common Recovery, in which the Tenant in Tail comes in as Vouchee; Recovery ſhall bar the Tenant in Tail and his Iſſue of a Writ of Error to reverſe the Fine, and the Recoveror may plead the Recovery in Bar of the Writ of Error; for, ſince the Tenant in Tail by coming in as Vouchee is barred of all Right or Title which he can have to the Land, the Writ of Error, which is but a Means to reſtore him to his Right, muſt likewiſe be barred, ſince the Recovery has left him no Right to be reſtored to.

Moor 365. Cro. Eliz. 388. Poph. 100. *Barton's* Caſe.

(D) Of erroneous and void Recoveries, who may avoid them, and by what Method.

* Page 553 *

Rol. Abr. 742. Lev. 142. Rol. Abr. 731.

IT is already obſerved, that a Recovery ſuffered by an Infant in Perſon ſhall not bind him; but though he may avoid it, yet it cannot be done by an Entry *in pais*, but by Writ of Error, and this too during his Minority; for the Judgment of the Court being on Record muſt be ſet aſide by an Act of equal Notoriety; but an Infant may avoid a Recovery by Writ of Error, as well where he comes in as Vouchee, as where he is Tenant to the *Præcipe*; for tho' ſtrictly ſpeaking the Recovery is not againſt him where he is not Tenant to the *Præcipe*, yet for the greater Security of the Purchaſer, and to ſtrengthen the Recovery by the Uſe of the double Voucher, the Perſon, who really has the Right to the Land in Demand, comes in as Vouchee, and then by vouching over the common Vouchee, has one Recompence for all his Titles; and conſequently, if he be the Perſon that really loſes the Land, he ought in Reaſon to reverſe the Recovery, as well where he comes in as Vouchee, as where he is ſeiſed of the Land, and is Tenant to the *Præcipe*.

Rol. Abr. 755, 796.

If Tenant in Tail within Age comes in as Vouchee by Attorney in a common Recovery, he in Remainder may aſſign this for Error, for he is Party in (*a*) Intereſt to the Recovery; and where a Man's Intereſt is bound by another's Act, it is but reaſonable he ſhould be allowed to free himſelf from the Miſchief of it by taking Advantage of any Error in it.

(*a*) But he muſt have the immediate Intereſt, for where a Writ of Error was brought in *B. R.* to reverſe a common Recovery, and there was a *Scire facias* iſſued againſt all the Tertenants, and they made a Default; though the Recovery was reverſed, yet it appearing afterwards that the Plaintiff in the Writ of Error had no Title, there being a Remainder-Man before him, the Court reverſed their former Reverſal. 5 Mod. 196.

Cro. Eliz. 2, 3. Lord *Norris* and Marquis of *Winchester*.

If *A.* be Tenant in Tail, the Remainder to *B.* and *A.* ſuffers an erroneous Recovery, and the common Vouchee releaſes to the Recoverer; yet if *A.* dies without Iſſue, *B.* may, notwithſtanding the Releaſe, reverſe it by Writ of Error, for the common Vouchee is only called in for Form; and as he has really no Intereſt in or Title to the Land, ſo really neither does he make any Recompence to the Perſon that loſes the Land; and therefore it were unreaſonable to carry the Notion of the imaginary Recompence ſo far as to ſuppoſe him a real Sufferer, and thereby giving him the Privilege of ſetting aſide a Conveyance by which he is no way affected.

2 Saund. 94, 95. Mod. 48. *Heſketh* and *Lee*. Sid. 446. Vent. 732. Keb. 627. See 2 Danv. Abr. 272. (G.) Fitzgib. 1, 114. 8 Mod. 25. 9 Mod. 103, 153. 12 Mod. 1. Gilb. Eq. Rep. 16. Ld. Raym. 113, 232, 600. Vern. 461. Eq. Caſ. Abr. 283. Stra. 445. 2 Stra. 1076. Will. Rep. 536. pl. 156. 2 Will. Rep. 119, 244, 297. pl. 80. 387, 519, 549. pl. 180. (643.) pl. 202. 3 Will. Rep. 206. pl 51. 208, 235.

In a Writ of Error to reverſe a Recovery ſuffered by an Infant, who appeared by Guardian, the Error aſſigned was in the Entry of his Admiſſion by Guardian, *viz. Conceſſ. eſt per Curiam hic quod A. B. ſequatur pro J. S. Armig. qui infra ætat' exiſtit ut Gardianus prædict. J. S.* whereas it was objected, that ſince the Infant was Tenant to the Writ, it ought to have been entered, that the Guardian was admitted to defend for the Infant; but this Exception was diſallowed, becauſe the Words *ad ſequend.* for the Infant ſignify the ſame with *ad defendend.* for the Infant; for *ad ſequend.* is to follow and attend the Buſineſs and Suit of the Infant; and the Guardian being aſſigned to do that, muſt likewiſe have been aſſigned to take Care of, or take upon him the Defence of the Infant's Suit.

In a common Recovery the Writ of Error bears Date 1 *Martii* 7 *Eliz. ret. die Lunæ in quarta ſeptimana Quadrageſim' proxim' futur'*, the firſt Day of *March* being that Year the firſt Day of *Lent*; the Recovery paſt in the uſual

* uſual Form that *Lent*; and in a Writ of Error to reverſe it, the Error aſſigned was, that the Words *proxim' futur'* ſhould be referred to *Quadrageſim'*, and then the Writ of Entry was not returned till *Monday* in the fourth Week of *Lent*, 8 *Eliz.* which was the Time the Tenant was to appear; and conſequently this Recovery muſt be void, becauſe here was Judgment upon a Voucher, and a Recovery in Value, before the Writ was returned, before which the Court has no Power to proceed; but it was anſwered and reſolved, that ſince *proxim' futur'* were not written at large, they may be indifferently applied either to *die Lunæ*, by ſuppoſing them to ſtand for *proximo futuro*, or to *quartâ ſeptimanâ*, by ſuppoſing them to ſtand for *proximâ futurâ*; and where Words abbreviated may be indifferently referred, it is but reaſonable to give them ſuch a Relation, as will beſt ſupport the Recovery, which is but a voluntary Conveyance, *ut res magis valeat quam pereat*; but if the Words had been at large *proximæ futuræ*, then they muſt neceſſarily be referred to *Quadrageſimæ*, and then the Objection had been good, and the Recovery for that Reaſon muſt have been void. * Page 554

In Error to reverſe a Recovery, the Errors aſſigned were, 1. That the Writ of Entry was brought of an Advowſon of a Rectory, and alſo of a Rent iſſuing out of the ſame Rectory, which was a *bis petitum*, and therefore the Writ vitious; but this was diſallowed, becauſe the Advowſon and Rectory are different Things; for he that has the Advowſon has only the Right of Preſentation, but he that has the Rectory has the Profits of the Church, out of which the Rent iſſues; and conſequently there can be no *bis petitum* in this Caſe, becauſe by the Demand of the Advowſon of the Rectory, and of the Rent iſſuing out of the Rectory, the Demandant recovers more than by a Demand of the Rectory only. Another Error aſſigned was in the Demand of a Rent or Penſion of four Marks iſſuing out of the Rectory, which is ſo uncertain a Demand, a Penſion being a different Thing from a Rent, and recoverable in the Spiritual Court; but this too was diſallowed, becauſe it is plain there is but one Sum of four Marks demanded, and the Penſion or Rent muſt be ſynonymous here, becauſe they are demanded as iſſuing out of the Rectory; and therefore the Penſion cannot be in Nature of an Annuity, which charges the Perſon only, becauſe it is expreſly to iſſue out of the Rectory. Poph. 23. 5 Co. 41. a. Poph. 23.

In a Writ of Error to reverſe a common Recovery, the Error inſiſted on was, that the Warrant of Attorney of the Vouchee bore Date before the *Summoneas ad Warrantizand.* iſſued, yet the Judgment was affirmed, becauſe the Vouchee may come in, if he will, before the *Summoneas ad Warrantizand.* and make his Attorney; and therefore, to ſupport the common Recovery, it ſhall be preſumed the Vouchee was preſent in Court and appointed his Attorney; and ſo the *Dedimus* for the Warrant and the *Summoneas ad Warrantizand.* void. Sid. 213. Lev. 130. Raym. 70. S. C. *Wynn* and *Lloyd.*

In a *Quare Impedit* the Plaintiff intitles himſelf to an Advowſon by a Recovery ſuffered by Tenant in Tail, in pleading which Recovery he alledges two to be Tenants to the *Præcipe*, but doth not ſhew how they came to be ſo, or what Conveyance was made to them, by which it may appear that they were Tenants to the *Præcipe*; and after Search of Precedents as to the Form of pleading common Recoveries, the Court inclined that it was not well pleaded, but delivered no Judgment. 2 Mod. 70. *Wakeman* and *Blackwall.*

Recoveries ſhall be good without the Surrender of the Leſſee for Life. 14 Geo. 2. c. 20.

Purchaſes in Poſſeſſion, after twenty Years, may give Evidence of a Recovery by the Deed creating the Tenant to the *Præcipe*. 14 Geo. 2. c. 20. ſ. 4.

After twenty Years a Recovery ſhall be good though the Deed be loſt, *&c.* 14 Geo. 2. c. 20. ſ. 5.

A Deed, *&c.* executed the ſame Term, ſhall be good to make a Tenant to the *Præcipe*. 14 Geo. 2. c. 20. ſ. 6.

*Page 555 * # Forcible Entry and Detainer.

Dalton's Juſtice 297. Lamb. 135. Crom. 70.a.b.

AT Common Law, if a Man had a Right of Entry in him, he was permitted to enter with Force and Arms, and to detain his Poſſeſſion by Force, where his Entry was lawful; this created great Inconvenience by arming the Tenants of the Lords, and in a Manner incouraging them in Miſchief, who were always too forward in Rebellions and Contentions in their Neighbourhood; alſo it gave an Opportunity to powerful Men, under the Pretence of feigned Titles, forcibly to eject their weaker Neighbours; therefore it will be neceſſary to ſet down and conſider,

(A) The ſeveral Statutes made relating to this Subject. 555.
(B) What ſhall be a forcible Entry and Detainer within theſe Statutes. 558.
(C) Of the Nature of the Poſſeſſions with reſpect to which one may be guilty of a forcible Entry or Detainer. 559.
(D) What Perſons may be guilty thereof. 560.
(E) What ought to be the Form of a Record grounded upon theſe Statutes. 561.
(F) Of the awarding of Reſtitution, by whom and in what Manner; and herein of the Nature of the Poſſeſſions, and to whom ſuch Reſtitution is to be made. 563.
(G) What ſhall be a Bar or Stay to ſuch Award of Reſtitution; and herein of ſuperſeding and ſetting it aſide after it is executed. 564.

(A) The ſeveral Statutes made relating to this Subject.

Plow. 86. Upon this Statute there was a Writ formed to take and appraiſe the Arms of ſuch as rode armed, and alſo to take and impriſon their Bodies; for which *vide* F. N. B. 249. But this was no ſufficient Proviſion againſt the Entering and Detaining Poſſeſſion by Force.

BY the 2 *Ed.* 3. *cap.* 3. called the Statute of *Northampton*, it is provided, "That no Perſons, but the King's Miniſters, ſhould ride armed, by Night or Day, under Pain of loſing their Arms, and their "Bodies to be impriſoned."

* By the 5 *R.* 2. *cap.* 8. it is provided, "That none from thenceforth "ſhould make any Entry into any Lands and Tenements, but in Caſes "where Entry is given by the Law; and in ſuch Caſes not with ſtrong "Hand, nor with Multitude of People, but only in a peaceable and eaſy "Manner; and if any Man from thenceforth ſhould do to the contrary, "and thereof be duly convict, he ſhould be puniſhed by Impriſonment of "his Body, and thereof ranſomed at the King's Will."

* Page 556

This Statute gave no ſpeedy Remedy, leaving the Party injured to the common Courſe of Proceeding by way of Indictment or Action, and made no Proviſion at all againſt forcible Detaine rs.

By the 15 *R.* 2. *cap.* 2. it is enacted, "That the ſaid Statute, and all "others made againſt forcible Entries, &c. ſhall be duly executed; and "farther, that at all Times that ſuch forcible Entries ſhall be made, and "Complaint thereof cometh to the Juſtices of Peace, or to any of them, "that the ſame Juſtices or Juſtice take ſufficient Power of the County, and "go to the Place where the Force is made; and if they find any that hold "ſuch Place forcibly, after ſuch Entry made, they ſhall be taken and put "into the next Gaol, there to abide convict by the Record of the ſame "Juſtices or Juſtice, until they have made Fine and Ranſom to the "King; and that all the People of the County, as well the Sheriff as "others, ſhall be attendant upon the ſame Juſtices, to go and aſſiſt the "ſame Juſtices to arreſt ſuch Offenders, upon Pain of Impriſonment, and "to make Fine to the King; and in the ſame Manner it ſhall be done "of them that make ſuch forcible Entries in Benefices or Office of Holy "Church."

This Statute gives no Remedy againſt thoſe who are guilty of a forcible Detainer after a peaceable Entry, nor againſt thoſe who were guilty of both a forcible Entry and forcible Detainer, if they were removed before the coming of a Juſtice of Peace; neither does it give the Juſtice any Power to reſtore the Party to his Poſſeſſion, nor inflict any Penalty on the Sheriff for diſobeying the Precepts of the Juſtices in the Execution of the Statute.

By the 8 *H.* 6. *cap.* 9. it is enacted, "That from henceforth where any "doth make any forcible Entry in Lands and Tenements, or other Poſſeſ-"ſions, or them hold forcibly after Complaint thereof made, within the "ſame County where ſuch Entry is made, to the Juſtices of the Peace, or "to one of them by the Party grieved, that the Juſtices or Juſtice ſo "warned within a convenient Time, ſhall cauſe, or one of them ſhall cauſe, "the ſaid Statute to be duly executed, and that at the Coſts of the Party "ſo grieved."

By the ſaid Statute it is further enacted, "That though ſuch Perſons "making ſuch Entries be preſent, or elſe departed before the coming of "the ſaid Juſtices or Juſtice, notwithſtanding the ſame Juſtices or Juſtice, "in ſome good Town next to the Tenements ſo entered, or in ſome other "convenient Place, according to their Diſcretion, ſhall have and either of "them ſhall have Authority and Power to inquire by the People of the "ſame County, as well of them that make ſuch forcible Entries in Lands "and Tenements, as of them which the ſame held with Force; and if it "be found before any of them, that any doth contrary to this Statute, "then the ſaid Juſtices or Juſtice ſhall cauſe to reſeiſe the Lands and Te-"nements ſo entered or holden as aforeſaid, and ſhall put the Party, ſo "put out, in full Poſſeſſion of the ſame Lands and Tenements ſo entered "or holden as before."

And it is further enacted by the ſaid Statute, "That when the ſaid "Juſtices or Juſtice make ſuch Inquiries as before, they ſhall make, or "one of them ſhall make, their Warrants and Precepts to be directed "to the Sheriff of the ſame County, commanding him, of the King's "Behalf, to cauſe to come before them, and every of them, ſufficient "and indifferent Perſons, dwelling next about the Lands ſo entered as "before, to inquire of ſuch Entries; whereof every Man which ſhall "be impanelled to inquire in this Behalf, ſhall have Land or Tene-

"ment

" ment of the yearly Value of forty Shillings by the Year at the
*Page 557 " leaſt, above Reprizes; and that the Sheriff return Iſſue upon every of
" them; at the Day of the firſt Precept returnable twenty Shillings, and
" at the ſecond Day forty Shillings, and at the third Time an hundred
" Shillings, and at every Day after the double; and if any Sheriff or Bai-
" liff within a Franchiſe, having Return of the King's Writ, be ſlack and
" make not Execution duly of the ſaid Precepts to him directed to make
" ſuch Enquiries, that he ſhall forfeit to the King twenty Pounds for every
" Default, and moreover ſhall make Fine and Ranſom to the King; and
" that as well the Juſtices or Juſtice aforeſaid, as the Juſtices of Aſſiſes,
" ſhall have Power to hear and determine ſuch Defaults of the ſaid Sheriffs
" and Bailiffs at the Suit of the King, or of the Party grieved, &c.

And it is further enacted by the ſaid Statute, " That Mayors, Juſtices
" or Juſtice of the Peace, Sheriffs and Bailiffs of Cities, Towns and Bo-
" roughs, having Franchiſe, have in the ſaid Cities, Towns and Boroughs,
" like Power to remove ſuch Entries, and in other Articles aforeſaid, riſing
" within the ſame, as the Juſtices of Peace and Sheriffs in Counties and
" Countries aforeſaid have.

Note; this Statute alſo founds a Remedy by Aſſiſe of *Novel Diſſeiſin*, or Action of

But it is provided by the ſaid Statute, " That they who keep their Poſ-
" ſeſſions with Force, in any Lands and Tenements, whereof they or their
" Anceſtors, or they whoſe Eſtate they have in ſuch Lands and Tenements,
" have continued their Poſſeſſions by *three* Years or more, be not endama-
" ged by Force of this Statute.

Treſpaſs, to recover the treble Damages, to which if the Defendant pleads Matter in Bar, he muſt alſo traverſe the Force; but if the Matter in Bar be found for the Defendant, ſo that he hath good Title at Law, the Defendant is excuſed from the Force, for the Plaintiff cannot recover in the Action if he hath no Right; but if the Plaintiff prevails, then the Force muſt be inquired of, and treble Damages aſſeſſed to Plaintiff; but a Perſon is puniſhed criminally for entering with Force even where he has a Right, though not for peaceably detaining a Poſſeſſion by Force, eſpecially if he has held it for *three* Years in Quiet, F. N. B. 249. Bro. Tit. Force 5, 11, 29. 17 H. 7. 17. b.†

† The Juſtices of Peace muſt ſet the Fine, and they muſt do it before they commit the Offender, though they may take a reaſonable Time to conſider of it. If no Fine is ſet by the Juſtices, and the Offender is committed, *B. R.* cannot ſet the Fine, but will quaſh the Conviction. *Rex* verſus *Elwell*. Stra. 794. Ld. Raym. 1514.

By the 31 *Eliz. cap.* 11. the Proviſo in the above Statute is farther en-
" forced and explained, by which it is declared and enacted, " That no
" Reſtitution upon any Indictment of forcible Entry, or holding with Force,
" be made to any Perſon, if the Perſon ſo indicted hath had the Occupa-
" tion, or been in quiet Poſſeſſion for the Space of *three* whole Years to-
" gether next before the Day of ſuch Indictment ſo found, and his Eſtate
" therein not ended, which the Party indicted may alledge for Stay of
" Reſtitution, and Reſtitution to ſtay till that be tried, if the other will
" deny or traverſe the ſame; and if the ſame Allegation be tried againſt
" the ſame Perſon ſo indicted, he is to pay ſuch Coſts and Damages to the
" other Party, as ſhall be aſſeſſed by the Judges or Juſtices before whom
" the ſame ſhall be tried; the ſame Coſts and Damages to be recovered and
" levied, as is uſual for Coſts and Damages contained in Judgments upon
" other Actions.

By the 21 *Jac.* 1. *cap.* 15. it is enacted, " That ſuch Judges, Juſtices
" or Juſtice of the Peace, as by reaſon of any Act or Acts of Parliament
" then in Force, were authorized and enabled upon Enquiry, to give
" Reſtitution of Poſſeſſion unto Tenants, of any Eſtate of Freehold of their
" Lands or Tenements which ſhall be entered upon with Force, or from
" them with-holden by Force, ſhall by reaſon of that Act have the like and
" the ſame Authority and Ability from thenceforth (upon Indictment of
" ſuch forcible Entries, or forcible With-holding before them duly found)

to

" to give like Reſtitution of Poſſeſſion unto Tenants for Term of Years, " Tenants by Copy of Court-Roll, Guardians by Knights-Service, Tenants " by *Elegit*, Statute-Merchant and Staple, of Lands or Tenements by " them ſo holden, which ſhalll be entered upon by Force, or holden from " them by Force.

(B) What ſhall be a forcible Entry and Detainer within theſe Statutes.

* Page 558

A Forcible Entry muſt regularly be with a ſtrong Hand, with unuſual Weapons, or with Menace of Life or Limb. H. P. C. 138. Dalt. 300. Hawk. P. C. 145.

If a Man enters peaceably into an Houſe, but turns the Party out of Poſſeſſion by Force, or by Threats frights him out of Poſſeſſion, this is a forcible Entry. Dalt. 299. Hawk. P. C. 145, 146. But threatning to ſpoil his Goods, or deſtroy his Cattle, if he will not quit his Poſſeſſion, will not make a forcible Entry. Bro. Tit. Dureſs 12, 16. Inſt. 257.

If a Houſe be bolted, it is forcible to break it open, but it is not ſo to (*a*) draw a Latch and enter into the Houſe; and if a Man, whoſe Entry is lawful, ſhall intice the other out of the Houſe and enter, the Door being open or only latcht, his Entry is juſtifiable. 2 Rol. Rep. 2. 2 Inſt. 235. Crom. 70. 2. (*a*) Noy 136. 137. *cont.* who ſays, that there can be no entering if the Door be latched; *vide* 1 Hawk. P. C. 145. *cont.* who ſays, that ſuch an inconſiderable Circumſtance as this, which commonly paſſes between Neighbour and Neighbour, will never bring a Man within the Meaning of thoſe Statutes; and it hath been holden, that an Entry into a Houſe through a Window, or by opening a Door with a Key, is not forcible. Lamb. 143. 1 Hawk. P. C. 145. 2 Rol. Rep. 2.

If one find a Man out of his Houſe, and forcibly with-hold him from returning to it, and ſend Perſons to take peaceable Poſſeſſion thereof in the Party's Abſence, this, by ſome Opinions, ſays *Hawkins*, is no forcible Entry, in as much as he did no Violence to the Houſe, but only to the Perſon of the other; but he himſelf is of a contrary Opinion, for though the Force be not actually done upon the Land, nor in the very Act of Entry, yet ſince it is uſed with an immediate Intent to make ſuch Entry, and the Manner of doing of it only prevents the Oppoſition, it cannot be ſaid to be without Force, which, whether it be upon or off the Land, ſeems equally within the Statute. 1 Hawk. P. C. 145.

If a Man enters to diſtrain for Rent in Arrear with Force, this is a forcible Entry, becauſe though he doth not claim the Land itſelf, yet he claims a Right and Title out of it, which by theſe Statutes he is forbid to exert by Force; but if a Man hath Right to Lands, and rides over them with Company armed to Church or Market, without expreſſing any Intent to claim it, this is no forcible Entry, becauſe his Actions ſhall be interpreted according to his Intent; but if a Man that has a Rent be reſiſted from his Diſtreſs by Force, this is a forcible Diſſeiſin of the Rent, for which he may recover treble Damages in an Aſſiſe, or may fine and impriſon the Party; but he cannot have a Writ of Reſtitution, for though the Statute gives Remedy by Fine and Impriſonment for the unjuſt Force that is offered to any Perſon's Right, yet it doth not give the Juſtices Power to reſeiſe the Rent, but only the Lands and Tenements themſelves; and therefore no Writ of Reſtitution can be awarded. Bridg. 175. 20 H. 6. 11. a. Crom. Juſt. 62. Dalt. 300.

2 Rol. Rep. 2. Perk. 45. Crom. Juſt. 164. Dalt. 315. Moor 656.

A Man may be guilty of a forcible Entry in a Dwelling-houſe, though there be no Body in the Houſe at the Time; and ſo he may by an Entry into Lands where any Perſon's Wife, Children, or Servants are upon the Lands to preſerve the Poſſeſſion; becauſe whatſoever a Man does by his Agents is his own Act, but his Cattle being upon the Ground don't preſerve his Poſſeſſion, becauſe they are not capable of being ſubſtituted as Agents; and therefore their reſiding upon the Land continues no Poſſeſſion.

* Page 559 Dalt. 303. 9 Co. 67, 112, 115. Fitz. Tit. Coron. 314, 315. Co. Lit. 157.

* If ſeveral do come in Company where their Entry is not lawful, and all of them, ſaying one, enter in a peaceable Manner, and that one only uſes Force, it is a forcible Entry in them all, becauſe they come in Company to do an unlawful Act; and therefore the Act of the one is the Act of them all, and he is preſumed to be only the Inſtrument of the Reſt; but otherwiſe it is where one had a Right of Entry, for there they only come to do a lawful Act, and therefore it is the Force of him only that uſed it.

2 H. 7. 16. b. 20 H. 6. 11. a. Cromp. Juſt. 62. a. Dalt. 300. Hawk. P. C. 145, 147.

If divers enter by Force to the Uſe of *A.* and *A.* afterwards agrees to it, this makes it a Diſſeiſin in *A.* but not a forcible Entry within the Statute, becauſe the Statute doth not puniſh an Agreement, but only the Force and Violence of an actual Entry.

If he, who hath an Eſtate in Land by a defeaſible Title, continues with Force in the Poſſeſſion thereof, after a Claim made by one who had a Right of Entry thereto, he ſhall be adjudged to have entered forcibly.

Cro. Jac. 199. Crom. 70. Lamb. 145. Hawk. P. C. 146.

The ſame Circumſtances of Violence or Terror, which will make an Entry forcible, will make a Detainer forcible alſo; from whence it follows, that whoever keeps in the Houſe an unuſual Number of People, or unuſual Weapons, or threatens to do ſome bodily Hurt to the former Poſſeſſor, if he dare return, ſhall be adjudged guilty of a forcible Detainer, though no Attempt be made to re-enter; and it hath been ſaid, that he alſo ſhall come under the like Conſtruction, who places Men at a Diſtance from the Houſe in order to aſſault any one who ſhall make an Attempt to enter into it; and that he alſo is in like Manner guilty, who ſhuts his Doors againſt a Juſtice of Peace coming to view the Force, and obſtinately refuſes to let him come in; but it is ſaid, that a Man ought not to be adjudged guilty of this Offence for barely refuſing to go out of a Houſe, and continuing therein in Deſpite of another.

Dalt. 301. Yelv. 99, 100. Cro. Jac. 151. Sid 97, 414. H. P. C. 149. *quod vide*, and Hawk P C. 151.

If a Man holds the Poſſeſſion by Force, though his Entry was peaceable, the Juſtices may remove him, if he had no Right to enter; but where the Entry is at firſt peaceable and lawful, there, whether the Juſtices may remove a forcible Detainer, where it hath not been peaceably held for three Years, is a Queſtion; for that the Juſtices are not Judges of the Right, but of the Poſſeſſion only; and if a Man be got peaceably into his own, it ſeems he may defend it by Force; and where the Jury have found *quoad* the Entry *Ignoramus*, and *quoad* the Detainer *billa vera*, ſuch Indictment hath been quaſhed, and the Reſtitution granted upon it ſet aſide, and a Re-reſtitution awarded.

Dalt. 315.

If two are in Poſſeſſion of a Houſe, and the one enter by one Title, and the other by another, he that hath Right ſhall be ſuppoſed to be in the Poſſeſſion; but the Juſtices have nothing to do to intermeddle, becauſe there is no Appearance of any Force in either; and therefore either Party that thinks himſelf injured muſt apply himſelf to an Action at Law to be redreſſed.

(C) Of the Nature of the Poſſeſſions, with reſpect to which one may be guilty of a forcible Entry and Detainer.

ONE may be guilty of this Offence by a Force done to Eccleſiaſtical Poſſeſſions, as Churches, Vicarage Houſes, *&c.* as much as if the ſame were done to any Temporal Inheritance. Sid. 101. Lev. 99. Keb. 438. Cro. Jac. 41.

* Alſo an Indictment of forcible Detainer lies againſt one, whether he be Tertenant or Stranger, who ſhall forcibly diſturb any in the Enjoyment of an incorporeal Inheritance, as Rent, Tithes, (*a*) Common, or an Office. * Page 560 Cro Car. 201, 486. but the Juſtices cannot award Reſtitution for theſe, becauſe no Man can be put out of Poſſeſſion of them but at his own Election.

(*a*) *Quære*, Whether ſuch Indictment will lie for a Common or Office, and *vide* Hawk. P. C. 146. who ſays, that he can find no good Authority that ſuch Indictment will lie; and note, that a Man cannot be convicted upon View, by Force of the 15 R. 2. c. 2. of a forcible Detainer of any incorporeal Inheritance, becauſe he cannot be ſaid to have made a precedent forcible Entry.

No one can come within the Danger of theſe Statutes by a Violence offered to another, in reſpect of a Way, or ſuch like Eaſement, which is no Poſſeſſion. Mod. 73. 2 Keb. 709. Note; It is ſaid to be a general Rule, that one may be indicted for entering into any Inheritance, for which a Writ of Entry will lie. Hawk. P. C. 146 Cro. Car. 201. 8 Mod. 65. 11 Mod. 52. pl. 23. 233, 273. pl. 18. 12 Mod. 268, 417, 423, 495, 516. Ld. Raym. 610. Salk. 260. pl. 2. 3 Salk. 169. pl. 1. Comb. 70.

(D) What Perſons may be guilty thereof.

A Man who breaks open the Doors of his own Dwelling-houſe, or of a Caſtle, which is his own Inheritance, but forcibly detained from him by one who claims the bare Cuſtody of it, cannot be guilty of a forcible Entry or Detainer within the Statutes. Cro. Jac. 18. Moor 786. 2 Keb. 495. but Serjeant *Hawkins* makes a *Quære*, whether a Man's entering forcibly into the Land in the Poſſeſſion of his own Leſſee at Will, be within theſe Statutes. Hawk. P. C. 147. †

† We ſhould ſuppoſe it within the Statutes, they being intended to puniſh Force, though exerted under Colour of Right, and to induce Men to apply to the Laws for Relief, inſtead of ſeeking to do themſelves Juſtice, and that with Force, which the Law abhors.

A Jointenant or Tenant in Common may offend againſt the Purport of theſe Statutes, either by forcibly Ejecting or forcibly Holding out his Companion; for though the Entry of ſuch a Tenant be lawful *per my & per tout*, ſo that he cannot in any Caſe be puniſhed in an Action of Treſpaſs at the Common Law; yet the Lawfulneſs of his Entry no way excuſes the Violence, or leſſens the Injury done to his Companion, and conſequently an Indictment of forcible Entry into a Moiety of a Manor, *&c.* is good. Latch. 224. Palm. 419. Hawk. P. C. 147. Dalt. 315, 316. Hardw. 174.

A Man cannot be indicted for entering into the King's Poſſeſſion by Force, for that he cannot be diſſeiſed. Co. 69. 10 Co 112.

An Infant at the Age of eighteen, and ſome ſay fourteen, or a Feme Covert, by their own Acts, may be guilty of a forcible Entry, and they may be fined for the ſame; but it is doubted, whether the Infant may be impriſoned, Bridg. 173. Cromp. Juſt. 62. Dalt. 300.

impriſoned, becauſe his Infancy is an Excuſe by Reaſon of his Indiſcretion; and he ſhall not be ſubject to corporal Puniſhment by Force of the general Words of any Statute, wherein he is not expreſsly named; but it is clearly agreed, that the Command of an Infant or Feme Covert to enter is void, and therefore the Perſon entering is only puniſhable.

(E) What ought to be the Form of a Record grounded upon theſe Statutes.

THESE Statutes ſeem to require, that in the Indictment the Entry must be laid *Manu forti*, or *cum Multitudine Gentium*, and that without theſe the Statute is not purſued; but ſome have held that equivalent Words will be ſufficient, eſpecially if the Indictment concludes *contra formam Statuti*, and that theſe Words in the Statute are put in *cauſa abundanti*; but it is not ſufficient to ſay only, he entered *Vi & Armis*, ſince that is the common Allegation in every Treſpaſs.

Style 135. 2 Bulſt. 258. 2 Rol. Rep. 46. 2 Rol. Abr. 80. Mod. 80, 81. Cro. Eliz. 461. *Warner* ver. *Collins*. Noy 155. Vent. 265. 2 Keb. 133.

Palm. 277. Cro. Jac. 633. It is ſufficient in the Caption of ſuch an Indictment to ſay, that it was taken before *A. B.* and *C. D. Juſticiariis ad pacem Domini Regis conſervandum aſſignatis*, without ſhewing, that they had Authority to hear and determine Felonies and Treſpaſſes, for the Statute enables all Juſtices of the Peace, as ſuch, to take ſuch Indictments.

(*a*) Dal. 15. 2 Rol. Rep. 46. 2 Rol. Abr. 80. pl. 8. 3 Leon. 102. (*b*) Co. Lit. 6. a. (*c*) 2 Rol. Abr. 80. pl. 4, 5. Rol. Rep. 334. Cro. Jac 633. Palm. 277. (*d*) 2 Rol. Abr. 81. pl. 4. (*g*) 2 Leon. 186. An Indictment of forcible Entry into a (*a*) Tenement, (which may ſignify any Thing whatſoever (*b*) wherein a Man may have an Eſtate of Freehold), or into a Houſe (*c*) or Tenement, or into two Cloſes of Meadow or (*d*) Paſture, or into a Rood (*e*) or Half a Rood of Land, or into (*f*) certain Lands belonging to ſuch a Houſe, or into ſuch a Houſe, without ſhewing in what (*g*) Town it lies, or into a (*b*) Tenement with the Appurtenances called *Truepenny* in *D.* is not good, for the Place muſt be deſcribed with convenient Certainty, for otherwiſe the Defendant will neither know the ſpecial Charge to which he is to make his Defence, neither will the Juſtices or Sheriff know how to reſtore the injured Party to his Poſſeſſion.

(*e*) Bulſt. 201. (*f*) 2 Leon. 186. 3 Leon. 101. Bro. Tit. For. Ent. 23. (*b*) 2 Rol. Abr. 80. pl. 7.

Cro. Jac. 633. Palm. 277. But it hath been reſolved, that an Indictment for a forcible Entry *in Domum Manſionalem ſive Meſſuagium*, &c. is good, for theſe are Words equipollent.

An Indictment for Entry into a Cloſe, called Serjeant *Hern*'s Cloſe, &c. without adding the Number of Acres, is good, for here is as much Certainty as is required in an Ejectment. Cro. Eliz. 458. 2 Rol. Abr. 80. pl. 8.

2 Leon. 186. 3 Leon. 102. Hawk. P. C. 148. Alſo ſuch Indictment may be void as to ſuch Part thereof, only, which is uncertain, and good for ſo much as is certain; therefore an Indictment for a forcible Entry into a Houſe and certain Acres of Land thereto belonging may be quaſhed as to the Land, and ſtand good as to the Houſe.

2 Keb. 495. 3 Bulſt. 71. Vent. 23, 25. An Indictment on the 5 *R.* 2. *c.* 8. or 15 *R.* 2. *c.* 2. needs not ſhew who had the Freehold at the Time of the Force, becauſe theſe Statutes equally puniſh all Force of this Kind, without any Way regarding what Eſtate the Party had on whom it was made; yet it ſeems that ſuch Indictment ought

to ſhew, that ſuch Entry was made on the Poſſeſſion of ſome Perſon who had ſome Eſtate in the Tenements, either as a Freehold or Leſſee for Years, *&c.* for otherwiſe it doth not appear that ſuch Entry was made injurious to any one.

But it is ſaid, that an Indictment on 8 *H.* 6. *c.* 9. muſt ſhew, that the Place was the Freehold of the Praty grieved at the Time of the Force, and therefore that it is not ſufficient to ſay, that the Defendant entered into ſuch a Houſe *exiſtens liberum Tenementum J. S.* without ſaying *Adtunc exiſtens liberum Tenementum J. S.* for otherwiſe it may be intended, that it was his Freehold at the Time of the Indictment only. 2 Keb. 495. Salk. 260. pl. 2. Hetley 73. Latch 109.

*It is therefore a general Rule, that an Indictment cannot warrant a Reſtitution, unleſs it find that the Party was ſeiſed at the Time; but yet ſuch Seiſin is (*a*) ſufficiently ſhewn by a neceſſary Implication. * Page 562

(*a*) As where it is ſaid, that the Defendant diſſeiſed *J. S.* which could not be unleſs *J. S.* had been ſeiſed; and it hath been holden, that the Words *Poſſeſſionatus pro termino vitæ*, though not ſtrictly proper in ſuch Indictment, are ſufficient; neither is it neceſſary to ſhew in particular what Eſtate the Party had. Palm. 426. Sid. 102. Yelv. 28. Cro. Jac. 633. Bulſt. 177. Vent. 305.

An Indictment on the 8 *H.* 6. *c.* 9. for entering and forcibly expelling my Farmer, and diſſeiſing me, is good, without ſhewing what Eſtate he had; for the forcible Diſſeiſin to me being the main Point of the Indictment, it is ſufficient to ſet it forth in Subſtance. 2 Rol. Abr. 80. pl. 3. adjudged, but in this Caſe the Want of ſhewing that the Farmer was ouſted, would have been an incurable Fault. Yelv. 165.

Alſo an Indictment on 21 *Jac.* 1. *cap.* 15. muſt ſhew, that the Party injured was poſſeſſed of ſuch an Eſtate as will bring him within that Statute; and therefore it is not ſufficient for it to ſhew in general, that he was poſſeſſed, or that he was poſſeſſed of a certain Term, without adding, for Years; for in the firſt Caſe it may be intended, that he was Tenant at Will, and in the ſecond, that he was poſſeſſed for Term of Life; in neither of which Caſes is he within the Statute; but it is ſaid to be ſufficient, to ſet forth a Poſſeſſion within the Statute in the reciting part of an Indictment, as thus, *quod cum J. S.* was poſſeſſed for a certain Term of Years, *&c.* Vent. 306. Sid. 102. Mod. 73. 2 Keb. 709. Salk. 260. pl. 1. 8 Mod. 65. 11 Mod. 52. pl. 23. 233, 273. pl. 18. 12 Mod. 268, 417, 423, 495, 516. Ld. Raym. 610.

A Repugnancy in ſetting forth the Offence in an Indictment on theſe Statutes is an incurable Fault; as where it is alledged, that the Defendants *Pacifice intraverunt, & J. S. adtunc & ibidem vi & armis diſſeiſierunt*, or that the Party was poſſeſſed of a Term for Years, or of a Copyhold Eſtate, and that the Defendants diſſeiſed him, or that the Defendants diſſeiſed *J. S.* of Land, then and yet being his Freehold, for it implies that he always continued in Poſſeſſion; and if ſo it is impoſſible he could be diſſeiſed at all; but ſome ſay, that this may be reconciled, by intending that he reentered after the Diſſeiſin, and before the Indictment; but it ſeems clear, that if the Words *Adhuc extra tenet* be added, ſuch a Repugnancy cannot be helped by any Intendment, and that no Reſtitution can be awarded on ſuch Indictment, whether theſe Words be added, or not, becauſe the Party grieved appears by the Indictment to have had the Freehold at the Time it was ſo found. Pop. 205. Raym. 67. Keb. 423, 428, 435, 472. Aleyn 50. Vent. 108. 2 Rol. Rep. 311. Show. 272. 2 Bulſt. 121. Sid. 102.

A Conviction on 15 *R.* 2. *c.* 2. of a forcible Detainer on View, cannot be good, unleſs it ſhew, that the Defendant was alſo guilty of a forcible Entry; for it ſeems plain from the expreſs Words of that Statute, that the Juſtices have no Juriſdiction by it over a forcible Detainer, where there has not been a forcible Entry; but it ſeems that ſuch forcible Entry is ſufficiently ſet forth in the Complaint recited in the Conviction; and it ſeems a rea- 2 Rol. Abr. 80. pl. 10.

Palm. 195, 196, 197. Cro. Jac. 19, 20, 21. Cro.Eliz.915. Salk. 353. pl. 15.

reaſonable Opinion, that an Indictment on 8 *H.* 6. *c.* 9. ſetting forth an Entry and forcible Detainer is good, without ſhewing whether the Entry was forcible or peaceable, for the Words of the Statute are, *Where any doth make forcible Entry in Lands*, &c. *or them hold forcibly*; but it muſt ſet forth an Entry, for otherwiſe it appears not, but that the Party hath been always in Poſſeſſion, in which Caſe he may lawfully detain it by Force.

Cro. Jac. 41. Hawk. P. C. 150.

The Time and Place of the Diſſeiſin are ſufficiently ſet forth in an Indictment, alledging, that the Defendant *tali die intravit*, &c. *& ipſum* A. B. *manu forti diſſeiſivit*, without adding the Words *adtunc & ibidem*; for the Entry and Diſſeiſin being both of the ſame Nature, and the one plainly tending to the other, it is a natural Intendment that they both happened together.

* Page 563

Noy 125. Cro. Jac. 32. Cro.Eliz.186. Noy 120. *cont.*

* It has been reſolved, that a Diſſeiſin is ſufficiently ſet forth, by alledging, that the Defendant entered, &c. into ſuch a Tenement, and diſſeiſed the Party, without adding either the Words *Illicitè* or *Expulit* or *Inde*, for the Word *Diſſeiſivit* implies as much. †

† If the Conviction is in the præterperfect Tenſe, *acceſſimus & vidimus*, inſtead of the preſent Tenſe, it ſhall be quaſhed. Stra. 443.

(F) Of the Awarding of Reſtitution, by whom, and in what Manner; and herein of the Nature of the Poſſeſſions, and to whom ſuch Reſtitution is to be made.

H P.C. 140. Bridgm 175. Kel. 204. 11 Co. 59, 65. Dalliſon 25. pl. 8. 9 Co. 118. Dalton's Juſt. 314. Lamb. Juſt. 160, 161. Vent. 308. Keb. 88. Sid 156.

THE ſame Juſtice or Juſtices, before whom an Indictment of forcible Entry or Detainer ſhall be found, may award Reſtitution, but no other Juſtices, but thoſe before whom the Inqueſt was found, can award Reſtitution, unleſs the Indictment be removed by *Certiorari* into the King's Bench, and they by the Plenitude of their Power can reſtore, becauſe that is ſuppoſed to be implied by the Statute; for that whenever an inferior Juriſdiction is erected, the ſuperior Juriſdiction muſt have Authority to put it in Execution; ſo if an Indictment be found before the Juſtices of the Peace at their Quarter-Seſſions, they have Authority to award a Writ of Reſtitution, becauſe the Statute having given Power to the Juſtices or Juſtice to reſeiſe, it may as well be done by them in Court as out of it; but the Juſtices of *Oyer* and *Terminer* or general Gaol-Delivery, though they may enquire of forcible Entries, and fine the Parties, yet they cannot award a Writ of Reſtitution.

The Juſtices or Juſtice may execute the ſame in Perſon, or may make their Precept to the Sheriff to do it. Dyer 187. Hawk. P. C. 152.

Lamb. Juſt. 157. Hawk. P. C. 152.

The Sheriff, if need be, may raiſe the *Poſſe Comitatus* to aſſiſt him in the Execution of the Writ of Reſtitution; therefore if he return, that he could not make Reſtitution by Reaſon of Reſiſtance, he ſhall be amerced.

Lamb Juſt. 133. Co. Lit. 323. Hawk. P. C. 151.

Reſtitution ought only to be awarded for the Poſſeſſion of Tenements viſible and corporeal; for a Man, who has Right to ſuch as are inviſible and incorporeal, as Rents or Commons, cannot be put out of Poſſeſſion of them, but only at his own Election, by a Fiction of Law to enable him to recover Damages againſt the Perſon that diſturbs him in the Enjoyment of them; and all the Remedy that can be deſired againſt a Force in reſpect

to ſuch Poſſeſſions, is to have the Force removed, and thoſe who are guilty of it puniſhed; which may be done by 15 *R.* 2. *c.* 2.

Reſtitution ſhall only be awarded to him who is found by the Indictment to have been put out of *actual* Poſſeſſion, and conſequently that it ſhall not be awarded to one who was only ſeiſed in Law; as to an Heir on whom a Stranger abateth upon the Death of the Anceſtor, before any actual Entry made by ſuch Heir; and from the ſame Ground it followeth, that it ſhall not be granted to an Heir upon an Indictment finding a forcible Entry made upon his Anceſtor.† Lamb. 153. 154. Dal. c. 83. Cro. Jac. 199. Hawk. P. C. 151.

† When the Conviction is quaſhed, Reſtitution muſt be awarded, though the Party's Title is expired ſince the Conviction. Stra. 474. ——If the Indictment is removed by *Certiorari*, *B. R.* may award Reſtitution, diſcretionally; and will do it, unleſs Defendant plead very ſoon, and take Notice of Trial within Term. Hardw. 174.

* (G) What ſhall be a Bar or Stay to ſuch Award of Reſtitution; and herein of ſuperſeding and ſetting it aſide after it is executed.

* Page 564

IT appears by the Proviſo in the Statute of 8 *H.* 6. *c.* 9. and alſo by the 31 *Eliz. cap.* 11. that any one indicted upon theſe Statutes may alledge quiet Poſſeſſion for three whole Years to ſtay the Award of Reſtitution, in the Conſtruction whereof, ſaith Serjeant *Hawkins*, it hath been holden, that ſuch Poſſeſſion muſt have continued without Interruption during three whole Years next before the Indictment; and therefore that he, who, having been in Poſſeſſion of Land for three Years or more, is forcibly ouſted, and then reſtored by Force of the Statute of 8 *H.* 6. *c.* 9. cannot juſtify a forcible Detainer till he hath been in Poſſeſſion again for three Years after ſuch Reſtitution; and alſo for the ſame Reaſon it hath been ſaid, that he, who under a defeaſible Title hath been never ſo long in Poſſeſſion of Land to which another hath a Right of Entry, cannot juſtify ſuch a Detainer at any Time within three Years after a Claim made by him who hath ſuch Right, and the ſubſequent Continuance in Poſſeſſion amounted to a new Entry. Hawk. P. C. 152. and the Authorities cited are Dal. c. 79. Crom. 71. H. P. C. 139. Dyer 141. pl. 48. 22 H. 6. 18. Bro. Tit. Force 22, 29. Inſt. 256.

Alſo it is ſaid, that the three Years Poſſeſſion muſt be of a lawful Eſtate, and therefore that a Diſſeiſor can in no Caſe juſtify a forcible Entry or Detainer againſt the Diſſeiſee having a Right of Entry, as it ſeems that he may againſt a Stranger, or even againſt the Diſſeiſee, having by his Laches loſt his Right of Entry. Dalt. c. 79. 22 H. 6. 18. b. Crom. 71. But by *Hawkins*, ſuch Diſſeiſor may juſtify againſt a Stranger, or even againſt the Diſſeiſee, if his Right of Entry is taken away. Hawk. P. C. 152-3.

Wherever ſuch Poſſeſſion is pleaded in Bar of a Reſtitution either in the King's Bench, or before Juſtices of the Peace, no Reſtitution ought to be awarded till the Truth of the Plea be tried, and ſuch Plea need not ſhew under what Title, or of what Eſtate ſuch Poſſeſſion was, becauſe not the Title, but the Poſſeſſion only is material. Keb. 538. Salk. 261. Hawk. P. C. 153. Sid. 149. Keb. 538. Raym. 84. Vent. 265.

If one, who has been three Years in Poſſeſſion, be afterwards ouſted, and the ſame Day re-enter with Force, and be alſo indicted on the ſame Day; yet it ſeems, that by the plain Meaning and Reaſon of the Statute, he can no more bar the Reſtitution of the Party forcibly entered upon, than if Hawk. P. C. 153.

if he had been indicted on another Day, though the Words of the Statute are, *That there ſhall be no Reſtitution*, &c. *if the Perſon indicted have been in quiet Poſſeſſion for three Years next before the Day of the Indictment found*, for the Import hereof ſeems to be no more than if it had been ſaid, *for three Years next before the Indictment.*

All. 78, 79. Hawk. P. C. 154. Savil 68. pl. 141. Keb. 343, 427. 2 Keb. 49, 571. Sid. 97, 99, 284. 2 Salk. 587. pl. 3. 588.

The Juſtices muſt not award Reſtitution in the Defendant's Abſence, and without calling him to anſwer for himſelf; for it is implied by natural Juſtice, in the Conſtruction of all Laws, that no one ought to ſuffer any Prejudice, without having an Opportunity to defend himſelf.

If the Defendant tender a Traverſe of the Force, (which muſt be in Writing) no Reſtitution ought to be till ſuch Traverſe be tried, in order to which the Juſtice, before whom the Indictment is found, ought to award a *Venire* for a Jury; but if ſuch Jury find ſo much of the Indictment to be true as will warrant a Reſtitution, it will be ſufficient, though they find the other Part of it to be falſe.

* Page 565 Dyer 187. pl. 6. H. P. C. 140. Crom. 165. Dalt. c. 81, 84. Cro. Eliz. 915. Yelv. 32. Mo. 677. pl. 921. Keb. 93.

* The ſame Juſtices, who have awarded a Reſtitution on an Indictment of forcible Entry, *&c.* or any two or one of them, may afterwards ſuperſede ſuch Reſtitution upon an Inſufficiency in the Indictment appearing unto them; but no other Juſtices or Court whatſoever have ſuch Power, except the Court of King's Bench; but a *Certiorari* from thence wholly cloſes the Hands of the Juſtices of Peace, and avoids any Reſtitution which is executed after its *Teſte*, but does not bring the Juſtices into a Contempt without Notice.

Savil 68. pl. 141. H. P. C. 140. Cro. Eliz. 31. Noy 119. Yelv. 99. Cro. Jac. 148.

Alſo the Court of King's-Bench has ſuch a diſcretionary Power over theſe Matters, from an equitable Conſtruction of the Statutes, that if a Reſtitution ſhall appear to have been illegally awarded or executed, the ſaid Court may ſet it aſide, and grant a Re-reſtitution to the Defendant; as where the Indictment on which the Juſtices proceeded is quaſhed for Inſufficiency, or where it appears that the Juſtices of Peace were irregular in their Proceedings, as by refuſing to try a Traverſe of Force, *&c.* or where the Defendant traverſes the Force and gets a Verdict in the King's Bench; but the Defendant cannot get ſuch Verdict if the Force be pardoned by a general ſtatute Pardon before the Trial, becauſe the Offence appearing to the Court to be diſcharged, it can no longer be proceeded upon, though the Defendant would waive the Benefit of the Pardon.

Raym. 85. Keb. 343, 808. 2 Keb. 505. H. P. C. 141. Cro. Eliz. 916. 2 Salk. 587. pl. 3. Dyer 123. pl. 34. 2 Keb. 571. Savil 68. pl. 141.

Neither can a Defendant in any Caſe whatſoever *ex Rigore Juris* demand a Reſtitution, either upon the quaſhing of the Indictment, or a Verdict found for him on a Traverſe thereof, *&c.* for the Power of granting a Re-reſtitution is veſted in the King's Bench only by an equitable Conſtruction of the general Words of the Statutes, and is not expreſly given by thoſe Statutes, and is never made uſe of by that Court, but when, upon Conſideration of the whole Circumſtances of the Caſe, the Defendant ſhall appear to have ſome Right to the Tenements, the Poſſeſſion whereof he loſt by the Reſtitution granted to the Proſecutor.

Cro. Eliz. 41. Hawk. P. C. 155.

The Court of *B. R.* hath been ſo favourable to one, who upon his Traverſe of an Indictment upon theſe Statutes being found for him, hath appeared to have been unjuſtly put out of his Poſſeſſion, that they have awarded him a Re-reſtitution, notwithſtanding it hath been ſhewn to the Court, that ſince the Reſtitution granted upon the Indictment, a Stranger hath recovered the Poſſeſſion of the ſame Land in the Lord's Court.

* Forgery.

* Page 566

FORGERY at Common Law is an Offence in falſly and fraudulently making or altering any Matter of Record, or any other authentic Matter of a public Nature, as a Pariſh Regiſter, or any Deed or Will, and puniſhable by Fine and Impriſonment, and ſuch other corporeal Puniſhment as the Court in Diſcretion ſhall think proper. Hawk. P. C. 182.

But the Miſchiefs of this Kind increaſing, it was found neceſſary to guard againſt them by more ſanguinary Laws. Hence we have ſeveral Acts of Parliament declaring what Offences amount to Forgery, and which inflict ſeverer Puniſhments than there were at the Common Law.

Therefore it will be neceſſary to conſider,

(A) In what Caſes the making and altering of a Writing ſhall be ſaid to be ſo far falſe and fraudulent, as to amount to Forgery. 566.

(B) Of what Nature or Kind the Writing muſt be, to conſtitute the Offence Forgery at Common Law. 568.

(C) What Offences of this Kind are made Forgery by Statute, and of the Puniſhment to be inflicted on Perſons guilty of Forgery. 569.

(A) In what Caſes the making and altering of a Writing ſhall be ſaid to be ſo far falſe and fraudulent as to amount to Forgery.

THE Notion of Forgery doth not ſo much conſiſt in the counterfeiting a Man's Hand and Seal, which may often be done innocently, but in the endeavouring to give an Appearance of Truth to a mere Deceit and Falſity; and either to impoſe that upon the World as the ſolemn Act of another, which he is no way privy to, or at leaſt to make a Man's own Act appear to have been done at a Time when it was not done, and by Force of ſuch a Falſity to give it an Operation, which in Truth and Juſtice it ought not to have, Hawk. P. C. 183. 2 Rol. Abr. 28, 29. 11 Co. 27.

Hence it is held to be Forgery for a Man to make a *(a)* Feoffment of certain Lands to *J. S.* and afterwards make a Deed of Feoffment of the ſame Lands to *J. D.* of a Date prior to that of the Feoffment to *J. S.* for 3 Inſt. 169. Put. 46. b. 27 H. 6. 3. Hawk. P. C. 182.

(a) So if by his firſt Conveyance he had paſſed only an equitable Intereſt for good Conſideration and had afterwards by ſuch a ſubſequent antedated Conveyance endeavoured to avoid it. Moor 665.

herein he falſifies the Date in order to defraud his own Feoffee by making a ſecond Conveyance, which at the Time he had no Power to make.

*Page 567 Noy 101. Moor 759, 760. 3 Inſt. 170. Hawk. P. C. 182. *cont.* Dyer 288. b.

* Alſo it is Forgery for a Man, who is ordered to draw a Will for a ſick Perſon, to inſert Legacies in it of his own Head.

3 Mod. 66. Hawk. P. C. 183. 8 Mod. 192. Fitzgib. 261. 12 Mod. 493, 496. Stra. 69.

So if one inſerts in an Indictment the Names of thoſe againſt whom in Truth it was not found, this is Forgery.

3 Inſt. 171. Hawk. P. C. 183.

So where one finding another's Name at the Bottom of a Letter, at a conſiderable Diſtance from the other Writing, cauſes the Letter to be cut off, and a general Releaſe to be written above the Name, and then takes off the Seal and fixes it under the Releaſe.

Moor 619. Hawk. P. C. 183. But in 3 Inſt. 169. my Lord *Coke* ſeems to think, that a Deed ſo altered is more properly and Seal are as more his Deed

Alſo the making any fraudulent Alteration of the Form of a true Deed, in a material Part of it, is Forgery; as the making a Leaſe of the Manor, of *Dale* appear to be a Leaſe of the Manor of *Sale*, by changing the Letter *D.* into an *S.* or by making a Bond for five Hundred Pounds expreſſed in Figures ſeem to have been made for five Thouſand, by adding a new Cypher.

to be called a falſe than a forged Deed; but by *Hawk.* this is Forgery; for a Man's Hand falſly made Uſe of to teſtify his Aſſent to an Inſtrument, which after ſuch an Alteration is no than a Stranger's. Hawk. P. C. 183.

Pult. 46. 21 H. 6. 4. b. Hawk. P. C. 183.

But as the Fraud and Intention to deceive, by impoſing upon the World that as the Act of another, which he never conſented to, are the chief Ingredients which conſtitute this Offence; ſo it hath been held, that he who writes a Deed in another's Name, and ſeals it in his Preſence, and by his Command, is not guilty of Forgery, becauſe the Law looks upon this as the other's own Sealing, as done by his Approbation and Command.

Moor 760.

So if a Man writes a Will for another without any Directions from him, and he for whom it is written becomes *Non Compos* before it is brought to him, it is not Forgery; for it is not the bare Writing an Inſtrument in another's Name without his Privity, but the Giving it a falſe Appearance of having been executed by him, which makes a Man guilty of Forgery.

Moor 619. Noy 99. Salk. 375.

Alſo he cannot be puniſhed as guilty of Forgery, who raſeth the Word *Libris* out of a Bond made to himſelf, and putteth in *Marcis*, becauſe here is no Appearance of a fraudulent Deſign to cheat another, and the Alteration is prejudicial to none but to him who makes it, whoſe Security for his Money is wholly avoided by it; yet it ſeems to be Forgery, if by the Circumſtances of the Caſe it ſhould any way appear to have been done with an Eye of gaining an Advantage to the Party himſelf, or of prejudicing a third Perſon; alſo it is holden, that ſuch an Alteration, even without theſe Circumſtances, is a Miſdemeanor though it be not Forgery.

Moor 762. Noy 101.

It ſeems, that by a bare Nonfeaſance a Man cannot be ſaid to be guilty of Forgery; as if a Man in drawing a Will omits a Legacy which he is directed to inſert; yet it hath been holden, that if the Omiſſion of a Bequeſt to one cauſe a material Alteration in the Limitation of a Bequeſt to another, as where the Omiſſion of a Deviſe of an Eſtate for Life to one Man cauſeth a Deviſe of the ſame Lands to another to paſs a preſent Eſtate, which otherwiſe would have paſſed a Remainder only, he who makes ſuch an Omiſſion is guilty of Forgery.†

† But in ſuch Caſe, the firſt Inquiry ſhould be *quo animo?*

But

But it ſeems to be no way material, whether a forged Inſtrument be made in ſuch a Manner, that if it were in Truth ſuch as it is counterfeited for, it would be of Validity or not; and upon this Ground it hath been adjudged, that the Forgery of a Protection in the Name of *A. B.* as being a Member of Parliament, who in Truth, at the Time, was not a Member, is as much a Crime as if he were. Hawk. P. C. 184. Sid. 142.

*(B) Of what Nature or Kind the Writing must be, to conſtitute the Offence Forgery at Common Law.

*Page 568

IT is clearly agreed, that at Common Law the Counterfeiting a Matter of Record is Forgery; for ſince the Law gives the higheſt Credit to all Records, it cannot but be of the utmoſt ill Conſequence to the Publick to have them either forged or falſified. Rol. Abr. 65, 76. Yelv. 146. Cro. Eliz. 178. 3 Mod. 66. 8 Mod. 192. 12 Mod. 493, 496. Fitzgib. 261. Stra. 69.

Alſo it is agreed to be Forgery to counterfeit any other authentick Matter of a publick Nature, as (*a*) a Privy Seal, or (*b*) a Licence from the Barons of the Exchequer to compound a Debt, or (*c*) a Certificate of Holy Orders, or (*d*) a Protection from a Parliament Man. (*a*) Rol. Abr. 68. pl. 33. Cro. Car. 326. Jon. 325. (*b*) Rol. Abr. 65. pl. 5. 2 Bulſ. 137. (*c*) Lev. 138. (*d*) Sid. 142.

It is alſo unqueſtionable, that a Man may be in like Manner guilty of Forgery at Common Law by forging (*e*) a Deed; and therefore it ſeems, that one may be equally guilty by forging (*f*) a Will, which cannot be thought to be of leſs Conſequence than a Deed. (*e*) Rol. Abr. 66. pl. 10. Raym. 81. Owen 47. Sid. 278.

3 Leon. 170. (*f*) Moor 760. Noy 101. Dyer 302. and Hawk. P. C. 184. where it is ſaid, that he cannot find this Point any where directly holden.——[But ſee *infra*, and the next Head]

There ſeem to be ſome ſtrong Opinions in the (*g*) Books, that the Counterfeiting any Writings of an inferior Nature to thoſe above-mentioned, is not Forgery at the Common Law; alſo it hath been (*h*) holden, that the Forging another's Hand, and thereby receiving Rent due to him from his Tenants, is not puniſhable at all; but by (*i*) *Hawk.* it cannot ſurely be proved by any good Authorities, that ſuch baſe Crimes are wholly diſregarded by the Common Law, as not deſerving a publick Proſecution; for the Opinion, that they are puniſhable by no Law, ſeems by no Means to be maintainable, ſince many of them are moſt certainly puniſhable by Force of 33 *H.* 8. *cap.* 1. neither can it be a convincing Argument, that they are not puniſhable at Common Law, (*k*) becauſe they are of a private Nature, as much as other Writings concerning ſuch Matters; yet no one will ſay, that the making a falſe Deed concerning a private Matter, is not puniſhable at Common Law; but perhaps, ſays he, it may be reaſonable to make this Diſtinction between the Counterfeiting of ſuch Writings, the Forgery whereof, as in the above Caſes, is properly puniſhable as Forgery, and the Counterfeiting of other Writings of an inferior Nature; that the former is in itſelf criminal, whether any third Perſon be actually injured thereby or not; but that the latter is no Crime unleſs ſome one receive a Prejudice from it. (*g*) Rol. Rep. 431. Sid. 16, 155. 451. Rol. Abr. 66. pl. 8, 9. Winch 40, 90. 3 Leon. 231. Leon. 101. Cro. Eliz. 296, 853. 3 Bulſ. 265. (*h*) Cro. Eliz. 166. Yelv. 146. 3 Bulſ. 265. (*i*) Hawk. P. C. 184. (*k*) Yelv. 146.

The King and *Ward, Mich.* 12 Geo. 1. Barnard. K. B. 10. 2 Ld. Raym. 1461.

But theſe Opinions came fully to be conſidered in a late noted Caſe, where it was held, that the Counterfeiting a Releaſe or Acquittance for a Sum of Money, though without Seal, was Forgery; and that it would be the moſt injurious Notion, and even a Reflection on the Common Law, to ſuppoſe it ſo defective as not to provide a Remedy againſt Offences of this Nature.

* Page 569 * (C) **What Offences of this Kind are made Forgery by the Statute, and of the Puniſhment to be inflicted on Perſons guilty of Forgery.**

BY the 5 *Eliz. cap.* 14. it is enacted, " That if any Perſon or Perſons, " upon his or their own Head and Imagination, or by falſe Conſpiracy " and Fraud with others, ſhall wittingly ſubtilly and falſely forge or make, " or ſubtilly cauſe, or wittingly aſſent to be forged or made any falſe Deed, " Charter or Writing ſealed, Court-Roll, or the Will of any Perſon or " Perſons in Writing, to the Intent that the Eſtate of Freehold or Inheri- " tance of any Perſon or Perſons, of, in or to any Lands, Tenements or " Hereditaments, Freehold or Copyhold, or the Right, Title or Intereſt of " any Perſon or Perſons, of, in or to the ſame, or any of them, ſhall or " may be moleſted, troubled, defeated, recovered or charged, or ſhall pro- " nounce, publiſh or ſhew forth in Evidence, any ſuch falſe and forged " Deed, Charter, Writing, Court-Roll or Will as true, knowing the ſame " to be falſe and forged, as is aforeſaid, to the Intent above remembered, " (except being an Attorney, Lawyer or Counſellor, he ſhall for his Client " plead, ſhew forth, or give in Evidence ſuch falſe or forged Deed, *&c.* " to the Forging whereof he was not Party or Privy,) and ſhall be thereof " convicted either upon Action, or Actions of Forgery of falſe Deeds, to " be founded upon the ſaid Statute, at the Suit of the Party grieved or " otherwiſe, according to the Order and due Courſe of the Laws of this " Realm, *&c.* he ſhall pay unto the Party grieved his double Coſts and " Damages, to be found and aſſeſſed in that Court where ſuch Conviction " ſhall be; and alſo ſhall be ſet upon the Pillory in ſome open Market- " Town, or other open Place, and there have both his Ears cut off, alſo " his Noſtrils ſlit and cut and ſeared with a hot Iron, *&c.* and ſhall for- " feit to the King the whole Iſſues and Profits of his Lands and Tene- " ments, and ſuffer perpetual Impriſonment.

And *Par.* 3. it is enacted, " That if any Perſon or Perſons, upon his or " their own Head or Imagination, or by falſe Conſpiration or Fraud had " with any other, ſhall wittingly, ſubtilly and falſly forge or make, or wit- " tingly, ſubtilly and falſly cauſe or aſſent to be made and forged, any falſe " Charter, Deed or Writing, to the Intent that any Perſon or Perſons ſhall " or may have, or claim any Eſtate or Intereſt for Term of Years, of, in " or to any Manors, Lands, Tenements or Hereditaments not being " Copyhold, or any Annuity in Fee-ſimple, Fee-tail, or for Term of Life, " Lives or Years; or ſhall, as is aforeſaid, forge, make or cauſe, or aſſent " to be made or forged any Obligation, or Bill Obligatory, or any Acquit- " tance, Releaſe, or other Diſcharge of any Debt, Account, Action, Suit, " Demand, or other Thing Perſonal, or ſhall pronounce, publiſh or give " in Evidence, except as is before excepted, any ſuch falſe or forged Char- " ter, Deed, Writing, Obligation, Bill Obligatory, Acquittance, Releaſe

" or

" or Diſcharge as true, knowing the ſame to be falſe and forged, and ſhall " be thereof convicted by any of the Ways and Means aforeſaid, he ſhall " pay unto the Party grieved his double Coſts and Damages, to be found " and aſſeſſed in ſuch Court where the ſaid Conviction ſhall be had, and " ſhall be alſo ſet upon the Pillory in ſome open Market-Town, or other " open Place, and there have one of his Ears cut off, and alſo ſhall ſuffer " Impriſonment for one Year, *&c.*

And by *Par.* 7 & 8. it is further enacted, " That if any Perſon or Per- " ſons being convicted or condemned of any of the Offences aforeſaid, " by any the Ways and Means limited, ſhall, after any ſuch his or their " * Conviction or Condemnation, eftſoons commit or perpetrate any of the * Page 570 " ſaid Offences in Form aforeſaid, that then every ſuch ſecond Offence " ſhall be adjudged Felony without Benefit of the Clergy, ſaving to all " Perſons other than the ſaid Offenders, and ſuch as claim to their Uſes, " all Rights, *&c.* which they ſhall have to any the Hereditaments of any " ſuch Perſon ſo as is aforeſaid convicted or attainted at any Time before, " *&c.* ſaving alſo the Dower of ſuch Offender's Wife, and the Right of his " Heir.

And by *Par.* 10. it is further enacted, " That all Juſtices of *Oyer* and " *Terminer*, and Juſtices of Aſſiſe, ſhall have Power to inquire of, hear and " determine the Offences aforeſaid.

But it is provided, by *Par.* 9, 12, & 16. " That this Act, or any Thing " therein contained, ſhall not extend to any Ordinary or his Commiſſary, " *&c.* for putting their Seal of Office to any Will to be exhibited unto " them, not knowing the ſame to be falſe or forged, or for writing of the " ſaid Will, or Probate of the ſame; nor to any Proctor, *&c.* of any " Eccleſiaſtical Court, for the writing, ſetting forth or pleading of any " Proxy made according to the Eccleſiaſtical Law, for the Appearance of " any Perſon being cited to appear in ſuch Court; nor to any Archdeacon " or Official for putting their authentick Seal to the ſaid Proxy or Proxies; " nor to any Eccleſiaſtical Judge for admitting the ſame; nor to any Per- " ſon who ſhall plead or ſhew forth any Deed or Writing exemplified under " the Great Seal of *England*, or under the Seal of any other authentick " Court of this Realm; nor to any Perſon who ſhall cauſe any Seal of any " Court to be ſet to any ſuch Deed, Charter or Writing inrolled, not " knowing the ſame to be falſe or forged.

In the Conſtruction of this Statute the following Points have been holden.

1. That a falſe Cuſtomary of a Copyhold Manor made in Parchment, under the Seals of ſeveral Tenants of the Manor, and containing in it divers falſe Cuſtoms, apparently tending to the Diſheriſon of the Lord, and falſly pretending to be its Title, to be ſet forth by the Conſent of all the Tenants and Allowance of the Lord, is within the firſt Branch of the Forgery mentioned in the Statute, as being a ſealed Writing made to the Intent to moleſt the Inheritance of the Lord. Dyer 322. pl. 26. 3 Leon. 108. Hawk P C. 186.

2. That the Forgery of a Leaſe for Years, or of a Grant of a Rent-charge for Years, in the Name of one who is ſeiſed of a Freehold or Inheritance, is alſo within the ſaid firſt Branch of the Statute, becauſe the ſaid Branch is penned in general Words extending to any Moleſtation whatſoever of ſuch Eſtate, without mentioning any Eſtate or Intereſt, in the Claim whereof ſuch Moleſtation ſhall conſiſt; and from this Ground it follows, that theſe Words in the ſecond Branch of Forgery mentioned in the Statute, *to the Intent that any Perſon ſhall claim any Eſtate or Intereſt for Term of Years*, &c. are meant only of ſuch Forgeries which relate to ſuch an Eſtate or Intereſt *in eſſe* before. 3 Inſt. 170. Noy 42. Hawk. P. C. 186.

Dyer 302. pl. 43. Hawk. P. C. 186.

3. That the Forgery of a Will in Writing of one poſſeſſed of ſuch an Eſtate, mentioning a Bequeſt thereof, is within the ſaid ſecond Branch of the Statute, as being a falſe Writing, made to the Intent that ſome Perſon may claim an Eſtate for Years, notwithſtanding the ſaid Branch makes no expreſs Mention of a Will, as the firſt doth.

3 Leon. 170.

4. That the Forgery of a Leaſe of Lands in *Ireland* is not within either of the Branches of the Statute.

3 Leon. 170. Hawk. P. C. 186.

5. That the Forgery of a Deed, containing a Gift of mere Perſonal Chattels, is alſo no way within the Statute, the Words whereof to this Purpoſe are, *If any Perſon ſhall forge any Obligation, or Bill Obligatory, or any Acquittance, Releaſe or other Diſcharge of any Debt, Account, Action, Suit, Demand, or other Thing Perſonal.*

* Page 571 15 H. 7. 15. a. 2 Rol. Abr. 466. Hawk. P. C. 186. *cont.* 3 Inſt. 171.

* 6. That the Forgery of a Statute Merchant, or of a Recognizance in the Nature of a Statute Staple, by acknowledging them in the Name of another, are within the Statute as being Obligations, becauſe they muſt have the Seal of the Party, by the expreſs Words of the Statute, which appoint in what Manner ſuch Statute or Recognizance ſhall be taken; but that the Forgery of the Statute Staple is no way within the Statute, becauſe it needeth not the Seal of the Party, but only the Seal of the Staple provided for it.

3 Inſt. 171. Hawk. P. C. 187.

7. That he, who is truly informed by another that a Deed is forged, is in Danger of the Statute, if he afterwards publiſh the ſame to be true, notwithſtanding the Words of the Statute are, *If any one ſhall publiſh*, &c. *ſuch falſe and forged Deed*, &c. *knowing the ſame to be falſe or forged.*

3 Inſt. 172. Hawk. P. C. 187.

8. That the double Damages to be awarded to the Party grieved by a forged Releaſe of an Obligation, &c. ſhall be governed by the Penalty, and not by the true Debt appearing in the Condition.

3 Inſt. 171. Hawk. P. C. 187.

9. That one, who hath been convicted of publiſhing a forged Deed, may become guilty of Felony by forging another Deed afterwards, as well as by publiſhing any ſuch Deed, notwithſtanding the ſecond Offence be not of the very ſame Nature with the firſt; for the Words of the Statute are, *If any Perſon being convicted or condemned of any of the Offences aforeſaid*, &c. *ſhall after any ſuch Conviction or Condemnation eſtſoons commit any of the ſaid Offences.*

3 Keb. 356, 367. 3 Inſt. 369. Keb. 849. 2 Keb. 129. 2 Lev. 221. Vent. 23, 24. Salk. 376. Hawk. P. C. 187.

10. That notwithſtanding it be neceſſary, in every Proſecution upon the Statute, ſtrictly to purſue the very Words of it, (for which Cauſe it hath been reſolved, that an Indictment, ſetting forth the Forgery of a Writing indented, without adding that it was ſealed, is inſufficient;) yet there was no Neceſſity that the Tranſlation of the Words of the Statute ſhould be in proper Claſſical *Latin*, ſo that it were intelligible; and upon this Ground it hath been adjudged, that an Indictment ſetting forth, that the Defendant *ſuper caput ſuum proprium* did forge, &c. meaning thereby to expreſs that he did it of his own Head, is ſufficient.

2 Lev. 111, 221. 3 Keb. 353. Hawk. P. C. 187.

11. That upon an Indictment of Treſpaſs, Forgery and Publication of a Deed, a Verdict finding the Defendant guilty *de tranſgreſſione & Forgeria prædictis, prout ſuperius in Indictamento ſupponitur*, is ſufficient, becauſe theſe Words *de tranſgreſſione prædict.* include the Whole; alſo perhaps ſuch a Verdict may be ſufficient for another Reaſon, becauſe the Offence is equally within the Statute, and the Puniſhment the very ſame, whether the Party be guilty both of the Forgery and Publication, or of one of them only.

Keb. 707, 742, 803, 848. *The King* ver. *Ring*, and *Paſch.* 4 Geo 2. S. P. determined between *The King* and *Croke*, 2 Stra. 901. Barnard. *K. B.* 168, 441, 461.

12. That if the Conveyance be defective, ſo as not to paſs the Thing intended to be conveyed, yet it is within the Act; as where to an Indictment of Forgery the Error aſſigned was of a Deed inrolled, and the Acknowledgment laid eleven Months after the Inrolment; and it being objected, that it being of a Bargain and Sale it can have no Force, nor be any

way

way binding to the Party without the Acknowledgment; but the Court held, that admitting the Acknowledgment eſſential, ſo that the Inrolment was not good, unleſs that appeared, (which they ſeemed to deny), yet that it was within the Statute; and that though there be a Flaw in the Conveyance forged, which Counſel Learned may eſpy and avoid, yet the Party may be impeached, moleſted and troubled by ſuch a Deed, which makes it within the Statute.

By the 2 *Geo.* 2. *cap.* 25.‡ reciting, that the Laws already in Force were not effectual for preventing the abominable Crimes of Forgery, it is enacted, "That if any Perſon ſhall falſly make, forge or counterfeit, or cauſe or "procure to be falſly made, forged or counterfeited, or willingly act or "aſſiſt in the falſe making, forging or counterfeiting any Deed, Will, Teſ-"tament, Bond, Writing Obligatory, Bill of Exchange, promiſſory Note "for Payment of Money, Indorſement or Aſſignment of any Bill of Ex-"change, or promiſſory Note for Payment of Money, Acquittance or * "Receipt either for Money or Goods, with Intention to defraud any Per-"ſon, knowing the ſame to be falſe, forged or counterfeited, then every "ſuch Perſon being thereof lawfully convicted, according to the due "Courſe of Law, ſhall be deemed guilty of Felony, without Benefit of "Clergy.

‡ Made perpetual by 9 G. 2. c. 18. & *vide* 31 G. 2. c. 22. ſ. 81.

* Page 572 Fitzgib. 57. & *vide* Hob. 272.

Forgery in the Name of a Perſon who never exiſted.

Foſt. Cr. Law 116. Forgery of an Order or Requeſt for Delivery of Goods, of which the Perſon ſuppoſed to ſend the Order, neither hath nor claims any diſpoſing Power. Foſt. Cr. Law 119.

"Provided, That no Attainder for this Office ſhall make or work any "Corruption of Blood, Loſs of Dower, or Diſheriſon of Heirs."

And by the 7 *Geo.* 2. *c.* 22. reciting the laſt above-mentioned Statute, and that the ſame doth not extend to the Forging of any Acceptance of Bills of Exchange, it is enacted, "That if any Perſon ſhall falſly make, alter, "forge or counterfeit, or cauſe or procure to be falſly made, altered, "forged or counterfeited, or willingly act or aſſiſt in the falſe Making, "Altering, Forging or Counterfeiting any Acceptance of any Bill of Ex-"change, or the Number or Principal Sum of any accountable Receipt "for any Note, Bill, or other Security for Payment of Money or Delivery "of Goods, with Intention to defraud any Perſon whatſoever, or ſhall "utter or publiſh as true, any falſe, altered, forged or counterfeited Ac-"ceptance of any Bill of Exchange, or accountable Receipt for any Note, "Bill, or other Security for Payment of Money or Delivery of Goods, "with Intention to defraud any Perſon, knowing the ſame to be falſe, al-"tered, forged or counterfeited; then every ſuch Perſon, being thereof "lawfully convicted, according to the due Courſe of Law, ſhall be deemed "guilty of Felony, and ſhall ſuffer Death as a Felon, without Benefit of "Clergy."†

† The following Forgeries are alſo Felonies without Benefit of Clergy, *viz.* Of *Teſtimonial* of Juſtices by Soldiers or Mariners. 39 Eliz. c. 17. ſ. 3.—Of Authorities to *transfer Stock*, or *perſonating* Proprietors. 8 Geo. 1. c. 22. 31 Geo. 2. c. 22. ſ 80.——Of Order for Payment of *Annuities*, or *perſonating* the Proprietor. 9 Geo. 1. c. 12. ſ. 4. 9 Geo. 2. c. 34. ſ. 8.—— Of new *Stamps*, or Receipts for Money payable on Indentures. 8 Ann. c 9. ſ. 41.——Of the Hand of the *Accountant-General*, *Regiſter*, *Clerk* of the *Report-Office*, or any of the *Caſhiers* of the *Bank*. 12 Geo. 1. c. 32. ſ. 9.——Of *Eaſt India Bonds*. *Id.*——Of *South-Sea Common Seal Bonds*, *Receipts*, or *Warrants* for Dividends, *per* various Statutes, ſee the Tables.——Of *Mediterranean Paſſes*. 4 Geo 2. c. 18.——Of any Entry of *Acknowledgment*.—Of *Bargainor* in Bargain and Sale in the Regiſtry of *York*, the ſecond Offence. 8 Geo. 2. c. 6. ſ. 31.——Of *Stamp* for marking *Gold* and *Silver*. 31 Geo. 2. c. 32. ſ. 15.——Of *Policies* of *Royal Exchange* and *London Aſſurances*. 6 Geo. 1. c. 18. ſ. 13. ——Of *Debentures*. 5 Geo. 1. c. 14. ſ. 10.——Of the *Marks* on *Leather* —On *Linen*.——Of the *Common Seal* of the *Bank*, or of *Bank-Notes*.—Of *Exchequer-Bills*.—Of *Lottery-Orders* —Of *Stamps*, &c. ſee the Tables.—Of Regiſter or *Licence* of *Marriage*. 26 Geo. 2. c. 33. ſ. 16.——Of *Seamen's Tickets*, *Wills*, &c. 9 Geo. 3. c. 30. ſ. 6.——Of the Hand of the *Receiver* of the *Præſines*. 30 Geo. 2. c. 14 ſ. 9. ——Of any *Warrant* or *Order* for *Payment* of *Money*, or *Delivery* of *Goods*. 7 Geo. 2. c. 22.

Foreſtalling.

(A) What it is at Common Law, and how puniſhed. 572.
(B) What it is by Statute, and how reſtrained and puniſhed. 573.

(A) What it is at Common Law, and how puniſhed.

3 Inſt. 195. 43 Aſſ. 38. Bro Indictment 40.

ALL unlawful Endeavours to enhance the Price of any Commodity, which is ſo prejudicial to Trade and Commerce, and injurious to the Publick in general, comes under the Notion of Foreſtalling, which includes Ingroſſing, Regrating, and all other Offences of the like Nature; and are puniſhable by Fine and Impriſonment anſwerable to the Heinouſneſs of the Offence upon an Indictment at Common Law.

*Page 573.

Crom. 80. Hawk. P. C. 234.

Offences of this Kind are thoſe of ſpreading falſe Rumours, buying Things in a Market before the accuſtomed Hour, or Buying and Selling again the ſame Thing in the ſame Market, and other ſuch like Devices.

3 Inſt. 196. Hale's P. C. 152.

Alſo if a Perſon (a) within the Realm buys any Merchandize in Groſs, and ſells the ſame again in Groſs, it is an Offence of this Nature, for hereby the Price is enhanced, becauſe, paſſing through ſeveral Hands, each will endeavour to make his Profit of it.

(a) But any Merchant, whether he be a Subject or a Foreigner, bringing Victuals, or any other Merchandize, into the Realm, may ſell the ſame in Groſs. 3 Inſt. 196. Hale's P. C. 152.

Cro. Car. 231. Hawk. P. C. 235.

So the bare Ingroſſing of a whole Commodity with an Intent to ſell it at an unreaſonable Price, is an Offence indictable at the Common Law; for if ſuch Practices were allowed, a rich Man might ingroſs into his Hands a whole Commodity, and then ſell it at what Price he ſhould think fit.

3 Inſt. 197. Hale's P. C. 152.

Alſo even the Buying of Corn in the Sheaf is an Offence at Common Law, becauſe it tends to enhance, which ſhews how jealous the Law is of all Practices of this Kind.

(B) What it is by Statute, and how reſtrained and puniſhed.

THE Statutes relating hereunto, are 23 *E.* 3. *cap.* 6. 6 *Rich.* 2. *cap.* 10. 11 *Rich.* 2. *cap.* 7. 1 *H.* 4. *cap.* 17. 14 *H.* 6. *cap.* 6. 25 *H.* 8. *cap.* 2. 2 & 3 *E.* 6. *cap.* 15. 3 & 4 *E.* 6. *cap.* 21. 5 & 6 *E.* 6.

cap. 14. 5 *Eliz. cap.* 5 and 12. 13 *Eliz. cap.* 25. 21 *Jac.* 1. *cap.* 22. and 1 *W. & M. ſeſſ.* 1. *cap.* 12. 31 *Geo.* 2. *cap.* 40.

But the principal Statutes are: *1ſt*, The 5 *& 6 E. cap.* 14. by which it is enacted, "That whoſoever ſhall buy, or cauſe to be bought, any "Merchandize, Victual, or any other Thing whatſoever (*a*) coming by "Land or by Water toward any Market or Fair to be ſold in the ſame, or "coming toward any City, Port, Haven, Creek or Road of this Realm, "or *Wales*, from any Parts beyond the Sea to be ſold, or make any Bar- "gain, Contract or Promiſe, for the having or buying the ſame, or any "Part thereof ſo coming as aforeſaid, before the ſame ſhall be in the "Market, Fair, City or Port, *&c.* ready to be ſold, or ſhall make any "Motion by Word, Letter, Meſſage, or otherwiſe, to any Perſon or Per- "ſons, for the Inhanſing of the Price or dearer Selling of any Thing above- "mentioned, or elſe diſſuade, move or ſtir any one coming to the Market, "or Fair, to abſtain or forbear to bring or convey any of the Things above "rehearſed, to any Market, Fair, City or Port, *&c.* to be ſold, ſhall be "deemed a Foreſtaller."

(*a*) On this Clauſe it hath been adjudged, that an Indictment, charging the Defendant with meeting *J. S.* at ſuch a Place near *B.* and there buying of him certain Goods, which he was about to ſell in the Market of *B.* is inſufficient, without alledging expreſsly, that the Goods were coming to the Market to be ſold. Rol. Rep. 421.

And by the ſaid Statute, *par.* 2. it is enacted, "That whoſoever ſhall "by any Means regrate, obtain, or get in his Hands or Poſſeſſion, in any "Fair or Market, any (*b*) Corn, Wine, Fiſh, Butter, Cheeſe, Candles, "* Tallow, Sheep, Lambs, Calves, Swine, Pigs, Geeſe, Capons, Hens, * Page 574 "Chickens, Pigeons, Conies, or other dead (*c*) Victual whatſoever that "ſhall be brought to any Fair or Market to be ſold, and do ſell the ſame "again in any Fair or Market holden in the ſame Place, or within four "Miles thereof, ſhall be taken for a Regrator."

(*b*) That the Buying of Corn, with an Intent to make Starch of it, and then to ſell it, is not within the Statute, becauſe it is not bought to be ſold again in the ſame Nature in which it was bought, but to be firſt altered by a Trade or Science, and then ſold again. Bridg. 5, 6. Hawk P. C. 237.——Nor for the ſame Reaſon does the Buying of Corn in order to make Meal of it ſeem to be within the Statute. Moor 595. pl. 810. Cro. Car. 231. *cont.* Owen 135. Nor the Buying of Barley with an Intent to make Malt of it. Cro. Car. 231. 3 Inſt. 196. *cont.* Owen. 135.† But this laſt is excepted by an expreſs Proviſo, *par.* 7. in the Statute.——But the Buying of Corn, and turning it into Malt in another's Houſe, being ſo large a Quantity that it could not be malted in the Buyer's own Houſe, is not within the Benefit of this Exception. Owen 135. (*c*) It hath been held, That buying Salt is a Victual within this Statute, as being neceſſary for the Food and Health of Man, and ſeaſoning and making wholeſome other Victuals. 3 Inſt. 195. Hale's P. C. 152. Cro. Car. 231.——But neither Apples, Cherries, nor other ſuch like Fruits, are within the Intent of the Statute. 3 Inſt. 195. Hale's P. C. 152. Cro. Car. 231. Owen 135. Cro. Jac. 214.——Nor Hops. Cro. Car. 231.—— Nor Malt. 3 Inſt. 196. Hale's P. C. 152. *cont.* Owen 135. Rol. Rep. 12.

† See *infra*, the laſt Note.

And it is further enacted by the ſaid Statute, *par.* 3. "That whoſoever "ſhall (*d*) engroſs or get into his Hands, by Buying, Contracting or Pro- "miſe of taking, other than by (*e*) Demiſe, Grant or Leaſe of Land, or Tithe "of any Corn growing in the Fields, or any other Corn or Grain, Butter, "Cheeſe, Fiſh, or other dead Victuals whatſoever, within the Realm of "*England*, to the Intent to ſell the ſame again, ſhall be reputed an unlaw- "ful Ingroſſer."

(*d*) That an Indictment, which charges the Defendant with having bought ſo much Corn, *&c.* is inſufficient, for the Words are, *Shall engroſs or get into his Hands by Buying, &c.* and therefore muſt be precisely purſued. 2 Leon. 39. (*e*) That there is no Neceſſity in an Information or Indictment to ſay that the Defendant did not come by it by a Demiſe of Land, *&c.* but that the Defendant, if he have any ſuch Matter to alledge in his Defence, may give it in Evidence. Jon. 157.

And it is farther enacted by the ſaid Statute, *par.* 4, 5, and 6, "That "whoever ſhall offend in any of the Things before recited, and be thereof

" duly convicted, ſhall for the firſt Offence ſuffer Impriſonment for two " Months, and forfeit the Value of the Goods ſo by him bought or had; " and for the ſecond Offence ſhall ſuffer Impriſonment for one half Year, " and forfeit the (*a*) double Value of the Goods, *&c.* and for the third " Offence ſhall be ſet on the Pillory, and forfeit all his Goods, and be com- " mitted to Priſon during the King's Pleaſure."

(*a*) And therefore no Information for ingroſſing Corn, *&c.* contrary to the Statute, is good, which doth not expreſsly ſhew the Quantity of the Thing ingroſſed; and on this Foundation it was adjudged, that an Information for ingroſſing Corn, the Quantity whereof was expreſſed by the Word *Cumulus*, was inſufficient. 2 Bulſt. 317. Cro. Car. 381.——But it is ſaid, that an Indictment for ingroſſing *magnam quantitatem frumenti* is ſufficient. 6 Mod. 32.——[We ſhould ſuppoſe the Buying great Quantities of Corn, to turn into Meal or Malt, muſt be within the Statute, at leaſt in many Inſtances.—But the Circumſtances of each Caſe muſt determine the Judgment of a Jury.‡—Perhaps in this Country there is not a Statute more beneficial for the Poor, and, in Fact, for the People in general, nor a Law to which ſo little Attention is paid, or the Execution whereof is ſo ſhamefully neglected. The conſtant Practice of the Saleſmen of Cattle in *Smithfield* Market, ſufficiently juſtifies the ſevereſt Cenſures on this Subject.]

‡ The Stat. 12 Geo. 3. c. 71. repeals 3 & 4 Ed. 6. 5 & 6 Ed. 6. 3 Ph. & M. 5 Eliz. 15 C. 2. and Part of 5 Ann. and all Acts inforcing them.

* Page 575

* Forfeiture.

Co. Lit. 59. a.

FOrfeiture is a Word often made uſe of in the Law, and in Civil Caſes is uſually applied to Alienations and Diſpoſitions made by thoſe who have but a particular Eſtate or Intereſt in Lands or Tenements, to the Prejudice of thoſe in Remainder or Reverſion; alſo the Omiſſion or Neglect of a Duty which the Party binds himſelf to perform, or to the Performance of which he is injoined by the Law, is upon the Breach or Neglect thereof called a Forfeiture, that is, the Advantages accruing from the Performance of the Thing are by his Omiſſion defeated and determined.

In this Senſe of the Word the principal Matters relating to Forfeiture are conſidered under the Titles *Eſtates for Life*, *Copyhold*, *Conditions*, *Obligations*, and Title *Offices*; and therefore in this Place we ſhall conſider it only as it relates to Crimes and Offences, for which the Party is puniſhed in his Eſtate and Poſterity. §

§ See this Subject fully conſidered, on Principles of Reaſon, Juſtice and Policy, in *Conſiderations on the Law of Forfeiture for High Treaſon*.——In *High Treaſon*, the Forfeiture accrues to the Crown, (of whomſoever the Land is holden) *propter delictum tenentis*, and this though the Blood of the Heir is ſaved, for the Offence is purged by that; but in *Felony*, ſaving the Blood preſerves the Deſcent to the Heir, becauſe the Lord is intitled by Eſcheat *propter defectum Sanguinis*. Foſter 223.

(A) For what Crimes an Offender ſhall forfeit his Lands at Common Law. 575.
(B) For what Crimes his Goods and Chattels. 577.
(C) For what Crimes by Statute. 579.

(D) To

(D) To what Time the Forfeiture shall have Relation. 581.
(E) What is to be done with the Offenders Goods before Conviction. 582.
(F) Where the Wife shall lose her Dower. 583.
(G) How far the Blood of the Offender is corrupted. 584.

(A) For what Crimes an Offender shall forfeit his Lands at Common Law.

BY the Common Law, all Lands of Inheritance whereof the Offender is seised in his own Right, and also all Rights of Entry to Lands in the Hands of a Wrong-doer, are forfeited to the King on an Attainder of High Treason, although the Lands are holden of another; for there is an Exception in the Oath of Fealty, which saves the Tenant's Allegiance to the King; so that if he forfeits his Allegiance, even the Lands held of another Lord are forfeited to the King, for the Lord himself cannot give out Lands but upon that Condition. Co. Lit. 8. 3 Inst. 19.

Also upon an Attainder of Petit Treason or Felony, all Lands of Inheritance whereof the Offender is seised in his own Right, as also all Rights of Entry to Lands in the Hands of a Wrong-doer, are forfeited to the Lord of whom they are immediately holden; for this by the Feudal Law was deemed a Breach of the Tenant's Oath of Fealty in the highest * Manner, his Body with which he had engaged to serve the Lord being forfeited to the King, and thereby his Blood corrupted, so that no Person could represent him; and consequently, dying without Heir, the Lord is in by Escheat. 3 Inst. 19. * Page 576

But the Lord cannot enter into the Lands holden of him upon an Escheat for Petit Treason or Felony without a special Grant, till it appear by due Process, that the King hath had his Prerogative of the Year, Day and Waste. Stamf. P. C. 191. 2 Hawk. P.C. 448.

And as to this, since the Statute of *Prærogativa Regis*, it seems to have been generally holden, that the King has a Right, not only to waste the Lands of Inheritance, which a Person attainted of Felony held immediately of any other Lord, but also to hold them over for a Year and Day; and by some he had always this Right, but according to others he had anciently a Right only to the Waste, and the Year and Day was given him in lieu of it. 2 Inst. 36, 37. 4 Co. 124. & *vide* 2 Hawk. P.C. 449.

As to Lands whereof a Person attainted of High Treason (*a*) dies seised of an Estate in Fee, they are actually vested in the King without any Office, because they cannot descend, the Blood being corrupted, and the Freehold shall not be in Abeyance. Co Lit 2. 4 Co. 58. Leon. 21. (*a*) But by the Common Law such Lands were not vested in the actual Possession of the King during the Life of the Offender. 3 Co. 10. Stamf. P. C. 19. Bro. Coron. 208, 210. Leon. 21. Co. Lit. 2.

It is said, that the Inheritance of Things not lying in Tenure, as of Rent-Charge, Rent-Seck, Commons, *&c.* are forfeited to the King by an Attainder of High Treason; and that the Profits of them are also forfeited to him by an Attainder of Felony during the Life of the Offender, and that the Inheritance shall be extinguished by his Death; for it cannot escheat, because it lies not in Tenure; neither can it descend, because the Blood is corrupted. 3 Inst. 19. 21. 2 Hawk. P.C. 449.

It

It ſeems agreed, that no (a) Right of Action to Lands of Inheritance could ever be forfeited; neither could (b) a Right of Entry into Lands whereof there was a Tenant by Title, nor an (c) Uſe, except where Land had been (d) fraudulently conveyed with an Intent to avoid a Forfeiture; nor a (e) Condition be forfeited before 33 *H.* 8. *c.* 20. *infra*, 579. neither could Land in (f) Tail be forfeited after the making of *Weſtm.* 2. 13 *Ed.* 1. *c.* 1. any longer than for the Life of the Tenant in Tail, till 26 *H.* 8. *c.* 13. *infra*, 579.

(a) 3 Co. 2, 3. 7 Co 17.
(b) 3 Inſt. 19. 3 Co. 2, 3.
(c) 3 Inſt. 19.
(d) 2 Rol. Abr. 34.
(e) 3 Inſt. 19.
(f) 3 Inſt. 19. Stamf. P C. 187. Plow. 554. Dyer 289. pl. 55. Co. Lit. 13c, 372, 391.

The Profits of Lands, whereof one attainted of Felony is ſeiſed of an Eſtate of Inheritance in his Wife's Right, or of an Eſtate for Life only in his own Right, are forfeited to the King, and nothing ſhall go to the Lord.

3 Inſt 19. F z. *Uſe* 166. *Forfeiture* 23. 4 *Aſſ.* pl. 4. Baſſ. 13. 2 Brownl. 217, &c. Leon. 1. Godb. 267. 2 Jon. 151, 189. Lev. 263. 2 Keb. 451. 2 Vent. 38. 5 Co. 117. Co. Cop. ſect. 58. Pollex. 615. to 621.

All Cuſtomary Eſtates of Inheritance are forfeited by an Attainder of Treaſon or Felony, unleſs there be ſome particular Cuſtom to the contrary, as in *Gavelkind*, becauſe the Perſon is *civiliter mortuus* by the Attainder, and therefore is diſabled to have or hold any Eſtate, or to have any Property in any Thing; and therefore if a Perſon be ſeiſed in Fee of a Copyhold, and be attainted of Treaſon or Felony, the Copyhold is in the Lord without any Preſentment of the Homage, becauſe it is againſt the Nature of a Court-Baron to inquire of Criminal Matters or Offences againſt the King; and ſuch Homage is at the Will of the Lord, and often influenced by him; but if a Copyholder be convicted of Felony, and preſented by the Homage, by *Special Cuſtom* the Eſtate may be forfeited to the Lord; but this is *only* by the *Special Cuſtom*, ſince the Copyholder is not diſabled by the *Conviction* to hold the Eſtate, as he is if he was *attainted*; and therefore ſince it is by the *Cuſtom only* that ſuch Forfeiture accrues, it muſt be in the Manner which the Cuſtom has ſettled it, which is by Preſentment of the Homage; but if a Copyhold is granted for Life, and by another Copy the Reverſion is granted * to another, *Habend.* after the Death of the firſt Copyholder, or Surrender, Forfeiture or other Determination of the firſt Eſtate; the firſt Copyholder commits Murder, and is thereof attainted, the King pardons the Murder and the Attainder and all Forfeitures thereby; in this Caſe, he in the Reverſion is intitled to the Eſtate; for the King cannot have it for the Baſeneſs of the Tenure, ſince he cannot be Tenant at Will to any Perſon; and the Lord cannot have it, becauſe he cannot be Tenant to himſelf; therefore the particular Eſtate of Tenant for Life being extinguiſhed, the Reverſion immediately commences.†

* Page 577

† On Certificate of Commiſſioners of forfeited Eſtates, that Defendants were poſſeſſed of Lands forfeited, and did not diſcloſe them according to Statute; the Court would not grant *Scire facias*, but ſaid they proceed as for Lands forfeited for High Treaſon. Bunb. 14.——But by Stat. 4 Geo. 1. c. 8. on ſuch Certificate, the Exchequer is to proceed as on an Inquiſition; and the Court afterwards ordered a *Scire facias* on ſuch Certificate, as on an Inquiſition found. Bunb. 15.

(B) Of the Forfeiture of Goods and Chattels.

ALL Things whatſoever, which come under the Notion of a Perſonal Eſtate, and which a Man is intitled to in his (g) own Right, whether

Staundf. Prerog. 45, 46. 12 Co. 12.

(g) But not thoſe which he hath as Executor or Adminiſtrator to another. Cro. Car. 566.——Alſo a Term limited to Executors, and not veſted in the Party himſelf, is not forfeitable. 2 Leon. 5, 6. And. 19. Moor 100. Dyer 309, 310.

ther they be in Action or Poſſeſſion, are forfeitable in the following Inſtances to the (a) King, for the Trouble and Charge he has been at in holding Courts and bringing the Offenders to Juſtice.

(a) That the Lord of a Manor, or other private Perſon, may have *bona Felonum & Fugitivorum*, but they muſt be claimed by way of Grant, and not by Preſcription, becauſe no Man can preſcribe for them; for every Preſcription muſt be immemorial; and the Goods of Felons and Fugitives cannot be forfeited without Matter of Record, which preſuppoſes the Memory of that Continuance. 5 Co. 109. 46 E. 3. 16.

Alſo Perſonal Things, ſettled by Way of Truſt on the Offender, are as much forfeited as if he had the legal Intereſt, or were in Poſſeſſion of them; as if a Bond be taken in another's Name, or a Leaſe made to another in Truſt for a Perſon who is afterwards convicted of Treaſon or Felony; theſe are as much liable to be forfeited, as a Bond made to him in his own Name, or a Leaſe in Poſſeſſion. Cro. Jac 312. Hob. 214.

Alſo the Truſt of a Term granted by a Man for the Uſe of himſelf, his Wife and Children, *&c.* is liable in like Manner to be forfeited, if fraudulently made with an Intent to avoid a ſubſequent Forfeiture, but it ſhall be forfeited ſo far only, as it is reſerved to the Benefit of the Party himſelf, if made *bona fide*, whether before or after Marriage, for good Conſideration without Fraud, which is to be left to a Jury on the whole Circumſtances of the Caſe, and ſhall never be preſumed by the Court where it is not expreſly found. 2 Keb. 564, 608, 644, 763, 772. Lev. 279. Lane 54, 113. Mod. 16, 38. Hard. 466. And. 294. Raym. 120. 2 Rol. Abr. 34.

Rol. Abr. 343. March 45, 88. Sid. 260, 403. Keb. 909.

But the Power of Revocation of the Truſt of a Settlement reſerved to the Grantor is not liable to be forfeited, if it depend upon ſomething Perſonal to be done by the Grantor himſelf, as the making the Deed of Revocation under his Hand and Seal. † 2 Keb. 564. Lev. 279. Mod. 16, 38. Vent. 128.

10 Mod. 116, 120, 124, 359, 361, 367, 415.

† See *infra* 581. Note.

A Man forfeits all ſuch Perſonal Eſtate ‡ in the following Inſtances.

‡ Grants of Felons Goods how to be inrolled, 4 & 5 W. & M. c. 22. ſ. 1.

1. Upon a Conviction of Treaſon or (b) Felony, as is clearly agreed by all the Books. 5 Co. 109.

(b) And therefore a Perſon convicted of Manſlaughter, and making Purgation, as was the ancient Practice, or burnt in the Hand according to the preſent, forfeits his Goods and Chattels, but not his Lands, for the King hath loſt a Subject; and therefore the Party is puniſhable, though in a more gentle Manner than when there is a ſedate and deliberate Revenge. 5 Co. 110—That a Perſon convicted of Hereſy forfeited neither Lands nor Goods, becauſe the Proceedings againſt him were only *pro ſalute animæ*. Doct. and Stud. l. 2 c. 29. Hale's P. C. 5.

* 2. Upon the Coroner's Inqueſt taken on (c) View of a dead Body, and finding him guilty either as Principal or as Acceſſary (d) before the Fact, and that he fled for the ſame, whereby he forfeits his Goods abſolutely, and the Iſſues of his Lands, till he be acquitted or pardoned. * Page 578 Staundf. P. C. 813. Hale's P. C. 271.

Keilw. 68. b. Dyer 239. pl. 36. 5 Co. 110. (c) And that in ſuch Caſes where the Coroner cannot have the View of the Body, the King ſhall intitle himſelf to the Goods and Chattels upon a Preſentment. 5 Co. 109. (d) *Secus* if he be found Acceſſary after, for the Indictment is ſo far void. Staundf. P. C. 184.

3. Upon a Jury's finding that the Defendant fled at the ſame Time that they acquit him of an Indictment of Capital Felony, or, as ſome ſay, of Larceny, before Juſtices of *Oyer*, *&c.* but ſuch a Finding cauſes no Forfeiture of the Iſſue of the Land, becauſe by the Acquittal the Land is diſcharged; Keilw. 68. 5 Co. 110. Hale's P. C. 271. Staundf. 184.

charged; neither will it have any Effect as to the Goods, if the Indictment were insufficient, or if the Flight be disproved on a Traverse, which, as all agree, may be taken to any such Finding, except that by a Coroner's Inquest, and, as (*a*) some say, even to that, as well in respect of the Flight, as of the Particulars of the Goods.

(*a*) For this *vide* Tit. Coroner.

5 Co. 110. 111. *vide* Tit. Outlawry. (*b*) Fitz. *Coron.* 181. *Forfeiture* 28. Staundf. P. C. 183, 184. Staundf. *Prerog.* 47. Bro. *Coron.* 8. Finch. 352. Rol Abr. 791. 41 Ass. pl. 13. 22 Ass. pl. 11. Cro. Eliz. 472. Cro. Jac. 464.

4. The Goods of Persons outlawed are forfeited to the King, for the Retiring from the Inquiries of Justice is held so criminal in the Eye of the Law, that it is punished with the Loss of Goods so long as the Outlawry stands in Force. So (*b*) if a Person make Default till the Award of an *Exigent*, either upon an Appeal or Indictment of a Capital Felony, he forfeits his Goods, unless he was pardoned before the *Exigent* was awarded; and it is (*c*) holden, that the Law is the same as to such a Default upon an Indictment of Petit Larceny, and that wherever Goods are so forfeited they are not saved by an Acquittal at the Trial; (*d*) but by a Reversal of the Award of the *Exigent* they are saved, whether such Reversal be for an Error either in Fact or in Law, as for the Imprisonment of the Defendant at the Time when the *Exigent* was awarded, or for a Defect in the Indictment, Appeal or Process.

(*c*) Hale's P. C. 271. (*d*) 5 Co. 110, 111. 43 E. 3. 17. Hale's P. C. 271. Co. Lit. 259.

5 Co. 109. Fitz. *Coron.* 289, 312. Staundf. P. C. 184. 3 Inst. 56, 227. Plow. 260.

5. If a Man be *Felo de se*, or if a Felon be killed in the Robbery, or by resisting in order to escape, he forfeits his Goods and Chattels; for when a Man thus forsakes Life, all his Goods and Chattels are derelict; and therefore the King shall have them as the Maintainer of public Justice.

5 Co. 109. 3 Inst. 134. Cro. Eliz. 694.

6. If a Felon waives, that is, leaves any Goods in his Flight from those who either pursue him, or are apprehended by him so to do, he forfeits them, whether they be his own Goods, or Goods stolen by him; and at Common Law, if the Owner did not pursue and appeal the Felon, he lost the Goods for ever; but by the (*e*) 21 *H.* 8. *cap.* 11. for encouraging the Prosecution of Felons it is provided, that if the Party comes in as Evidence on the Indictment, and attaint the Felon, he shall have a Writ of Restitution.

(*e*) But for this *vide* 2 Hawk. P. C. 170. And that a Sale in a Market Overt does not so far alter the Property of the Goods, but that upon a Prosecution by the Person from whom they were stolen, he shall have them again. Tit. Fairs and Markets.

5 Co. 109. *Foxley's* Case.

And here we may observe a Difference between Goods waived, Strays and the like, and Goods forfeited for Felony or Flight; for, as it has been observed, Goods forfeited for Felony are not in the King without an Office found of such Felony or Flight, because the Property cannot alter without Matter of Record; but Goods waived are in the King without Office, because there the Property is in no Body; and therefore by public Agree-

* Page 579

* ment is put out of the Finder, in whom it was by the State of Nature, and is vested in the King as a Recompence for his Trouble and Charge in the Execution of Justice. †

† If *A.* has a Freehold Lease, and is attainted on 8 & 9 W. 3. c. 26. relative to coining; it is forfeited to the Crown. *Kirton* v. *Horton.* Foster 223.——Tenant at Will hath not any Thing to forfeit. *Denn* v. *Fearnside.* 1 Wilf. 176.

(C) For what Crimes by Statute.

BY the 26 *H.* 8. *cap.* 13. it is enacted, "That every Offender and Of-
" fenders, being hereafter lawfully convicted of any Manner of High
" Treaſons by Preſentment, Confeſſion, Verdict or Proceſs of Outlawry,
" according to the due Courſe and Cuſtom of the Common Laws of this
" Realm, ſhall loſe and forfeit to the King, his Heirs and Succeſſors, all
" ſuch Lands, Tenements and Hereditaments, which any ſuch Offender
" or Offenders ſhall have of any Eſtate of Inheritance in Uſe or Poſſeſſion,
" by any Right Title or Means, within the Realm of *England*, or elſe-
" where within any of the King's Dominions, at the Time of any ſuch Trea-
" ſon committed, or at any Time after, ſaving to every Perſon and Per-
" ſons, their Heirs and Succeſſors, other than the Offenders in any Trea-
" ſons, their Heirs and Succeſſors, and ſuch Perſon and Perſons as claim
" to any their Uſes, all ſuch Rights, Titles, Intereſts, Poſſeſſions, Leaſes,
" Rents, Offices and other Profits, which they ſhall have at the Day of
" committing ſuch Treaſons, or at any Time before, in as large and
" ample Manner, as if this Act had never been had nor made.

And by the 33 *H.* 8. *cap.* 20. it is enacted, "That if any Perſon or
" Perſons ſhall be attainted of High Treaſon, by the Courſe of the Com-
" mon Law or Statutes of this Realm, in every ſuch Caſe every ſuch At-
" tainder by the Common Law ſhall be of as good Strength, Value, Force
" and Effect, as if it had been done by Authority of Parliament; and that
" the King, his Heirs and Succeſſors, ſhall have as much Benefit and
" Advantage by ſuch Attainder, as well of Uſes, Rights, Entries, Condi-
" tions, as Poſſeſſions, Reverſions, Remainders, and all other Things, as
" if it had been done and declared by Authority of Parliament; and ſhall
" be deemed and adjudged in actual and real Poſſeſſion of the Lands, Te-
" nements, Hereditaments, Uſes, Goods, Chattels, and all other Things
" of the Offenders ſo attainted, which his Highneſs ought lawfully to have,
" and which they, being ſo attainted, ought or might lawfully loſe or for-
" feit, if the Attainder had been done by Authority of Parliament, with-
" out any Office or Inquiſition to be found of the ſame; any Law,
" Statute or Uſe of the Realm to the contrary thereof in any wiſe not-
" withſtanding.

" Saving to all and every Perſon and Perſons, and Bodies Politick, and
" their Heirs, Aſſigns and Succeſſors, and every of them, (other than ſuch
" Perſon and Perſons which hereafter ſhall be attainted of High Treaſon,
" and their Heirs and Aſſigns, and every of them, and all and every other
" Perſon and Perſons claiming by them or any of them, or to their Uſes,
" or to the Uſes of any of them, after the ſaid Treaſons committed) all
" ſuch Right, Title, Uſe, Poſſeſſion, Entry, Reverſions, Remainders, In-
" tereſts, Conditions, Fees, Offices, Rents, Annuities, Commons, Leaſes,
" and all other Commodities, Profits and Hereditaments whatſoever they
" or any of them ſhould, might or ought to have had, if this Act had ne-
" ver been had or made."†

† For the Treaſons in 5 Eliz. c. 1. concerning the Papal Supremacy, 5 Eliz. c. 11. and 18 Eliz. c. 1. touching the Coin, no Forfeiture of Lands ſhall be but during the Life of the Offender. And *vide* 7 Ann. c. 21. and 17 Geo. 2. c. 29. For the Treaſons in 8 & 9 W. 3. c. 25 and 15 and 16 Geo. 2. c. 28. the Lands are forfeited.—The Blood is not corrupted for either. Foſter 223.

In the Conſtruction of theſe Statutes the following Opinions have been holden.

* 1. That neither of theſe Statutes are repealed by 1 *Ma. Seſſ.* 1. *cap.* 1. which enacts, "That no Pains of Death, Penalty or Forfeiture, ſhall en-
" ſue

* Page 580 Staundf. P. C. 387.

3 Inſt. 19. Dyer 28. 2 Hawk. P.C. 452.

"ſue to any Offender, for the doing any Treaſon, Petit Treaſon, or Miſ-"priſion of Treaſon, other than ſuch as be within the Statute of 25 *E.* 3. "*ſt.* 5. *c.* 2. ordained and provided;" for the Words, *other than ſuch*, *&c.* have been conſtrued not to extend to the Pains, *&c.* mentioned in the Beginning of the Sentence, but to the Offences mentioned in the End of it.

Staundf. P. C. 187. Co. Lit. 372, 391. (*a*) Dyer 322. pl. 27. adjudged.

2. That Eſtates in Tail are forfeited by Force of theſe Words in 26 *H.* 8. *c.* 13. (*ante* 579.) *of any Eſtate of Inheritance*, which muſt be void, if they do not include Eſtates in Tail; (*a*) alſo Lands given to a Man and his Wife and the Heirs of their two Bodies, are as much forfeited by his Attainder, as Lands given to him and the Heirs of his Body. †

† If *A.* intails his Eſtate in *Scotland* on himſelf for Life, Remainder to *B.* his eldeſt Son, and the Heirs Male of his Body, Remainder to the Heirs Male of *A.*'s own Body, with ſubſequent Limitations, and the Reverſion to the Heirs and Aſſigns whatſoever of *A.* with prohibitive, irritant and reſolutive Clauſes; and *A.* dies, leaving *B.* and another Son, *C.* *B.* is attainted of High Treaſon; the Eſtate is forfeited to the Crown during his Life, and the Continuance of ſuch Iſſue Male of his Body as would have been inheritable to the ſaid Eſtate *tailzie*, and alſo for ſuch Eſtate and Intereſt as veſts in him by the Limitation to the Heirs whatſoever of *A.* after the Subſtitutions determined; and after the Death of *B.* and Failure of his Iſſue Male, *C.* ſhall ſucceed, by virtue of the Subſtitution to the Heirs Male of the Body of *A.* Foſter 95.—— If the Eſtate is limited to *A.* and the Heirs Male of his Body, without any previous Limitation to his Son *B.* and *B.* on his Father's Death becomes intitled as Heir of his Body, and is attainted of High Treaſon, the whole Intail is forfeited by his Attainder, as long as there are Heirs Male of the Body of *A.* Foſter 102.

(*b*) 3 Co. 2, 3. agreed in the Marquis of *Winchester*'s Caſe. Leon. 270, 27. Moor 125. Hob 340. Cro Eliz. 389. Cro. Car. 428. 7 Co. 13. Lit. Rep. 100. S. P. agreed. (*c*) 3 Co. 2, 3. Hob. 340. 9 Co. 95. a.

3. That neither a *Right* to (*b*) a *Writ of Error* to reverſe an erroneous Common Recovery, (*c*) nor a mere *Right of Action* to Lands in the Hands of a Stranger as of a Diſcontinuee, or of the Heir of the Diſſeiſor, are forfeited by either of theſe Statutes; (*d*) but *Rights of Entry* are as much forfeited as Lands in Poſſeſſion; yet the King ſhall (*e*) not be adjudged in Poſſeſſion, by virtue of ſuch a Right, without an Office, and a *Scire facias* or Seiſure on ſuch Office; for the Words, *The King ſhall be deemed in Poſſeſſion without Office*, &c. ſhall have this Conſtruction, that he ſhall be in Poſſeſſion without Office, in the ſame Manner as he ſhould have been on an Office found at Common Law; but at Common Law, if a Diſſeiſee had been attainted of High Treaſon, the King ſhould not have been in Poſſeſſion without Office, and a *Scire facias* or Seiſure thereon.

7 Co. 13. 4 Co. 58. a. (*d*) 3 Co. 2, 3, 20. (*e*) 3 Co. 11. a. 4 Co. 58. a. Leon. 21.

Cro. Car. 427. *Stone* and *Norman*'s Caſe, & *vide* Plow. 552.

4. If Tenant in Tail of the Gift of the Crown makes a Feoffment in Fee, and then is attainted of High Treaſon, the Right of the Intail is forfeited, for it could not be diſcontinued, becauſe the Reverſion continued always in the Crown; and though it be put in Abeyance by the Feoffment, as to any Benefit which the Feoffor could have claimed from it; yet ſince it is not turned to a Right of Action, but would have ſtill continued in him for the Benefit of the Heir, if there had been no Attainder, it ſhall likewiſe continue in him for the Benefit of the Crown.

Hob. 334. Palm. 351. 2 Rol. Rep. 305.

5. That if one attainted of High Treaſon is ſeiſed of a defeaſible Eſtate-tail, and hath alſo a Right to an ancient Intail, which is diſcontinued, he forfeits both; for the firſt is within the expreſs Words of 26 *H.* 8. *c.* 13. and the other within thoſe of 33 *H.* 8. *c.* 20. and it doth not follow, that becauſe naked Rights to Lands in the Hands of a Diſcontinuee, or of the Heir of a Diſſeiſor, are not within the Meaning of the Statute, therefore a Right in the Party himſelf is not; for the Forfeiture of ſuch naked Rights might not only be of dangerous Conſequence in unſettling Poſſeſſions, but might alſo be prejudicial to Strangers, whom the Statute, by an expreſs Saving, plainly intends to favour; but a Forfeiture of the Offender's Right to his own Lands can prejudice none but himſelf and his Heirs.

6. In

6. In the Conſtruction of the Statute of 33 *H.* 8. *c.* 20. it is (*a*) agreed, that a Power of Revoking the Uſes of a Settlement may be forfeited by Force thereof, if the Execution of it require nothing but what may be as well performed by any other Perſon, as by the Party himſelf by whom it was reſerved; as the Tender of a Ring, *&c.* (*b*) Neither doth the Mention of ſuch Conſiderations, and Inducements for the Reſerving ſuch a Power in the Preamble of it, as are inſeparable from the Perſon, alter * the Caſe, if nothing of this Kind be inſerted in the Proviſo itſelf, by which it is reſerved; but (*c*) if ſuch Proviſo require any Thing of this Kind, it prevents the Forfeiture; as if it be worded thus, That if the Party ſhould be minded to alter and revoke the Uſes, and ſignify his Mind in Writing under his Hand and Seal, or (*d*) if it only require, that the Revocation be under his Hand and Seal, without ſaying any Thing about his changing his Mind; or as (*e*) ſome ſay, if it only require the Tender of a Ring by the Party, *ipſo adjunct declarante* his Intent, *&c.* †

* Page 581

(*a*) In *Engleſield's* Caſe, 7 Co. 12, 13. Poph. 18. And. 293. Moor 303. 4 Leon. 135. Palm. 433. Rol. Rep. 142.

(*b*) *Engleſield's* Caſe adjudged in 7 Co. 12. and in the Books cited *ſupra*, and agreed to be Law, 2 Keb. 566, 763, 773. Lev. 279. Lane 44. Rol. Rep. 142. (*c*) As in the Duke of *Norfolk's* Caſe, where there was this Proviſo, That if the Duke ſhould be minded to alter and revoke the Uſes, and ſignify his Mind in Writing under his Hand and Seal, that then, *&c.* and it was clearly adjudged, that the Power of Revocation was not forfeitable, becauſe it depended on the Duke's ſignifying his Mind in Writing under his proper Hand and Seal, which none but himſelf could do. 7 Co. 13. cited and agreed. Lev. 279. 2 Keb. 566, 763, 773. 3 Inſt. 19. (*d*) Mod. 16, 38. Lev. 279. *Main's* Caſe. (*e*) *Vide* Palm. 429. Latch. 25, 26, 70, 102. Jon. 135. Vent. 129. Mod. 40.

† *A.* who is Tenant for Life, with Power to make Leaſes for three Lives, or twenty-one Years, makes a Leaſe to Truſtees for ninety-nine Years, if he ſo long live, for Payment of his Debts; and appoints them his Attornies, to make Leaſes purſuant to the Power; *A.* is outlawed for High Treaſon; the Truſtees ſhall not make the Leaſes to the Nominees of the Crown. Bunb. 92.

7. That neither an (*f*) Annuity granted *pro conſilio impendendo*, (*g*) nor an Office granted for Life, and requiring Skill and Confidence, are forfeitable by theſe Statutes; but ſuch Office in Fee may be forfeited without the Aid of them, becauſe the Grantor in giving an Eſtate deſcendable to all the Heirs of the Grantee, however qualified, appears not to have been induced to make his Grant from the Conſideration of the peculiar Merit of the Perſons who are to execute the Office.

(*f*) Plow. 381. (*g*) Plow. 379. *& vide* Tit. Offices and Officers.

By an Act of Parliament made 13 *Car.* 2. it was enacted, *That all the Manors, Meſſuages, Lands, Tenements, Poſſeſſions and Reverſions, Remainders, Rights, Intereſts, Hereditaments, Leaſes, Chattels Real, and other Things of what Nature ſoever, that Sir* John Danvers, *or any other to his Uſe, or in Truſt for him, had the 25th of* March 1646, *or at any Time after, ſhould be forfeited to the King*; and it was adjudged, that by Force of theſe Words, *All Intereſts of what Nature ſoever*, an Eſtate-tail was forfeited.

2 Lev. 169. *Browne* and *Wyatt.* 2 Jon. 57. 2 Mod. 130. 3 Keb. 459, 651, 712. Vent. 299. Pollexf. 181. S. C.

But it is holden, that the Statutes of *Præmunire*, which give a general Forfeiture of all the Lands and Tenements of the Offender, extend not to Lands in Tail.

Co. Lit. 130.

It is agreed, that a Saving againſt Corruption of Blood in a Statute concerning *Felony* ſaves the Land to the Heir, becauſe the Eſcheat to the Lord for Felony is only *pro defectu tenentis*, occaſioned by the Corruption of Blood; alſo the ſaving the Land to the Heir ſaves the Corruption of Blood and Loſs of Dower.

Hale's P.C. 8. 3 Inſt. 47.

But a Saving againſt the Corruption of Blood in a Statute concerning *High Treaſon* does not ſave the Land to the Heir, becauſe the Land goes to the King by Way of *immediate Forfeiture*, and not by Way of Eſcheat.‡

Salk 85. pl. 2.

‡ See farther the Statutes 7 Ann. c. 21. & 17 Geo. 2. c. 29. and the Obſervations on thoſe Statutes, in *Conſ. on Law of Forf. for High Treaſon.* By thoſe Statutes, after the Death of the *Pretender's* Sons, no Attainder of High Treaſon is to extend to the Diſinheriting any Heir, *&c.*—Council allowed to Perſons impeached by the Commons. 20 Geo. 2. c. 30.

(D) To what Time the Forfeiture ſhall have Relation.

THE Forfeiture upon an Attainder either of *Treaſon* or *Felony* ſhall have Relation to the (*a*) *Time* of the *Offence*, for the avoiding all ſubſequent Alienations of the *Lands*, but to the Time of the Con-
* Page 582 * viction,† or *fugam fecit* found, *&c.* only as to *Chattels*, unleſs the Party were killed in flying from, or reſiſting thoſe who had arreſted him; in which Caſe it is ſaid, that the Forfeiture ſhall relate to the Time of the Offence.

Plow. 488. b. Co. Lit. 2. b. 8 Co. 170.

(*a*) That if the Time proved varies from that laid in the Indictment, and the Jury find the Defendant guilty generally, the Forfeiture ſhall relate to the Time laid, till the Verdict be falſified by the Party intereſted, as it may be in this reſpect, though not as to the Point of the Offence. Hale's P. C. 264, 270. 3 Inſt. 230.—But if the Jury find the Defendant guilty on the Day on which the Fact is proved, whether before or after the Day laid in the Indictment, in ſuch Caſe the Forfeiture ſhall relate to the Day ſo ſpecially found. Kelynge 16. Hale's P. C. 264. 2 Inſt. 318. 3 Inſt. 230.

† See *infra*, Letter (E).

8 Co. 170. Plow. 488.

No Attainder whatſoever ſhall have any Relation as to the meſne Profits of the Lands of the Perſon attainted, (*b*) but only from the Time of the Attainder.

(*b*) Whether in a *Præmunire* the Forfeiture ſhall relate to the Time of the Offence, or only to that of the Judgment, Q. & *vide* Cro. Car. 172. Jon. 217. & Tit. Præmunire.

Plow. 260. 5 Co. 110. Hale's P. C. 29.

The Forfeiture of a Perſon becoming *Felo de ſe* has Relation to the Time the mortal Wound was given, ſo that all intermediate Alienations are avoided.

(E) What is to be done with the Offender's Goods before Conviction.

8 Co. 171.

IT hath always been held, that one indicted or appealed of Treaſon or Felony may, *bona fide*, ſell any of his Chattels Real or Perſonal, for the Suſtenance of himſelf and Family, until they be actually forfeited.

Skin. 357. pl. 4. *Jones* and *Aſcurt*.

But where a Perſon being in *Newgate* for Robbery and Burglary, before Conviction, made a Bill of Sale of all his Goods to his Son; and on Trover brought by the Son againſt the Sheriffs of *London*, it was held by *Holt*, that the Bill was fraudulent, and that though a Sale, *bona fide*, and for a valuable Conſideration, had been good, becauſe the Party had a Property in the Goods till Conviction, and ought to be reaſonably ſuſtained out of them, yet that ſuch a Conveyance as this cannot be intended to any other Purpoſe than to prevent a Forfeiture and defraud the King; and this he ſaid was a Fraud at Common Law.

3 Inſt. 229. Bridg. 77. Hale's P. C. 269.

It ſeems the better Opinion, that at (*c*) this Day, before Indictment, the Goods of the Offender cannot be ſearched and inventoried, and that after Indictment they cannot be ſeiſed and taken away till the Felon is convicted, for till the Conviction the Property remains in the Felon.

(*c*) That according to the general Tenor of the old Books, the Goods of one arreſted for Treaſon or Felony may, by the Purview of an ancient Statute, which ſeems to continue ſtill in Force, be immediately inventoried and appraiſed; after which

And

And by the 25 *E.* 3. *cap.* 14. it is enacted, "That no Sheriff, Under-
"sheriff, nor Escheator, Bailiff of Franchise, nor any other Person, take
"or seise the Goods of any Person arrested or imprisoned for Suspicion of
"Felony, before that the same Person so arrested and imprisoned be con-
"victed or attainted of such Felony according to the Law; or else the
"same Goods otherwise lawfully forfeited; upon Pain to forfeit the double
"Value of the Goods so taken to him that is so hurt in that Behalf by
"(*a*) Action of Debt, *&c.*

(*a*) For Precedents of such Actions, *vide* Lutw. 132. Cro. Eliz. 749.

This Statute is said to be in Affirmance of the Common Law, and hath been (*b*) adjudged to extend as well to the Seizure of Money, as of any other Chattel. 8 Co. 171. (*b*) Raym. 414.

* It seems plain from this Statute, that Goods may be seized as soon as they are forfeited; and it seems the whole Township is answerable for them to the King, and may seize them wherever they can be found. * Page 583 Co. Lit. 391. 2 Hawk. P.C. 455. and several ancient Authorities there cited.

And at Common Law it was no Plea for such Township, that the Goods were delivered to the Custody of *J. S.* who embezelled them, *&c.* but it is enacted by 31 *E.* 3. *c.* 3. "That if any Man or Town be charged in the
"Exchequer by Estreats of the Justices of the Chattels of Fugitives and
"Felons, and will alledge in Discharge of him another which is charge-
"able, he shall be heard, and Right done to the other." 2 Hawk. P. C. 456.

(F) Where the Wife shall lose her Dower.

BEFORE the Statute of 1 *E.* 6. *cap.* 12. the Wife not only lost her Dower at Common Law, but also her Dower *Ad ostium Ecclesiæ*, or *ex assensu Patris*, or by Special Custom, (except that of Gavelkind) by the Husband's Attainder of Treason or (*c*) Capital Felony, whether committed before or after the Marriage. Co. Lit. 31. b. 37. a. 41. a. F. N. B. 150. Perk. Sect. 308. Bro. Tit. Dower 82.

Plow. 261. (*c*) That the Wife of a *Felo de se* shall have Dower. Plow. 261, 262. Dame *Hale*'s Case. —So if the Husband be outlawed in Trespass or any Civil Action, for this works no Corruption of Blood, or Forfeiture of Lands. Perk. Sect. 388. Co. Lit. 31. a.——So if the Husband be attainted of Heresy, for this is only a Spiritual Offence. Co. Lit. 31.——So if the Husband or Wife be excommunicated. Co. Lit. 31.——So if either the Husband or Wife be attainted in a *Præmunire*, she shall be endowed; but for this vide Co. Lit. 134. and Tit. *Præmunire*.

But the Wife never forfeited Lands given jointly to her Husband and her, whether by Way of Frank-marriage, or otherwise, but only for the Year and Day, and Waste. Co. Lit. 37. 3 Inst. 216.

It is enacted by 1 *E.* 6. *cap.* 12: *par.* 17. "That albeit any Person shall
"be attainted of any Treason or Felony whatsoever; yet that notwith-
"standing every Woman, that shall fortune to be the Wife of the Person
"so attainted, shall be endowable and enabled to demand, have and enjoy
"her Dower, in like Manner and Form as though her Husband had
"not been attainted, *&c.*"

which, and on Surety found that they shall be forth coming, they shall be kept by the Bailiffs of the Party arrested, and for Want of such Surety by his Neighbours, till he be convicted, or found to have fled, *&c.* whereby they are actually forfeited, vide 2 Hawk. P. C. 455. and the Authorities there cited.

But this is repealed as to Treaſon by 5 & 6 *E.* 6. *cap.* 11. *par.* 9. *ſect.* 13 by which it is enacted, "That the Wife, whoſe Huſband ſhall be attainted of any Treaſon (*a*) whatſoever, ſhall in no wiſe be received to aſk, challenge, demand or have Dowry of any the Lands, Tenements or Hereditaments of the Perſon ſo attainted, during the ſaid Attainder in Force."

(*a*) This Act extends to an Attainder of Petit Treaſon, as well as to an Attainder of High Treaſon.

Staundf. 195. Dyer 140. pl. 42. Co. Lit. 37. a. 392. b.—But not to Miſpriſion of Treaſon. Co. Lit. 37. a. Moor 639. Dyer 97. pl. 49. 13 Co. 19.

Bendl 56. Dyer 140. Co. Lit. 111. a. If the Huſband ſeiſed of Lands in Fee makes a Feoffment, and then commits Treaſon and is attainted of it, the Wife ſhall not recover Dower againſt the Feoffee.

(*b*) 3 Leon. 3. (*c*) Perk. Sect. 391. So (*b*) if the Huſband is attainted of Treaſon, and afterwards pardoned, yet the Wife ſhall not recover Dower; but (*c*) of Lands purchaſed by the Huſband after the Pardon the Wife ſhall be endowed.

2 Inſt. 216. Moor 639 pl. 879. If a Huſband having levied a Fine with Proclamations is erroneouſly attainted of Treaſon, and the five Years paſs after his Death, and then the Outlawry is reverſed, the Fine and Nonclaim are no Bar till five Years are paſſed after the Reverſal, becauſe the Wife could not ſue for her * Dower while the Attainder ſtood in Force, neither could ſhe any Way reverſe.

* Page 584

For this *vide* Tit. *Dower.* After the making of the Statute 1 *E.* 6. *cap.* 12. it ſeems to have been doubted, whether the Wife ſhould not loſe her Dower in caſe of any new Felony made by Act of Parliament; and therefore where ſeveral Offences have been made Felony ſince, Care has been taken to provide for the Wife's Dower.

(G) How far the Blood of the Offender is corrupted.

Co. Lit. 8, 41. 3 Inſt. 211. Staundf. P. C. 195. IT is clearly agreed, that by an Attainder of Treaſon or (*d*) Felony, the Blood of the Offender is ſo far ſtained or corrupted, that the Party loſes all the Nobility or Gentility he might have had before, and becomes ignoble.

(*d*) But an Attainder of Piracy corrupts not the Blood. Co. Lit. 391.——Nor of Petit Larceny. 3 Inſt. 211. Co. Lit. 41. a. Noy 170.

Co. Lit. 8. a. 301. b. 392. Staundf. P. C. 165. Bro. *Nonability* 21. Cro. 66. Alſo it is clearly agreed, that he can neither inherit as Heir to any Anceſtor, nor have an Heir; and the Policy of the Law herein is to make Men more mindful of their Allegiance, and to deter them from taking up Arms againſt the Crown; for as the natural Love Men have for their Poſterity, often reſtrains them from Actions which would prejudice them, either by entailing the Infamy of ſuch Actions on them, or making them Sharers in the Puniſhment which the Law has appointed for ſuch Offences; ſo Men are leſs careful of their Perſons, when their Miſcarriages will neither involve their Children in the Guilt or Puniſhment of them.

(*e*) As in Cro Car. 543. Lit. Rep. 28. Noy 159. Vent. 413, 4. 7. Lev. 60. Sid. 200. Therefore it is (*e*) laid down as a ſure Rule, that wherever it is neceſſary for any one, who would make a Title to another, to derive the Deſcent thro' him, that the Attainder is an effectual Bar to ſuch Title, (*f*) unleſs

(*f*) Lit. Sect. 746. 3 Co. 10. 8 Co. 166. a.——And therefore, if the Grandfather be ſeiſed in Tail, and the Father be attainted of Treaſon ſince the 26th H. 8. c 13. (*ante* 579.) and

leſs the Lands were intailed, in which Caſe he claims *per formam doni*, and paramount his Title.

and dies in the Life of the Grandfather, the Son ſhall inherit the Grandfather, for the Son is Heir *per formam doni* to the Tail, which is originally not forfeitable, and by that Statute the Father forfeits only the Lands and Rights that he hath in him. Co. Lit. 8. 3 Co. 10. *Dowty*'s Caſe.

As if there be Grandfather, Father and Son, and the Father is attainted, the Son cannot claim as Heir to the Grandfather of the Lands in Feeſimple, becauſe he muſt of Neceſſity derive the Deſcent through the Father, which by Reaſon of the Attainder he cannot do. Co. Lit 392. Daliſ. 14. pl. 3. Vent. 416.

So if there be two Brothers, and one of them having Iſſue a Son be attainted, and either the Son or Uncle purchaſe Land, and die without Iſſue, the other cannot be his Heir, becauſe the Blood of the Father, through whom the Deſcent muſt be conveyed, is corrupted. Dyer 274. pl. 40. Cro Car. 543. Vent. 413, 416, 425.

But it is alſo a general Rule, that the Attainder of a Perſon, who needs not be mentioned in the Conveyance of the Deſcent, does no Hurt, let the Anceſtor be never ſo remote; and that therefore where one may claim as immediate Heir to another, without deriving the Deſcent through any other, he ſhall not be barred by the Attainder of any other. Lit. Rep. 28. Noy 159, 166. Lev. 60. Sid. 200. Vent. 413.

As if the Son of one attainted purchaſe Land, and have a Son and die, ſuch Son ſhall inherit him, becauſe he derives his Deſcent immediately from him. Vent. 416.

* So if a Man hath two Sons, and is attainted, and one of the Sons purchaſe Lands, and die without Iſſue, the other ſhall be his Heir, becauſe he may make his Title without mentioning the Father; and therefore there is no Diſability in the one to be repreſented, or in the other to repreſent. * Page 585 Co. Lit. 8. a. 4 Leon. 5. Cro. Jac. 539. Rol. Abr. 625. pl. 5. Cro. Car. 543. Palm. 19. Lev. 59. Vent. 425. 2 Rol. Rep. 93. 2 Sid. 25, 27. Moor 569. pl. 775. Noy 158. Lit. Rep. 28.—But my Lord *Coke* ſays, that the Reaſon of this Caſe is, becauſe the Attainder of the Father corrupts only the lineal Blood, and not the collateral Blood between the Brethren, which was veſted in them before the Attainder; but he ſaith that ſome have holden, that if a Man, after he be attainted, have Iſſue two Sons, the one cannot be Heir to the other, becauſe they could not be Heir to their Father, for that they never had any inheritable Blood in them. Co. Lit. 8. a.——But the Ground of this Opinion is overthrown by the Reſolution in the Caſe of *Collingwood* and *Pace*, wherein it was adjudged in the Exchequer Chamber by ſeven Judges againſt three, that the Sons of an Alien † might be Heirs one to another, if born in *England*, or naturalized, though it is certain they could not be Heirs to their Father. Sid. 193. Hard. 224. Vent. 413. Lev. 59. And therefore it ſeems now ſettled, that ſuch Sons, whether born before or after the Attainder of their Father, may inherit each other.

† By 11 & 12 W. 3. c. 6. Natural Subjects may inherit and make their Title by Anceſtors born beyond Sea, & *vide* 25 Geo. 2. c. 39.

So where a Perſon attainted hath Iſſue by a Woman ſeiſed of Lands of Inheritance, ſuch Iſſue may inherit the Mother, though he never had any inheritable Blood from the Father. Noy 159, 167. Saunds P. C. 196. 2 Sid. 248.

Cro. Jac. 539. Lit. Rep. 28. Lev. 59. Sid. 201. Vent. 422. Co. Lit. 84. b.

If the Father of a Perſon attainted die ſeiſed of an Eſtate of Inheritance during his Life, no younger Brother can be Heir, but the Land ſhall rather eſcheat; for the elder Brother, though attainted, is ſtill a Brother, and no other can be Heir to the Father while he is alive; but if he die before the Father, the younger Brother ſhall be Heir, becauſe there is no Default in the Father to be repreſented, nor in the younger Son to repreſent the Father after the Death of his Brother. Co. Lit. 8. a. 13. a. Noy 166, 170. Lev. 60. Sid. 195. Vent. 413.

But if the eldeſt Son had left Iſſue and died, ſuch Iſſue could not have inherited, but ſuch Land muſt have eſcheated, becauſe the eldeſt Son could not have repreſented the Grandfather, but by the Mediation of the Father, Dyer 48.

and as ſtanding in his Stead, and that in this Caſe he could not do, becauſe the Father can have no Repreſentatives, and the younger Son could not inherit, becauſe the elder Line is ſtill continuing, which excludes the Younger.

Co. Lit. 163 b. If a Man be ſeiſed of Lands in Fee, and hath Iſſue two Daughters, and one of them is attainted of Felony, and the Father dies, both Daughters being alive, one Moiety ſhall deſcend to the innocent Daughter, and the other Moiety ſhall eſcheat.

Co. Lit. 163. b. But if a Man make a Leaſe for Life, Remainder to the right Heirs of *A.* being dead, who hath Iſſue two Daughters, whereof one is attainted of Felony, it ſeems the Remainder is not good for a Moiety, but void for the Whole.

Co. Lit. 163. b. For in the firſt Caſe the Lord by Eſcheat muſt make a Title to deveſt the Eſtate which was once lawfully veſted in the Anceſtor; which he cannot do, becauſe there is no Defect in this Caſe, ſince the Anceſtor may be legally repreſented, and the innocent Daughter may legally repreſent; and therefore there can be no Title in the Lord to evict that Moiety, though he has Title to the Moiety of the offending Daughter, who after her Crime can repreſent no Man; but in the ſecond Caſe, the Siſters are to make Title to the Remainder, which they cannot do, becauſe to make Title to the Remainder, they muſt bring themſelves within the Words of the Gift; and the innocent Daughter cannot take upon her the Character of an Heir alone, ſince they both make but one Heir to the Anceſtor; and both cannot join, becauſe one is attainted and incapable of that Character.

Co. Lit. 2. b. Although a Perſon attainted be to many Purpoſes looked upon as dead in Law, yet he hath a Capacity to purchaſe Land, which the King ſhall * Page 586 * have upon Office found, and not the Lord of the Fee, becauſe his Perſon being forfeited to the King he cannot purchaſe but for the King.

Co. Lit. 8 a. 391. b. 392. b. Stam. P. C. 195. 3 Inſt. 233. Daliſ. 14. pl. 3. But if a Man attainted be pardoned by Act of Parliament, he may purchaſe as before, for he is totally reſtored and inheritable to all Perſons; but if he be pardoned by Charter, he may thenceforth purchaſe Lands, but cannot inherit his former Relations; for the King's Charter cannot alter the Law or take away the Right of others, or reſtore the Relation that was loſt.

Noy 170. Co. Lit. 8 a. 3 Inſt. 233. If a Man be attainted and after pardoned by Charter, the Children born before ſuch Pardon ſhall not inherit; but if they fail, the Children born after ſuch Pardon may inherit him; for the Pardon makes him capable of *new Relations* as well as of *new Purchaſes*, though all the old legal Benefitt and Relations are loſt. †

† See *ante* 579. laſt Note.

Formedon.

FORMEDON is a Real Action which lies for the Iſſue in Tail after the Death of his Anceſtor, or for him in Remainder or Reverſion after the Eſtate-tail determined, and is called *Formedon*, becauſe the Writ comprehends the Form of the Gift. Co. Lit 326. b. 527 Booth 139.

The Proceedings in this Action, as in all other Real Actions, being dilatory and expenſive, it is now ſeldom brought; but as it is a proper Remedy in many Caſes, and ſtill in Uſe, we ſhall conſider it under the following Heads.

(A) Of the ſeveral Writs of Formedon. 587.

And herein,

1. Of the Formedon in Deſcender. 587
2. Of the Formedon in Remainder. 588.
3. Of the Formedon in Reverter. 589.

(B) Of what Things a Formedon will lie. 590.
(C) How the Demandant muſt ſet forth his Title. 590.
(D) Of the Tenant's Plea in Abatement or Bar. 591.

* (A) Of the ſeveral Writs of Formedon: And herein, * Page 587

1. Of the Formedon in Deſcender.

FOrmedon in the Deſcender is an Action *Anceſtrel Droiturel*, which lies for the Iſſue in Tail, upon a Violation of that Right which deſcends to him from his Anceſtor, according to the Form of the Gift, and is in Nature of a Writ of Right, being the (*a*) higheſt Writ that an Iſſue in Tail can have. 2 Inſt. 291. Plow. 235. F. N. B. 471. Lit. Sect. 595. (*a*) And therefore Tenant in Tail ſhall not have a Writ of Right *Sur diſclaimer*, nor a *Quo jure*, nor a *Ne injuſte vexes*, nor *Nuper obiit*, or *Rationabili parte*, nor a *Mortdanceſtor*, nor a *Sur cui in vita*; for theſe and the like none but Tenant in Fee ſhall have. Co. Lit. 326. b. ——But Tenant in Tail ſhall have a *Quod permittat*, a Writ of *Cuſtoms and Services in le debet & ſolet*, but not in the *debet* only; and in like Manner he ſhall have a *Secta ad Molendinum in le debet & ſolet*, but not in the *debet* only; alſo he may have a Writ of Entry *in conſimili caſu*, and an Admeaſurement, and a *Nativo habendo*, *Ceſſavit*, *Eſcheat*, *Waſte*, and the like. Co. Lit. 326. b.

This Writ lay not at Common Law, but was given by *Weſtm.* 2. *cap.* 1. Co. Lit. 21, 320. b. F. N. B. 471. And. 73. Plow. 239. b. 6 Co. 40. Moor 155. Vent. 299. & *vide* Title *Eſtates Tail.*

the (*a*) Form of which is ſet forth in the Statute; for at Common Law all Eſtates-tail were Fees-ſimple, Conditional, and the Donee, by having of Iſſue, might have aliened the Eſtate or forfeited it, in which Caſes the Iſſue had no Remedy; but when by this Statute, called the Statute *de donis conditionalibus*, the Donee was deprived of this Power, it was alſo neceſſary that the Iſſue ſhould have a Remedy againſt the Alienation or Diſcontinuance of his Anceſtor, and therefore the (*b*) Formedon in Deſcender was given.

(*a*) But tho' the Form of the Writ be ſet down, yet the Statute need not be recited, nor any other Statute which giveth the Form of the Writ. 2 Inſt. 336. (*b*) That where the Heir could not have an Aſſiſe of *Mortdanceſtor*, he might, according to his Special Caſe, have a Formedon in Deſcender at Common Law, but then he was to recover a Fee-ſimple. Plow. 239. *b. per Bendlow.* Co. Lit. 60. b.

F. N. B. 471. (*d*) That the Demandant may have one Formedon upon ſeveral Gifts. Cro. Jac. 330. *per Coke.*—But if *A.* makes a Gift of the Manor of *S.* to *B.* and the Heirs of his Body, and afterwards by another Deed gives ſixty Acres of Land to *B.* and the Heirs of his Body, upon the Death of *B.* without Iſſue, *A.* cannot have one Formedon in Reverter on theſe diſtinct Gifts. 8 Co. 86. b. (*e*) But the Writ againſt the Pernor of the Profits is given by the Statute of 1 H. 7. c. 1.

And therefore ſince this Statue upon (*d*) every Gift in Tail of Lands or Tenements, if the Anceſtor doth alien the Lands or Tenements, or be diſſeiſed or deforced thereof and dieth, he who is Heir unto the Lands, by Force of the Gift, ſhall have his Formedon in Deſcender againſt him who is Tenant of the Lands or Tenements, or (*e*) Pernor of the Profits of the ſame.

F. N. B. 478. So if Tenant in Tail hath Iſſue two Daughters, and one of them hath Iſſue a Son, and dies, and the Tenant in Tail dieth, and a Stranger abates, the ſurviving Daughter and Son ſhall have a Formedon in Deſcender.

F. N. B. 474. So if a Man gives Lands unto a Woman, and unto the Heirs which he himſelf ſhall beget on the Body of the ſaid Woman, and they have Iſſue between them two Daughters, and one of them hath Iſſue a Daughter, and dies, and after the Donor and Donee die, the Aunt and Niece ſhall join in a Formedon.

F. N. B. 474. If Tenant in Tail hath Iſſue two Sons, and dies, and the eldeſt Son enters and hath Iſſue and dies, and the Iſſue enters, and dies without Iſſue, the youngeſt Son of Tenant in Tail ſhall have his Formedon in Deſcender.

* Page 588 F. N. B. 476. *vide* Tit. *Coparceners.* * If Tenant in Tail hath ſeveral Daughters, and after his Death they enter and make Partition, if one of the Daughters after diſcontinues, and dies leaving Iſſue, ſuch Iſſue may have a Formedon in Deſcender.

Fitz. N. B. 476, 480. So if two Coparceners be Tenants in Tail by Deſcent from their Father or Mother, and afterwards they make Partition, and one Coparcener hath Iſſue and dies, and the other Coparcener dies without Iſſue, the Iſſue ſhall have a Formedon in Deſcender for the whole Land.

F. N. B. 476, So if Lands in *Gavelkind* be intailed, and deſcend to many Brethren as Heirs to their Father, and they make Partition betwixt them of the Lands, and afterwards one aliens his Part and dies, his Heir ſhall have a Formedon of that which they held in Parts.

Perk. Sect. 334. If Lands be given to two Men, and to the Heirs of the Body of one of them, and he who hath the Inheritance marries, and dies leaving Iſſue, ſuch Iſſue may, after the Death of him who hath the Freehold, bring a Formedon in Deſcender againſt a Stranger who abates, and alledge the Explees in his Father; for to ſuch an Intent the Eſtate-tail was executed in the Donee; but in this Caſe, it ſeems, that the Wife of the Donee who had the Inheritance in him ſhall not be endowed, becauſe the Eſtate-tail was not executed to all Purpoſes in the Huſband.

Co. Lit. 297. b. If Tenant in Tail diſcontinue in Fee, and dies, and the Diſcontinuee makes a Leaſe for Life, and grants the Reverſion to the Iſſue, he ſhall not

not have a Formedon againſt the Tenant for Life, for by his Formedon he muſt recover an Eſtate of Inheritance, which the Tenant hath not in him.

If in a Formedon in Deſcender the Demandant is barred by Verdict or on Demurrer, yet his Iſſue in Tail ſhall have a new Formedon on the Conſtruction of the Statute *Weſtm.* 2. So if he be barred of a Writ of Error by a Releaſe of Errors by his Anceſtor, yet he ſhall have a new Writ of Error; for he does not claim altogether as Heir, but *per formam doni*; and by the Statute he ſhall not be barred by the feint or falſe Pleading of his Anceſtor (*a*) ſo long as the Right of Intail remains. 6 Co. 7. b.

(*a*) That a Bar in a Formedon in Deſcender is a good Bar in any other Formedon in Deſcender brought upon the ſame Gift Co. Lit. 393. b.

2. Of the Formedon in Remainder.

This Writ lies where a Gift is made in Tail or for Life, Remainder in Tail or in Fee, and the Tenant in Tail or for Life aliens, or is diſſeiſed, and dieth without Iſſue, he in Remainder, or his Repreſentative, may bring their Formedon in Remainder. Lit. Sect. 597. F. N. B. 483.

This Writ, as it lies for him in Remainder after an Eſtate-tail, is grounded upon the Equity of the Statute *de donis*; for a Formedon in Remainder did not lie upon an Eſtate-tail at Common Law, becauſe it was a Fee-ſimple conditional, whereupon no Remainder could be limited, becauſe of the Danger of a Perpetuity, which was always againſt the Policy of our Law. 2 Inſt. 336. Booth 151.

But it ſeems, that by the better Opinion, a Formedon in Remainder lay after an Eſtate for Life; for this was an Intereſt well known long before the Statute *de donis*; yet others doubt hereof, and think, that in this Caſe it was given by the Statute of *Weſtm.* 2. *cap.* 24. made in the ſame Year, by which it is provided, *Quod quotieſcunque de cætero evenerit in cancell' quod in uno caſu reperit' breve, in conſimili caſu cadente ſub eodem jure & ſimili remedio indigente, concordent Clerici in Canc. in brevi faciend.* on which Words it is clearly agreed the Writ of Entry *in conſimili caſu* is grounded, which is (*b*) proper Writ for him in Reverſion or Remainder after an Eſtate for Life. F. N. B. 484. Booth 151. * Page 589

(*b*) That at this Day, if the Tenant for Life aliens, he in Remainder ſeldom or never brings either his Writ of Entry *in conſimili caſu*, in the Life-time of the Tenant for Life, or his Formedon after his Death, or Writ of Entry *ad Communem Legem*, but enters for the Forfeiture, and brings his Ejectment; but if the Alienee of the Tenant for Life die ſeiſed before the Entry of him in Remainder or Reverſion, his Entry in ſuch Caſe being taken away, this may be a proper Remedy. Booth 151-2.——[*Sed qu.* if an *Ejectment* will not lie, if brought within twenty Years?]

If Lands be given to *A.* for Life, and the Reverſion is afterwards granted to *B.* in (*c*) Tail, and after the Death of *A.* a Stranger abates, *B.* ſhall have a Formedon in Remainder, and not in the Reverter. F. N. B. 484. Dyer 125.

(*c*) But if it had been in Fee, *B.* muſt bring his Formedon in Reverter. F. N. B. 487.

If Lands be given to the Father and Son, and to the Heirs of their two Bodies begotten, Remainder over in Fee, and the Father dies leaving only one Son, who afterwards dies without Iſſue, and a Stranger abates, or the Eſtate had been diſcontinued, he in Remainder may have one Formedon, and need not bring ſeveral Writs. Dyer 143-5.

If a Remainder be once executed, that is to ſay, if the Remainder-Man be once ſeiſed of the Eſtate-tail in Poſſeſſion, and the Right deſcends to his Heirs, the Heir ſhall not have a Formedon in Remainder, but in the Deſcender; as if *A.* gives Lands to *B.* in Tail, Remainder to *C.* in Tail, F. N. B. 486, 487. 8 Co. 89. Booth 152.

B. dies without Iſſue, *C.* enters and aliens in Fee, and has Iſſue *D. D.* ſhall not have a Formedon in Remainder, becauſe *C.* his Father was ſeiſed, and the Right deſcended to him, but he ſhall have the general Writ of Formedon in Deſcender.

3. Of the Formedon in Reverter.

Lit. Sect. 596. F. N. B. 487. *vide* Dyer 199. pl. 55. where he in Reverſion

This Writ lies where the Donee in Tail or his Iſſue die without Iſſue, and a Stranger abates, or they who were ſeiſed by Force of the Intail diſcontinue the ſame; in either of theſe Caſes, the Donor or his Heirs may have a Formedon in Reverter.

muſt bring his Formedon, and cannot have a *Scire facias* to execute a Fine.

2 Inſt. 336. Plow. 235.

This Writ lay at Common Law; for though at Common Law the Eſtate-tail was a Fee-ſimple Conditional, ſo that by having of Iſſue, the Donee by Alienation, *&c.* might have barred the Poſſibility of the Donor's Right of Reverter, yet the having of Children was in the Nature of a Condition Precedent; and therefore if the Donee never had a Child, the Donor might bring his Formedon in Reverter, and recover againſt any Alienation or Diſpoſition of the Donee.

Page 590 * (B) Of what Things a Formedon will lie.

Co. Lit. 20. *vide* Tit. *Eſtates-tail*, Letter (A). 258.

IT ſeems that all ſuch Inheritances, as may be intailed, may be recovered in a Formedon, and that therefore it lies not only of Lands, but alſo of Rents, (*a*) Commons, Eſtovers, or other (*b*) Profits ariſing from Lands.

(*a*) But it is ſaid, that if one grants Common of Paſture to a Man and the Heirs of his Body, and the Donee dies, and the Heir is deforced of the Common, he ſhall not have a Formedon in Deſcender of the Common, but a *Quod permittat*, in the Nature of a Formedon, and ſhall count upon the Gift and ſpecial Matter. F. N. B. 472. (*b*) As if a Man grants the Moiety of the Profits ariſing out of his Mill unto another Man, and the Heirs of his Body, and the Donee dieth, and his Heir is deforced of the Profits, the Heir ſhall have a Formedon in the Deſcender for thoſe Profits. F. N. B. 471.—So if one grants to a Man, and the Heirs of his Body, Paſture for twenty Oxen, or for an hundred Sheep, *&c.* and the Donee die, and his Son, who is his Heir, is deforced thereof, he ſhall have a Formedon in the Deſcender. F. N. B. 471.

Rol. Abr 837. Plow. 2.

But no Formedon will lie for Things merely Perſonal, which only charge the Perſon, and neither Iſſue out of Land nor relate to it, and therefore cannot be demanded as a Tenement in a *Præcipe*; as if *A.* grants to *B.* and the Heirs of his Body, to be Maſter of his Hawks, or Keeper of his Hounds, with a Fee or Salary annexed to it, the Iſſue of *B.* cannot have a Formedon thereof.

Co. Lit. 60. *vide* Tit. *Copyhold.*

If there be a Cuſtom in a Manor, that Copyholds may be intailed, which co-operating with the Statute *de donis* is allowed to be good, the Iſſue in Tail may have a Formedon of ſuch Lands.

(C) How the Demandant muſt ſet forth his Title.

THE Demandant in a Formedon in the Deſcender muſt make himſelf Heir to him who was laſt ſeiſed by Force of the Intail, but he (*a*) need not mention an Anceſtor who happened to be Inheritable, but was never actually ſeiſed by Force of the Intail; as if there be Grandfather, Father and Son, and the Father dies in the Life-time of the Grandfather, the Son may bring his Formedon without alledging any Right in the Father. So if the Donee in Tail has two Sons, and the Eldeſt dies in his Life-time, the ſecond may, after the Death of his Father, bring his Formedon without taking Notice of the eldeſt Son.

Reg. 243. 8 Co. 87. Dyer 216. pl. 56. F. N. B. 477. Booth 143. Hetl. 78.

(*a*) Where in Formedon in Deſcender the Demandant made himſelf Heir unto every one that had been inheritable to the Intail, though by the Regiſter he ſhould make himſelf Heir only unto them that were ſeiſed by the Force of the Intail; yet the Writ was holden good, cited from the Year Book 11 H. 6. 20. Hob. 51, 52. But he muſt not fail to make himſelf Heir to all that were ſeiſed. Hob. 52.

So where in a Formedon in Deſcender the Demandant ſet forth, that the Right deſcended unto him as Brother and Heir to the Donee, without alledging that the Donee died without Iſſue; and it was held good; for he could not be Heir to his Brother unleſs the Brother had died without Iſſue.

Mod. 219. *Barrow* and *Haggett*. 2 Mod. 94. S. C. See 10 Mod. 140, 362, 367.

In Formedon in Reverter, the Demandant need not in his Writ or Count alledge, that all the Iſſue inheritable are dead; but it is ſufficient for him to ſay, that the Donee is dead without Iſſue; and that after his * Death it ought to revert to him, for he is (*b*) a Stranger to the Pedigree, and therefore not obliged to make it out.

* Page 591 Dyer 216. pl. 56.

Booth 155. Dyer 14. pl. 75, 19. pl. 90. (*b*) But in this Writ, none of the Anceſtors of the Donor, that were ſeiſed of the Reverſion deſcended, are to be omitted in the Pedigree. Booth 155.

So in a Formedon in Remainder, the Demandant need not alledge, that all the Parties are dead, for he is equally a Stranger, as in the precedent Caſe; and it is ſufficient for him to ſhew, that he who laſt inherited by Force of the Intail is dead without Iſſue.

Booth 155. 3 Lev. 218. Leon. 286. Brownl. 155.

So in a Formedon in Remainder upon an Eſtate-tail limited to *P.* and *K.* the Remainder to *F.* in Fee, *& que poſt mortem P.* and *K.* to *T.* Son and Heir of *F.* ought to remain; and the Writ was adjudged good without laying expreſly the Death of *F.* though it was urged that the Form of the Regiſter was ſo, becauſe the laying of *T.* to be Heir of *F.* doth import as much.

Hob. 51.

But in a Formedon in Remainder, it is not ſufficient for the Demandant to alledge, that the Iſſue in Tail is dead without Iſſue, without ſaying that the Tenant in Tail is alſo dead without Iſſue, for he in Remainder can have no Title unleſs the Eſtate-tail be ſpent; and it is not implied that becauſe the Iſſue is dead without Iſſue, that therefore the Tenant in Tail is, for he may have other Sons beſides his eldeſt.

5 Mod. 17. *per Holt* C. J.

Alſo if there be Tenant in Tail who hath three Sons, and the ſecond levies a Fine in the Life-time of his Father, and the Lands deſcend to the eldeſt, in whoſe Life-time the ſecond Son dies, although the youngeſt Son may, on the Death of the eldeſt, bring his Formedon in Deſcender, and lay down the Intail, and then bring it to his eldeſt Brother that was laſt ſeiſed, and make himſelf immediate Heir unto him without Mention of the

Hob. 333.

ſecond Brother; yet if the ſecond Son ſurvived the elder, the Tenant in the Formedon may plead the Fine of the middle Brother, and that he or his Iſſue did ſurvive, *&c.* and this will be a good Bar.

Hob. 1. Brownl. 154. S. C. In a Formedon in Deſcender by Huſband and Wife, in Right of the Wife, the Deſcent muſt be made in the Writ to the Wife alone, for the Deſcent followeth the Blood, and to that the Huſband is a Stranger.

F. N. B. 486, 487. Booth 153. In a Formedon in Remainder, the Demandant ought to ſhew the Deed of Gift, if *Oyer* be required thereof, but he need not mention it in his Count, but the Tenant is to demand *Oyer* thereof.

(D) Of the Tenant's Plea in Abatement or Bar.

Booth 28. (*a*) This Plea is founded on that Rule laid down by Bracton, l. 5. c. 27. *Amittere non poteſt quod non habet, & ita cadit breve.* THERE are ſeveral Pleas both in Bar and Abatement, which the Tenant may plead to this Action; ſuch as (*a*) Non-Tenure, which is a Plea in Abatement, and by which the Tenant ſhews that he is not Tenant of the Freehold, or of ſome Part thereof, at the Time of the Writ brought, or at any Time ſince; which is called Pleading Non-Tenure generally.

Booth 29. Special Non-Tenure is where the Tenant ſhews what Intereſt and Eſtate he hath in the Land demanded, as that he is Tenant for Years, in Ward, by Statute Merchant, Elegit, or the like; and therefore the Plea of Special Non-Tenure muſt always ſhew who is Tenant.

* Page 592 Brownl. 153. *Pit* ver. *Staple.* * In a Formedon in Deſcender againſt three, who plead Non-Tenure, and Iſſue thereupon joined, it was found ſpecially that two of them were Leſſees for Life, the Remainder to the third Perſon; and whether the three were Tenants, as the Writ ſuppoſed, was the Queſtion; and it ſeems by the Book, that they were, for they ſhould have pleaded ſeveral Tenancy, and then the Demandant might maintain his Writ.

Booth 29. Mod. 181. 2 Danv. Abr. 570. Ld. Raym. 229, 476. 10 Mod. 3, 142. 12 Mod. 512. At Common Law, Non-Tenure of Parcel of an intire Thing, as a Manor, *&c.* abated the whole Writ; but now by the 25 *E.* 3. *cap.* 16. it is enacted, "That by the Exception of Non-Tenure of Parcel, no Writ "ſhall be abated, but only for that Parcel whereof the Non-Tenure was "alledged."

Mod. 181. See the above Authorities. If the Tenant pleads Non-Tenure of the whole, he need not ſhew who is Tenant; but in a Plea of Non-Tenure of Parcel he muſt ſhew who is Tenant, and this even before the Statute; for the Common Law would not ſuffer a Writ good in Part, to be wholly deſtroyed, except the Tenant ſhewed the Demandant how he might have a better.

3 Lev. 55. *Barrow* and *Hagget.* The Tenant cannot, after a general Imparlance, plead Non-Tenure of Part, though he may plead Non-Tenure of the whole.

3 Lev. 330. *Hunlock* ver. *Peter.* 2 Lutw. 963. S. C. In a Formedon in Reverter it hath been adjudged, that if the Tenant pleads Non-Tenure generally, the Demandant may maintain his Writ that he is Tenant, though he can recover no Damages; and that *Littleton* and *Coke* were not to be intended of Simple Plea of Non-Tenure, but of Non-Tenure with a Diſclaimer, as the Pleadings were uſually in *Littleton*'s Time

Time; for upon the Simple Plea of Non-Tenure, ſuppoſing the Tenant hath no Freehold, but a Reverſion in Fee, the Demandant ſhall not be reſtored to the Fee, for nothing is diſowned by the Simple Plea of Non-Tenure but only the Freehold; which may be true, and yet he may have the Reverſion in Fee; but when the Tenant diſclaims, or pleads Non-Tenure and diſclaims, the Demandant ſhall be reſtored to the whole, becauſe he hath diſclaimed the whole.

A Feoffment and Lineal Warranty, with Aſſets, by Deſcent, may be pleaded in Bar to a Formedon in the Deſcender. So a collateral Warranty, without Aſſets, before the Statute 4 & 5 *Ann. c.* 16. *ſ.* 21. might be pleaded in Bar to ſuch a Formedon. 2 Inſt. 291. Booth 163. *vide* Tit. *Warranty.*

So a common Recovery may be pleaded in Bar to a Formedon in Remainder or Reverter, either with double or ſingle Voucher; with ſingle, if the Tenant to the Writ were ſeiſed of the Eſtate-tail at the Time of the Recovery; with double Voucher, though he were not ſeiſed. Booth 164. *vide* Tit. *Fines and Recoveries.*

In a Formedon the Tenant may plead in Bar an Exchange between the Anceſtor of the Demandant and he under whom the Tenant claims, and that the Demandant entered into the Lands given in Exchange, and takes the Profits; and an Alienee may plead this Plea, though he be a Stranger, for he is privy in Eſtate. Booth 165.

Non dedit, i. e. no ſuch Intail, is a good Plea in Bar of all Formedons, and it may be pleaded by the Vouchee. Co. Ent. 322. b. Booth 163.

To a Formedon in Remainder may be pleaded in Bar an Eſtate-tail, made by another long before the Donor in the Count had any Thing, and that the Tenants are Heirs to the firſt Intail. Booth 164.

A Remitter may be pleaded in Bar, as thus; that the Donee was ſeiſed in Fee, and being an Infant made a Feoffment to the Donor, who gave the Land to the Infant in Tail, by which he was remitted, whoſe Eſtate the Tenant hath. Booth 164.

If in a Formedon in Remainder the Tenant pleads Infancy, and that the Remainder deſcended to him, and prays his Age; and the Demandant pleads that the Remainder did not deſcend to him, and thereupon Iſſue is joined, and found for the Demandant, a Final Judgment ſhall be given notwithſtanding the Infancy of the Tenant. Lev. 163. *Amcot* ver. *Amcot.* Sid. 118. 252. S. C. But ſo forthis *vide* Tit. *Infancy and Age.*

* The Tenant may plead, that the Demandant, at the Day of the Purchaſe of the Writ, was (*a*) ſeiſed of the Lands for which the Formedon was brought, but in ſuch Plea he muſt ſhew of what Eſtate. *Page 593 Winch 23. Dyer 137. *b.* pl. 26.

(*a*) That if the Demandant enters into any Part of the Land after the Writ purchaſed, this falſifies his Writ; and therefore the Writ ſhall abate for the Whole. Lutw. 29.——That if the Tenant pleads Entry into Part pending the Writ, he ought to ſay that he entered and expelled the other. Winch 23.

It is held as a Rule, that nothing can be pleaded in Abatement to this Action after a View, but what ariſes upon the View. 3 Lev. 219.

Fraud.

Co. Lit. 3. b. (a) My Lord *Coke* defines Covin to be a ſecret Aſſent, determined in the Hearts of two or more, to the Defrauding and Prejudice of another. Co. Lit. 357.

FRAUD (a) Covin, Colluſion and Deceit, are often uſed as ſynonymous Words, and in whatever Shape or Form they appear, are always deemed odious in the Eye of the Law.

But for the better Underſtanding hereof we ſhall conſider,

(A) What Acts are condemned in the Common Law Courts as fraudulent, though not within the expreſs Proviſion of any Act of Parliament. 594.

(B) What Acts are deemed fraudulent in the Courts of Equity. 597.

(C) Of fraudulent Conveyances and Deviſes, &c. to defeat Creditors and Purchaſers within the 13 & 27 Eliz. & 3 W. & M. &c. 601.

(D) In what Court Fraud is cogniſable. 610.

(E) Where a Wrong-doer is farther puniſhable than by making void the fraudulent Act. 611.

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* Page 594

* (A) What Acts are condemned in the common Law Courts as fraudulent, though not within the expreſs Proviſion of any Act of Parliament.

Co. Lit. 3. b. Dyer 295. (a) As to the moſt remarkable Statutes againſt Fraud and Impoſition, *vide* the Statute of *Merton*, or 20 H. 3. c. 5. againſt the Lord's Enfeoffing his Son and Heir apparent to defeat the King of his Wardſhip; and the Statute 4 H. 7. c. 17. to the ſame Purpoſe, the Statute of *Glouceſter*, or 6 E. 1. c. 11. for ſecuring the Intereſt of Termors againſt Recoveries by Fraud; but more particularly the 21 H. 8. c. 15. which enables Termors to falſify Recoveries againſt their Leſſors. *Weſtm.* 2. or 13 E. 1. c. 4. for ſecuring the Wife's Dower againſt a fraudulent Recovery ſuffered by the Huſband. 9 R. 2. c. 3. 13 R. 2. c. 12. 32 H. 8. c. 38. for ſecuring the Intereſt of Reverſioners againſt Recoveries ſuffered by Fraud

HERE it may be laid down as a general Rule, that without the expreſs Proviſion of any (a) Act of Parliament, all deceitful Practices in defrauding or endeavouring to defraud another of his known Right, by means of ſome artful Device, contrary to the plain Rules of common Honeſty, are condemned by the Common Law, and puniſhable according to the Heinouſneſs of the Offence.

Such

Such as (*b*) causing an illiterate Person to execute a Deed to his Prejudice, by reading of it over to him in Words different from those in which it was written. Sid. 312.

(*b*) So if one persuades a Woman to execute Writings to another as her Trustee, upon an intended Marriage, which in Truth contained no such Thing, but only a Warrant of Attorney to confess a Judgment, &c. Sid. 431.——So if he suppress a Will. Noy 103.——Or levies a Fine in another's Name. Noy 99. Moor 630. Cro. Eliz. 531. Mod. 46. 2 Jon. 64.——If he sues out Execution upon a Judgment obtained by another Person. Noy 99.——Or if he acknowledges an Action in the Name of another, without his Privity and against his Will. Noy 99.——In which Cases the Record may be vacated, and also the Wrong-doer punished by Information or Indictment, and obliged to answer in Damages, to the Party injured, by an Action on the Case. Salk. 379. pl. 25. Hawk. P. C. 187-8. 2 Ld. Raym. 1013. 6 Mod. 42, 61, 104, 301, 311. 7 Mod. 40. Salk. 285. pl. 20.

Also it is a Rule, that a wrongful (*c*) Manner of executing a Thing shall avoid a Matter that might have been executed lawfully. Co. Lit. 35.

(*c*) Where a Person by adding a Seal to a Note, which was sufficient without a Seal, lost his Security. 2 Vern. 162.

As if a Man, that has a Right of Action to certain Lands, by Covin causes another to oust the Tenant of the Land to the Intent to recover it from him; and he recovers accordingly against him by Action tried, yet he shall not be remitted to his ancient Right, but is in of the Estate of him who was the Ouster. 41 Ass. 28. 44 Ass. 29. Rol. Abr. 420, 549. Co. Lit. 357. Poph. 64, 100.

So if one Man disseises another of Land, to which a Woman hath Title of Dower by Covin, and with Consent of the Woman, to the Intent to endow her, and he endows her in the (*d*) Country accordingly, yet this is of no Effect against the Disseisee, but he may oust him because of the Covin. 44 Ass. 29. Rol. Abr. 549.

(*d*) The same Law, though the Endowment was upon a Recovery against him in a Writ of Dower, because of the Covin. 44 Ass. 29. Rol. Abr. 549.——And although the Assignment was indifferently made by the Sheriff of an equal third Part, yet shall the Disseisee avoid it. Co. Lit. 357. b. 3 Co. 78. 5 Co. 31. a. 6 Co. 58. 8 Co. 132. b.

If Goods are sold in a Market-overt, by Covin, between two, on Purpose to bar him that has a Right, this shall not bar him thereof. 2 Inst. 713. Cro. Eliz. 86.

* As to Frauds in Contracts and Dealings, the Common Law subjects the Wrong-doer in several Instances, to an Action on the Case; as if a Person having the Possession of Goods sells them to another, (*e*) affirming them to be his own, when in Truth they are another's, an Action on the Case lies. *Page 595 Rol. Abr. 90. Cro. Jac 474. But for this *vide* Tit. *Actions on the Case*, Letter (F.)

(*e*) That the having the Goods in his Possession is a Warranty in Law, that they belong to him. Salk. 210. pl. 2. Ld. Raym. 593.

But if *A.* possessed of a Term for Years, offers to sell it to *B.* and says, that a Stranger would have given him twenty Pounds for this Term, by which Means *B.* buys it, though in Truth *A.* was never offered twenty Pounds, no Action on the Case lies, tho' *B.* is hereby deceived in the Value. Rol. Abr. 91, 101. Sid. 146. Yelv. 20. S.P.

And that in these Cases it was the Plaintiff's Folly to believe him.

Fraud by particular Tenants, such as Tenant for Life, Dower, Curtesy, and after Possibility of Issue extinct. 5 E. 3. c. 6. and 2 R. 2. c. 3. for securing Creditors against such as take Sanctuary. 1 R. 2. c. 9. against fraudulent Feoffments to Persons unknown. 3 H. 7. c. 2. which makes Deeds of Gift of Goods or Chattels, in Trust for the Maker, void. 33 H. 8. c. 1. & 30 Geo. 2. c. 24. against obtaining Money or Goods by false Tokens. The 13 Eliz. c. 5. 27 Eliz. c. 4. 29 Car. 2. c. 3. 3 & 4 W. 3. c. 14. 4 & 5 W. 3. c. 16. 10 Ann. c. 23. against fraudulent Conveyances to multiply Votes at Elections of Knights of the Shire, and the Statutes against Frauds by Persons becoming Bankrupts, for which *vide* Tit. *Bankrupt*

Salk. 211. pl. 3. *Riſney* and *Selby*. Lev. 102. Sid. 146. Keb. 510, 518, 522. S. P. adjudged.

But if on a Treaty for the Purchaſe of a Houſe, the Defendant affirms the Rent to be thirty Pounds *per Ann.* whereas in Truth it is but twenty Pounds, and thereby the Plaintiff is induced to give ſo much more than the Houſe is worth, an Action on the Caſe lies; for the Value of the Rent is Matter that lies in the private Knowledge of the Landlord and Tenant, and if they affirm the Rent to be more than it is, the Purchaſer is cheated, and ought to have a Remedy for it.

11 H. 6. 18. F. N. B. 96. Dyer 75. *in Margine.*

If a Vintner ſells (*a*) Wine, which he warrants to be ſound and not corrupted, or if a Perſon ſells any (*b*) Commodity which he warrants to be good, if it proves otherwiſe, an Action on the Caſe lies againſt him.

(*a*) That if the Servant of a Taverner ſells Wine to another which is corrupted, an Action upon the Caſe lies againſt the Maſter tho' he did not command the Servant to ſell it to any particular Perſon. 9 H. 6. 53. Rol. Abr. 95.———But if a Servant ſells an unſound Horſe, or other Merchandize, in a Fair, no Action lies againſt the Maſter, unleſs he commanded him to ſell to a particular Perſon. 9 H. 6. 53. Rol. Abr. 95. Poph. 143. Bridgm 128.———But it ſeems, that in theſe Caſes no Action lies againſt the Servant. Rol. Abr. 95.———So if an Attorney, in an Action of Debt, knows of and was a Witneſs to a Releaſe of the Debt, made before the Action brought for it, yet no Action lies againſt the Attorney, for he acted only as a Servant, and in the Way of his Calling. Mod. 209.† (*b*) So an Action on the Caſe lies againſt a Goldſmith for mingling Droſs with his Plate. Cro. Jac. 471. 2 Rol. Rep. 28.———So againſt a Jeweller for ſelling counterfeit Jewels. 2 Rol. Rep. 5, 26, 27. Poph. 123, Cro. Jac. 469. S. C.———So for ſelling Silk of ſuch a Nature, whereas it was of a different Kind. Salk. 289. pl. 27.———So on a Promiſe to deliver ten Pots of good and merchandizable Pot Aſhes, and delivering Pot Aſhes mixed with Dirt. Vent. 365.

† *Sed qu.*

Sid. 298. *Huſſy* and *Pacy*. 2 Keb. 88. S. C. Lev. 188. S. C. adjudged, tho' objected it was not laid to be done *ea intentione* to damnify the Plaintiff; for let *C.* intend *quicquid velit*, *A.* was damnified thereby. Rol. Abr. 105. Like Point.

If *A.* is employed by *B.* to ſail from *England* to the *Indies*, and *A.* covenants that he or his Servants will not thence import any *Callicoes*, *&c.* and *A.* retains *C.* as his Servant in this Voyage, and acquaints him with the Covenants; and notwithſtanding *C.* falſly and fraudulently brings thence certain *Callicoes*, *&c. A.* ſhall have an Action againſt *C.* for though no Action lies by a Maſter for a bare Breach of his Command, yet if a Servant does any Thing falſly and fraudulently to the Damage of his Maſter, an Action will lie.

Rol. Abr. 100. *Harris's* Caſe. Cro. Eliz. 838. S. C.

If *A.* be excommunicated, and the Letters of Excommunication are brought to the Parſon of the Pariſh to be read and publiſhed in the Church againſt *A.* and the Parſon having Malice to *B.* inſerts his Name inſtead of the Name of *A.* and pronounces him excommunicated, an Action on the Caſe lies.

Rol. Abr. 100, 101. Cro. Car. 325. S. C.

If a Man chaſes the Cattle of another into the Lands of *J. S.* whereby he is ſubject to the Action of *J. S.* an (*c*) Action on the Caſe lies againſt him.

(*c*) So if one Perſon affirms that another's Sheep are Strays, by which they are ſeiſed upon by the Bailiff of the Manor, an Action on the Caſe lies. Allen 3. Rol. Abr. 101.

* Page 596

Carth. 3, 4. *Smith* and *Tonſtall*, adjudged in *B. R.* and affirmed in the Houſe of Lords.

* If *A.* hath Judgment againſt *B.* and *J. S.* with an Intent to defeat him of the Benefit of it, perſuades *B.* to acknowledge a Judgment to a Stranger, to whom in Truth he owed nothing, and thereupon his Goods are taken in Execution, *&c. A.* may bring an Action on the Caſe againſt *J. S.* on this Fraud and Combination.

If Land be aliened pending a Writ of Debt, by Covin, to avoid the Extent thereof for the Debt; yet when the Covin appears upon the Return of the *Elegit* by the Sheriff, the Land ſo aliened ſhall be extended. Rol. Abr. 549.

If a Man makes a Feoffment to the Uſe of his Son, an Infant, and not in Conſideration of Marriage, &c. and ten Days afterwards commits Treaſon, of which he is attainted, this Land ſhall be forfeited; for the Feoffment was fraudulent againſt the King. 2 Rol. Abr. 34.

But if the Feoffment had been made in Purſuance of an Agreement entred into before, by which it was agreed, in conſideration of his Wife's ſettling her Lands in ſuch Manner, that he would alſo ſettle his Lands on his Son; this it ſeems is not fraudulent, but good againſt the King. 2 Rol. Abr. 34.

A. being in *Newgate* for a Robbery makes a Bill of Sale of all his Goods, to the Intent to make a Proviſion for his Son, and is afterwards convicted and executed; and in an Action of Trover brought by the Son againſt the Sheriff of *London*, it was held by *Holt* Ch. Juſt. that the Bill of Sale was fraudulent; for though a Sale *bona fide*, and for valuable Conſideration, had been good, becauſe the Party had a Property in the Goods till Conviction, and ought to be reaſonably ſuſtained out of them, yet this (*a*) Conveyance is fraudulent at Common Law, for it cannot be intended to any other Purpoſe than to prevent a Forfeiture, and defraud the King. Skin. 357. pl. 4. *Jones* and *Aſburt.*

(*a*) That if a Man aliens his Lands fraudulently, with an Intent to prevent a Forfeiture, and afterwards commits Felony, the Land ſhall be forfeited. Rol. Abr. 34.

A Man takes a Wife, and afterwards marries another, his firſt Wife living, and by Deed gave Part of his Goods to his pretended ſecond Wife; it ſeems this is a fraudulent Gift within 13 *Eliz. c.* 5. and by the Common Law too, in reſpect of Creditors, becauſe made without any valuable Conſideration; for the ſecond pretended Marriage is ſo far from coming under the Notion of a Conſideration, that it is a Crime puniſhable by Law. 2 Leon. 223.

A Man has a Judgment for a juſt Debt againſt *A.* and takes out a *Fieri facias*, and gets the Sheriff to ſeize the Goods, but would not let him proceed further, but ſuffered the Goods to remain in the Cuſtody of *A.* the Debtor, *B.* who has alſo a Judgment againſt *A.* for a juſt Debt, takes out a *Fieri facias*; and the Queſtion was, whether he could ſeize upon the ſame Goods; and it was held *per Cur'*, that he might, for the former was a fraudulent Execution, and the Sheriff might very well return *Nulla bona* upon it. Farefl. 37. *Rice* and *Serjeant.* Ld. Raym. 555, 1072, 1075. 2 Vern. 239. Comyns 35. pl. 24.

Stra. 226, 461. 2 Will. Rep. 91. pl. 22. Forteſc. 373. Stra. 515.

If there be Judgment in Debt againſt *J. S.* and he ſuffers himſelf to be (*b*) outlawed for Felony with an Intent to defraud his Creditors, and afterwards he purchaſes his Pardon and hath Reſtitution, the Creditor may well take out Execution for this apparent Fraud. Dyer 245. b. *in Margine.*

(*b*) Where a Priſoner in the *Fleet*, at the Suit of divers Creditors, procured himſelf to be accuſed of Felony, and to be removed to the *King's Bench*, with an Intent to plead Guilty, and after the Allowance of Clergy, to get quit; and the King being informed of this Practice, by his Privy Seal directed the Juſtices not to proceed on his Arraignment, without farther Directions from him. Dyer 247.

A Man comes by *Habeas Corpus* out of *London*, and had no Cauſe to have the Privilege of the Common Pleas, but by his Covin; it was ordered, that he ſhould be in Execution till he had paid the Debt recovered againſt him after the * Writ brought, and that after he ſhould be remanded to anſwer the Plaintiffs there. * Page 597

39 H. 6. 50. b. Rol. Abr. 549. Cro. Car. 128.

Hence it appears, that the making Uſe of the Proceſs of the Law is not only a Fraud, but an Aggravation of the Offence; as if a Perſon intending 2 Inſt. 108. H. P. C. 63.

Kelynge 43, 81. Cro. Jac. 254. Raym. 267.

to ſteal a Horſe takes out a Replevin, and thereby has the Horſe delivered to him by the Sheriff; or if one intending to rifle Goods, gets Poſſeſſion from the Sheriff, by virtue of a Judgment obtained, without any the leaſt Colour of Title, upon falſe Affidavits, &c.

H. P. C. 48. Hawk. P. C. 81.

If *A.* on a Quarrel with *B.* tells him, that he will not ſtrike him, but that he will give *B.* a Pot of Ale to ſtrike him, and thereupon *B.* ſtrikes, and *A.* kills him, he is guilty of Murder, for he ſhall not elude the Juſtice of the Law by ſuch a Pretence to cover his Malice.

Hawk. P. C. 81.

So if *B.* challenge *A.* and *A.* refuſe to meet him; but, in order to evade the Law, tells *B.* that he ſhall go the next Day to ſuch a Town about his Buſineſs, and accordingly *B.* meets him the next Day in the Road to the ſame Town, and aſſaults him, whereupon they fight, and *A.* kills *B.* he ſeems guilty of Murder, unleſs it appear by the whole Circumſtances, that he gave *B.* ſuch Information accidentally, and not with a Deſign to give him an Opportunity of fighting.

Kelynge 24, 81. Show. 50, 51. That this at Common Law was not clearly Felony, for 3 & 4 W. & M. c. 9. was made in Aid of it, as by this Statute it is made Felony.

If a Perſon takes a Lodging in a Houſe, under the Colour thereof to have the Opportunity of rifling it, and to elude the Juſtice of the Law, by endeavouring to keep out of the Letter of it, by gaining a Poſſeſſion of the Goods with the Conſent of the Owner, he ſeems to be as guilty of Felony as any other Felon, in as much as his whole Intention was to defraud the Law.

(B) What Acts are deemed fraudulent in the Courts of Equity.

4 Inſt. 84. See of the Juriſdiction of the Court of Chancery, Tit. *Courts.*

IT is clearly agreed, that all Covins, Frauds and Deceits, for which there is no Remedy by the ordinary Courſe of Law, are properly cogniſable in Equity; and it is admitted, that Matters of Fraud were one of the chief Branches to which the Juriſdiction of Chancery was originally confined.

But as every Caſe on this Head depends ſo much upon its own Circumſtances, it will be difficult to range them in any other Order than by inſerting the moſt remarkable Caſes where the Parties have been relieved againſt Fraud and Impoſition.

Preced. Chan. 35. *Rawlinſon* ver. *Potts.* 2 Vern. 239. S. C. and affirmed in the Houſe of Lords.

As where *A.* being Tenant in Tail, Remainder to his Brother *B.* in Tail, *A.* not knowing of the Intail, makes a Settlement on his Wife for Life for her Jointure, without levying a Fine, or ſuffering a Recovery, which *B.* who knew of the Intail engroſſes, but does not mention any Thing of the Intail, becauſe, as he confeſſed in his Anſwer, if he had ſpoke any Thing of it, his Brother, by a Recovery, might have cut off the Remainder, and barred him; and although after the Death of *A.* *B.* recovered in Ejectment againſt the Widow by Force of the Intail; yet ſhe was relieved in Chancery, and a perpetual Injunction granted for this Fraud in *B.* in concealing the Intail, which if it had been diſcloſed, the Settlement might have been made good by a Recovery.

2 Vern. 150. *Hundſden* and *Cheney.*

So where a Mother being abſolute Owner of a Term, the ſame being limited to her in Tail, is preſent at a Treaty for her Son's Marriage, and hears her Son declare, that the Term was to come to him at his Mother's Death, and is a Witneſs to the Deed, whereby the Reverſion of the Term * is ſettled on the Iſſue of this Marriage after the Mother's Death, and ſhe was compelled in Equity to make good the Settlement.

* Page 598

Fraud.

If *A.* by a Marriage-Settlement be Tenant for Life of certain Mills, Remainder to his firſt Son in Tail, and the Son, who knows of the Settlement, encourages a Perſon to take a Leaſe for thirty Years of thoſe Mills, and to lay out conſiderable Sums of Money in new building and improving them, in order to reap the Advantage thereof after his Father's Death; this is ſuch a Fraud and Practice, as ought to be diſcountenanced in Equity, and therefore it was decreed in this Caſe, that the Leſſee ſhould enjoy for the Reſidue of the Term that remained unexpired after the Father's Death. Abr. Eq 357. *Haning* and *Ferrers.*

So where a younger Brother, having an Annuity of 100 *l. per Annum* charged on Lands by his Father's Will, agrees with *J. S.* to ſell it to him, which *J. S.* is encouraged to purchaſe by the elder Brother, who told him, that though he had heard that there was a Settlement which had intailed thoſe Lands out of which it iſſued, that yet he had conſtantly paid this Annuity, as alſo 3000 *l.* charged by the ſame Will to his Siſters; and the elder Brother afterwards getting the Settlement into his Hands, and endeavouring thereby to avoid Payment of this Annuity, it was decreed in Favour of the Purchaſer, that the Annuity ſhould ſtill be paid purely on the Encouragement given by the elder Brother. Vern. 136. *Hobbs* and *Norton.*

So where Lands in Mortgage running through three Deſcents, and the Perſon intitled to redeem, not knowing how much was due for the Intereſt, is informed by the Heir of the Mortgagee, that it was conſiderably leſs than really it was; whereupon he ſettles it upon his Marriage, as ſubject only to ſo much; and it was decreed, that thoſe who derive under this Settlement ſhould redeem accordingly, without being obliged to pay the Sum concealed, for the Fraud. Preced. Chan. 131. *Barret* and *Wells.*

If *A.* has a prior Incumbrance on an Eſtate, and is a Witneſs to a ſubſequent Mortgage, but does not diſcloſe his own Incumbrance; this is ſuch a Fraud in him, for which his Incumbrance ſhall be poſtponed. 2 Vern. 151. *Clare* and the Earl of *Bedford*, cited to have been decreed.

So where a Counſel having a Statute from *A.* adviſes *B.* to lend *A.* 1000 *l.* on a Mortgage, and draws the Mortgage, with a Covenant againſt all Incumbrances, and conceals his own Statute; and it was held, that the Statute ſhould be poſtponed to the Mortgage. Vern. 370. *Draper* ver. *Borlace.*

So if *A.* being about to lend Money to *B.* on a Mortgage, ſends *C.* to enquire of *D.* who had a prior Mortgage, whether he had any Incumbrance on *B.*'s Eſtate, if it be proved that *C.* went to him accordingly, and that *D.* denied that he had any, *D.*'s Mortgage ſhall be poſtponed. 2 Vern. 554. *Ibbotſon* ver. *Rhodes.*

So if *A.* having a *Mortgage* on a Leaſehold Eſtate, lends the Mortgage Deed to the Mortgagor, with an Intention to borrow more Money; this is ſuch a Fraud in the Mortgagee, for which his Mortgage ſhall be poſtponed to the ſubſequent Incumbrance. 2 Vern. 726. *Peter* and *Ruſſel.* Abr. Eq. 321. S. C.

The Plaintiff's Wife before her Intermarriage with the Plaintiff, being poſſeſſed of a Term for Years, as Executrix to her firſt Huſband, and which was liable as Aſſets, to the Payment of his Debts, in order thereto, and to raiſe Money for that Purpoſe, the Plaintiffs after their Marriage entered into an Agreement with the Defendant for Sale of the Houſe in Queſtion, for the Reſidue of the Term, for 450 *l.* whereof 210 *l.* was to be applied in Diſcharge of a Mortgage thereon to one *J. S.* and the remaining 240 *l.* was to be paid to the Plaintiffs; accordingly the Plaintiffs executed an Aſſignment of the Houſe to the Defendant, with a Receipt indorſed thereon for the whole Purchaſe-money, but the Defendant did not then pay the Purchaſe-money, but gave a Note for the Payment of 210 *l.* Part thereof to *J. S.* the Mortgagee, and of the remaining 240 *l.* to the Plaintiffs; and for the Non-payment thereof the Plaintiffs brought * their Bill to have a Specific Performance and Payment of the Money accordingly; Abr. Eq. 357. *Beatniff* and *Smith.*

* Page 599

cordingly; the Defendant, by his Anſwer, admitted the whole Caſe to be as above ſet forth; but inſiſted, that he ought not to be bound thereby, for that the Plaintiffs could not make him a good Title, they having by Articles before Marriage agreed to ſettle this Houſe for the Benefit of themſelves and their Iſſue, of which he had no Notice at the Time of his Purchaſe; and for a Diſcovery of theſe Articles, and to have up his Note on a Re-aſſignment of the Houſe, the Defendant brought his Croſs-Bill. The Plaintiffs by their Anſwer admitted there were ſuch Articles, but inſiſted, that the Houſe lying in *Middleſex*, thoſe Articles were never regiſtered in the *Middleſex* Office, and therefore void as againſt the Plaintiff; but on a Hearing at the *Rolls*, the Maſter of the *Rolls* decreed the original Bill to ſtand diſmiſſed with Coſts; and on the Croſs-Bill decreed the Note given for the Purchaſe-money to be delivered up on a Re-aſſignment of the Houſe, and the Plaintiff in that Cauſe likewiſe to have his Coſts, by Reaſon of the Plaintiff's Fraud in concealing the Articles; which Decree was affirmed by my Lord Chancellor.

Abr. Eq. 358. *Blades* and *Blades*.

So in a Caſe between two Purchaſers of Lands in *Yorkſhire*, where the ſecond Purchaſer having Notice of the firſt Purchaſe, but that it was not regiſtered, went on and purchaſed the ſame Eſtate, and got his Purchaſe regiſtered; yet it was decreed, that having Notice of the firſt Purchaſe, though it was not regiſtered, bound him, and that his getting his own Purchaſe firſt regiſtered was a Fraud, the Deſign of thoſe Acts being only to give the Parties Notice, who might otherwiſe without ſuch Regiſtry be in Danger of being impoſed upon by a prior Purchaſe or Mortgage, which they are in no Danger of when they have Notice thereof in any Manner, though not by the Regiſtry.

Preced. Chan. 3. *Deveniſh* and *Baines*.

If a Copyholder, by his Will intending to give the greateſt Part of his Eſtate to his Godſon, and the other Part to his Wife, is perſuaded by the Wife to nominate her to the Whole, on a Promiſe that ſhe would give the Godſon the Part deſigned for him; it will be decreed againſt the Wife on the Point of Fraud, though there was no *Memorandum* thereof in Writing purſuant to the Statute of Frauds and Perjuries.

Abr. Eq. 20. *Halfpenny* and *Mallet*. 2 Vern. 373. S. C.

So where the Defendant, on a Treaty of Marriage for his Daughter with the Plaintiff, ſigned a Writing comprifing the Terms of the Agreement, and afterwards deſigning to elude the Force thereof, and get looſe from his Agreement, ordered his Daughter to put on a good Humour, and get the Plaintiff to deliver up that Writing, and then marry him, which ſhe accordingly did, and the Defendant ſtood by, at a Corner of a Street, to ſee them go by to be married; and the Plaintiff was relieved on the Point of Fraud.

Abr. Eq. 19. *& vide* Tit. *Agreements* Letter (C.)

There are likewiſe ſeveral other Inſtances, where a Parol Agreement intended to be reduced into Writing, but prevented by Fraud, has been decreed in Equity, notwithſtanding the Statute of Frauds and Perjuries; as where upon a Marriage-Treaty, Inſtructions were given by the Huſband to draw a Settlement, which he privately countermanded, and afterwards drew in the Woman by Perſuaſions and Aſſurances of ſuch Settlement to marry him; and it was decreed that he ſhould make good the Settlement.

Abr. Eq. 20.

So where a Parol Agreement was concerning the Lending of Money on a Mortgage, and the Conveyance propoſed was an abſolute Deed from the Mortgagor, and a Deed of Defeaſance from the Mortgagee, and after the Mortgagee had got the Deed of Conveyance, he refuſed to execute the Defeaſance; and it was decreed againſt him on the Point of Fraud.

Preced. Chan. 4. *Chamberlain*'s Caſe cited to have been decreed.

If a Son and Heir apparent perſuades his Father not to make a Will which he intended to have made, and which was to contain Proviſions for his younger Children, promiſing to do for them himſelf; this is ſuch a * Fraud, for which Equity will decree the Heir to give them ſuch Proviſions himſelf.

* Page 600

So where Tenant in Tail is prevented by the Iſſue in Tail from ſuffering a Recovery in order to provide for younger Children, by his promiſing to do for them himſelf, Equity will compel him to do it after his Father's Death. Preced. Chan. 5.

If a Mother having a Right to Dower, to encourage a Marriage of her Son to *A. B.* releaſes her Dower, and the Releaſe is ſhewn to the Wife and her Relations, it ſhall bind the Mother, though the Releaſe was obtained by (*a*) a fraudulent Suggeſtion. 2 Vern. 133.

(*a*) That a Releaſe ſhall be avoided in Equity whenever there is *Suppreſſio veri* or *Suggeſtio falſi*. Vern. 19, 20, 31, 32.

If a Man charges Lands in *D.* with a Portion for a Daughter by a firſt Venter, and then marries, and ſettles Part of thoſe Lands for the Jointure of a ſecond Wife, who has no Notice of the Charge, and *A.* believing that the Portion would take Place of the Jointure, by Will gives other Lands in Lieu thereof, and the Wife combines with her Son, who is Heir to *A.* to defeat his Settlement and Proviſion on the Daughter, by adhering to her Jointure, and inſiſting, that the Proviſion on the Daughter was voluntary and fraudulent as to her; and that therefore ſhe was not bound to accept of the Deviſe; the Daughter will be relieved in Equity. Vern. 219. *Reeve* and *Reeve*.

A Widow makes a (*b*) Deed of Settlement of her Eſtate, and marries a ſecond Huſband, who was not privy to ſuch Settlement; and it appearing to the Court, that it was in Confidence of her having ſuch Eſtate, that the Huſband married her, the Court ſet aſide the Deed as fraudulent. 2 Chan. Rep. 81. *Howard* and *Hooker*.

(*b*) So where the intended Wife, the Day before her Marriage, entered privately into a Recognizance to her Brother; and it was decreed to be delivered up. 2 Chan. Rep. 79.—But where a Conveyance or Settlement ſhall be ſaid to be fraudulent, and in Derogation of the Rights of Marriage, *vide* 2 Vern. 17.

But where a Widow, before her Marriage with a ſecond Huſband, aſſigned over the greateſt Part of her Eſtate to Truſtees, in Truſt for Children by her former Huſband; and though it was inſiſted, that this was without the Privity of the Huſband, and done with a Deſign to cheat him, yet the Court thought that a Widow may thus provide for her Children before ſhe put herſelf under the Power of a Huſband; and it being proved that 8000 *l.* was thus ſettled, and that the Huſband had ſuppreſſed the Deed, he was decreed to pay the whole Money, without directing any Account. Vern. 408. *Hunt* and *Mathews*.

A. failing in his Trade compounded with his Creditors at ſo much in the Pound, to be paid at the Time therein mentioned; and he having failed in Payment at the preciſe Time, ſome of the Creditors refuſed to ſtand to the Agreement, which being under Hand and Seal, he brought his Bill to compel a Performance thereof; but it appearing in the Cauſe that *A.* to draw in the reſt of the Creditors, had made an under-hand Agreement with ſome of them, who were ſeemingly to accept of the Compoſition, to pay them their whole Debts, which being a Fraud and Deceit upon the reſt of the Creditors, the Court would not decree the Agreement, nor relieve the Plaintiff, but diſmiſſed the Bill. 2 Vern. 71. *Child* and *Danbridge*.

So where *A.* being intruſted by *B.* to receive Intereſt on Tallies, receives the Principal and fails, and afterwards compounds with his Creditors, but *B.* would not come in, without having a greater Compoſition, which *A.* agrees to give, and *A.* brought his Bill to be relieved againſt this under-hand Agreement; but he having been guilty of a Breach of Truſt, and alſo a Party to the Fraud, the Court refuſed to give him any Relief. 2 Vern. 602. *Smal* and *Brackley*.

* If a Security be obtained from a Perſon by Fraud and Practice, upon a Pretence of a Demand that is fictitious, it will be relieved againſt in Equity. * Page 601

As 2 Vern. 123. Where a Bill of Exchange was obtained by a groſs Fraud, and it was relieved againſt with Coſts to be aſcertained by the Party's own Oath

2 Vern. 307. As where *A.* having by the Means of an Attorney prevailed on *E.* a Woman, to levy a Fine of ſome Houſes, and to execute a Deed leading the Uſes thereof to *A.* and his Heirs; and it being proved that ſhe, at the Time of levying the Fine, declared ſhe muſt make uſe of ſome Friend's Name in Truſt; and afterwards by Will declaring ſhe had levied ſuch Fine only in Truſt, and the better to enable her to diſpoſe of the Eſtate, and thereby deviſed it to *J. S.* and his Heirs, ſubject to the Payment of her Debts; and although *A.* proved a great Familiarity and Friendſhip between them, and that ſhe had declared he ſhould have her Eſtate; yet it was decreed, not only that the Eſtate ſhould be liable to the Creditors Debts, but that *A.* ſhould convey the Eſtate to the Deviſee and his Heirs.

Preced. Chan. 80. *Smith* and *Loader*. 2 Vern. 346. S. C. So where *A.* being to procure 1000 *l.* for *B.* borrows it, and pays *B.* only 300 *l.* and takes other 300 *l.* himſelf, and the Remaining 400 *l.* in Goods, which prove worth little or nothing; and for ſecuring the Whole, both gave a Recognizance; yet that being ſued againſt *B.* he brought his Bill, and had a perpetual Injunction againſt the Recognizance on Payment of 300 *l.* only and Intereſt, by Reaſon of ſome Circumſtances of Fraud; and it appearing to be a Contrivance between *A.* and the Lender, to charge *B.* with the Whole.

Vern. 206. *vide* Preced. Chan. 76. Where on the Circumſtances of a Fraud, the Court of Chancery refuſed to carry the Agreement of a Feme Covert into Execution. Where a Purchaſe was obtained from a Man almoſt in his Dotage, at a great Under-value, who was perſuaded by the Perſons that treated with him, that they could help him to a great Match, and told him, that to qualify himſelf for the Lady, it was neceſſary he ſhould convert all his Lands into Money, and they treated for the Purchaſe in a Perſon's Name who knew nothing of the Matter; and for theſe Circumſtances of Fraud the Purchaſe was ſet aſide.

———Where a Purchaſe at a great Under value, obtained from a Perſon who ſome Time after became a Lunatic, was ſet aſide for Fraud. 2 Vern. 678.

2 Vern. 632. *Green* v. *Wood*. Where an Agreement for a Purchaſe was obtained from a Woman of ninety Years of Age, and ſeveral ſuſpicious Circumſtances appearing, the Court would neither decree it to be carried into Execution againſt the Heir at Law, nor to be delivered on a Croſs-Bill for that Purpoſe, but left the Parties to their Remedy at Law.

(C) Of fraudulent Conveyances and Deviſes, &c. to defeat Creditors and Purchaſers within the 13 Eliz. c. 5. & 27 Eliz. c. 4. & 3 W. & M. c. 14, &c.

3 Co. 83. Moor 638. Dyer 295. Co. Lit. 290. a. b. IT ſeems by the Common Law, if a Man had Right and Title to a Thing, or a Juſt Debt owing to him, he might avoid any fraudulent Conveyance made to deceive him of that Right or Debt; as if a Man * had a Right to Goods,, and he that had them ſold them by Covin in a Market-overt, to alter the Property of them; or if one paſſed away Goods

* Page 602

Oath.——Where a Policy of Inſurance for inſuring a Life was gained by Fraud, and ſet aſide with Coſts both at Law and in Equity. 2 Vern. 206.——Where a weak Man was prevailed upon by two of his Relations, to give a Bond to one of them, to ſettle his Eſtate to the Uſe of himſelf in Tail Male, Remainder to his two Brothers ſucceſſively in Tail Male, and he afterwards marrying, was relieved againſt the Bond. 2 Vern. 189.

to deceive a Creditor, theſe Acts might have been ſet aſide; but if the Gift were precedent to the Right or Debt, there was no Way in ſuch Caſe to ſet aſide the Conveyance.

" But now by the 13 *Eliz. cap.* 5. for the Avoiding and Aboliſhing of " feigned, covenous and fraudulent Feoffments, Gifts, Grants, Alienations, Conveyances, Bonds, Suits, Judgments and Executions as well " of Lands and Tenements as of Goods and Chattels, now of late more " commonly practiſed than heretofore; which Feoffments, Gifts, Grants, " Alienations, Conveyances, Bonds, Suits, Judgments and Executions have " been and are deviſed and contrived of Malice, Fraud, Covin, Colluſion " or Guile, to the End, Purpoſe and Intent to delay, hinder or defraud " Creditors and others of their juſt and lawful Actions, Suits, Debts, Accounts, Damages, Penalties, Forfeitures, Heriots, Mortuaries and Reliefs, not only to the Let or Hindrance of the due Courſe or Execution " of Law and Juſtice, but alſo to the Overthrow of all true and plain " Dealing, Bargaining and Cheviſance;

It is therefore enacted, " That all and every Feoffment, Gift, Grant, " Alienation, Bargain and Conveyance of Lands, Tenements, Hereditaments, Goods and Chattels, or of any of them, or of any Leaſe, Rent, " Common, or other Profit or Charge out of the ſame Lands, Tenements, " Hereditaments, Goods and Chattels, or any of them, by Writing or " otherwiſe, and all and every Bond, Suit, Judgment and Execution at " any Time had, or hereafter to be had or made to or for any Intent or " Purpoſe before declared and expreſſed, ſhall be from henceforth deemed " and taken (only as againſt that Perſon or Perſons, his or their Heirs, " Succeſſors, Executors, Adminiſtrators and Aſſigns, and every of them, " whoſe Actions, Suits, Debts, Accounts, Damages, Penalties, Forfeitures, Heriots, Mortuaries and Reliefs by ſuch guileful, covenous, or " fraudulent Devices and Practices, as is aforeſaid, are, ſhall or might be " in any wiſe diſturbed, hindered, delayed or defrauded) to be clearly and " utterly void, fruſtrate and of none Effect; any Pretence, Colour, fained " Conſideration, expreſſing of Uſe, or any other Matter or Thing to the " contrary notwithſtanding.

" Provided that this Act, or any Thing therein contained, ſhall not extend to any Eſtate or Intereſt in Lands, Tenements, Hereditaments, " Leaſes, Rents, Commons, Profits, Goods or Chattels had, made, conveyed or aſſured, or hereafter to be had, made, conveyed or aſſured, " which Eſtate or Intereſt is, or ſhall be upon good Conſideration, and " *bona fide*, lawfully conveyed or aſſured to any Perſon or Perſons, or Bodies Politic or Corporate, not having at the Time of ſuch Conveyance, " or Aſſurance to them made, any Manner of Notice or Knowledge of " ſuch Covin, Fraud or Colluſion, as is aforeſaid.

" And by the 27 *Eliz. cap.* 4† for avoiding of fraudulent, fained and " covenous Conveyances, Gifts, Grants, Charges, Uſes and Eſtates, and " for the Mantenance of upright and juſt Dealing in the Purchaſing of " Lands, Tenements and Hereditaments, it is enacted, that all and every " Conveyance, Grant, Charge, Leaſe, Eſtate, Incumbrance and Limitation of Uſe or Uſes, of, in or out of any Lands, Tenements or other " Hereditaments whatſoever had or made, or at any Time hereafter to be " made, for the Intent and Purpoſe to defraud and deceive ſuch Perſon " or Perſons, Bodies Politic or Corporate, as have purchaſed, or ſhall " afterwards purchaſe in Fee-ſimple, Fee-tail, for Life, Lives or Years, " the ſame Lands, Tenements and Hereditaments, or any Part or Parcel " thereof ſo formerly conveyed, granted, leaſed, charged, incumbred or " limited in Uſe, or to defraud and deceive ſuch as have, or ſhall purchaſe " any Rent, Profit or Commodity, in or out of the ſame, or any Part " thereof, ſhall be deemed and taken only as againſt that Perſon and * Page 603 " Per-

† This Stat. is made perpetual by 39 Eliz. c. 18.

" Perſons, Bodies Politic and Corporate, his and their Heirs, Succeſſors, " Executors, Adminiſtrators and Aſſigns, and againſt all and every other " Perſon and Perſons lawfully having or claiming, by, from or under " them, or any of them, which have purchaſed, or ſhall hereafter ſo " purchaſe for Money, or other good Conſideration, the ſame Lands, Te- " nements or Hereditaments, or any Part or Parcel thereof, or any Rent, " Profit or Commodity, in or out of the ſame, to be utterly void, fruſ- " trate, and of none Effect; any Pretence, Colour, fained Conſideration, " or expreſſing of any Uſe or Uſes to the contrary notwithſtanding.

" Provided that this Act, or any Thing therein contained, ſhall not " extend or be conſtrued to impeach, defeat, make void or fruſtrate any " Conveyance, Aſſignment of Leaſe, Aſſurance, Grant, Charge, Leaſe, " Eſtate, Intereſt or Limitation of Uſe or Uſes of, in, to or out of any " Lands, Tenements or Hereditaments heretofore at any Time had or " made, or hereafter to be had or made upon or for good Conſideration, " and *bona fide* to any Perſon or Perſons, Bodies Politic or Corporate; any " Thing before mentioned to the contrary hereof notwithſtanding.

" And by *par.* 5. of the ſaid Statute it is further enacted, That if any " Perſon or Perſons ſhall make any Conveyance, Gift, Grant, Demiſe, " Charge, Limitation of Uſe or Uſes, or Aſſurance of, in or out of any " Lands, Tenements or Hereditaments, with any Clauſe, Proviſion, Article " or Condition of Revocation, Determination or Alteration, at his or their " Will or Pleaſure, of ſuch Conveyance, Aſſurance, Grants, Limitations " of Uſes, or Eſtates of, in or out of the ſaid Lands, Tenements or " Hereditaments, or of, in or out of any Part or Parcel of them con- " tained or mentioned in any Writing, Deed or Indenture of ſuch Aſ- " ſurance, Conveyance, Grant or Gift, and after ſuch Conveyance, Grant, " Gift, Demiſe, Charge, Limitation of Uſes, or Aſſurance ſo made or " had, ſhall or do bargain, ſell, demiſe, grant, convey or charge the ſame " Lands, Tenements or Hereditaments, or any Part or Parcel thereof, to " any Perſon or Perſons, Bodies Politic or Corporate, for Money or other " good Conſideration paid or given, (the ſaid firſt Conveyance, Aſſurance, " Gift, Grant, Demiſe, Charge or Limitation, not by him or them re- " voked, made void or altered, according to the Power and Authority re- " ſerved or expreſſed unto him or them, in and by the ſaid ſecret Convey- " ance, Aſſurance, Gift or Grant,) That then the ſaid former Conveyance, " Aſſurance, Gift, Demiſe and Grant as touching the ſaid Lands, Tene- " ments and Hereditaments ſo after bargained, ſold, conveyed, demiſed or " charged againſt the ſaid Bargainees, Vendees, Leſſees, Grantees, and " every of them, their Heirs, Succeſſors, Executors and Aſſigns, and " againſt all and every Perſon and Perſons which have, ſhall or may law- " fully claim any Thing by, from or under them, or any of them, ſhall " be deemed, taken and adjudged to be void, fruſtrate, and of none Ef- " fect, by Virtue and Force of this preſent Act.

" Provided, That no lawful Mortgage made, or to be made *bona fide*, " and without Fraud or Covin, upon good Conſideration, ſhall be im- " peached or impaired by Force of this Act, but ſhall ſtand in the like " Force and Effect, as the ſame ſhould have done if the Act had never " been had or made.

In the Conſtruction of theſe Statutes the following Opinions have been holden;

Cro Eliz. 243. *Leonard* and *Bacon*.

That where in a *Formedon* the Tenant pleaded Non-tenure upon which they were at Iſſue; and it was found, that before the Writ purchaſed, the Tenant infeoffed divers Perſons, with an Intent to defraud him who had Cauſe of Action to the Lands, and that notwithſtanding the Feoffor took the Profits; and on this Verdict it was adjudged for the Demandant, *viz.* " that by the 13 *Eliz. c.* 5. the Feoffment was void againſt him.

* *A.* being indebted to *B.* in 400 *l.* and to *C.* in 200 *l.* *C.* brings Debt againſt him, and pending the Writ, *A.* being poſſeſſed of Goods and Chattels to the Value of 300 *l.* makes a ſecret Conveyance of them all, without Exception, to *B.* in Satisfaction of his Debt, but notwithſtanding continues in Poſſeſſion of them, and ſells ſome of them, and others of them being Sheep he ſets his Mark on; and it was reſolved to be a fraudulent Gift and Sale within the 13 *Eliz. c.* 5. for tho' ſuch a Sale hath one of the Qualifications required by the Statute, being made to a Creditor for his juſt Debt, and conſequently on a valuable Conſideration; yet it wants the other; for the Owner's continuing in Poſſeſſion is a fixed and undoubted Character of a fraudulent Conveyance, becauſe the Poſſeſſion is the only *Indicium* of the Property of a Chattel, and therefore this Sale is not made *bona fide*; and as this is a leading Reſolution, being agreeable to the Rule of Commerce ſettled by the Statute, ſo it is highly conformable to the moſt exact Reaſon and Equity; for if ſuch Colluſion and Practice were allowed between a Debtor and his Creditor, as it would prove injurious to other Creditors of the ſame Debtor, in depriving them of all Means of ſatisfying themſelves by the ſtated Methods of Juſtice; ſo it muſt in its Conſequence have a very ill Influence on Commerce, by preventing Loans of Money, and other Confidences of that Nature, which are ſo neceſſary for the Support of it, ſince no Man would lend or truſt another with Money or Goods upon ſuch an apparent Hazard of loſing them.

* Page 604
3 Co. 80. *Twine's* Caſe. Moor 638. 2 Bulſt. 226. S. C.

So where *A.* being indebted to five ſeveral Perſons in the Sums of 20 *l.* each, and having Goods to the Value of 20 *l.* makes a Gift of them to one of the Five, in Satisfaction of his Debt; but upon this ſecret Truſt between them, that the Grantee, in Compaſſion to his Circumſtances, ſhould deal favourably with him in permitting him, or ſome other for him, to uſe and poſſeſs the ſaid Goods, paying this Creditor as he was able and could afford it, the ſaid Debt of 20 *l.* and reſolved to be a fraudulent Conveyance and Deed of Sale.

3 Co. 81. Moor 639.

So if *A.* makes a Bill of Sale of all his Goods in Conſideration of Blood and natural Affection to his Son, or one of his Relations, it is a void Conveyance in reſpect to Creditors, for the Conſideration of Blood, *&c.* which are made the Motives of this Gift, are eſteemed in their Nature inferior to valuable Conſiderations, which are neceſſarily required in ſuch Sales by 13 *Eliz. c.* 5. and this ſeems to be a Conſtruction ſuitable to the ſtricteſt Rules of Equity; for if Conſiderations of Blood or natural Affection were allowed to be of equal Dignity with, or to come under the Notion of, valuable Conſiderations required by this Statute, it would be in the Power of any Debtor, by ſuch Conveyances of his Perſonal Eſtate to his Kindred, to build a Family upon a Conduct to his Creditors, which carries in it all the Strains of Injuſtice and colluſive Dealing; moreover, there is a ſtrong Preſumption, that ſuch Sales to Relations are conſtantly attended with a ſecret Truſt and Perſonal Confidence of reconveying Part of the Goods to the Vendor for his Subſiſtence; ſo that they are intirely inconſiſtent with the Scheme laid down by the Statute, and therefore void and illegal.

2 Rol. Abr. 779. Palm. 214. 3 Co. 81.

But if a Perſon, before he contracts any Debts, makes a voluntary Settlement on his Son *bona fide*, it ſeems that this is not within the Statute, for it never could be the Intent of the Act to ſet aſide all voluntary Settlements; but if the Gift be made on any Truſt either expreſſed or implied, between Donor and Donee, it is within the Statute; for all Acts for the Suppreſſing of Fraud are to be liberally expounded.

Mod. 119. Vent. 194. Sid. 349. 2 Rol. Rep. 306. Eq. Caſ. Abr. 170. 9 Mod. 80, 83, 96. 10 Mod. 247, 469, 471, 478, 489, 497. Gilb. Eq. Rep. 2. 122. Prec. Chan. 84. Vern. 46. 2 Vern. 473. Caſ. Temp. Talb. 65. Will. Rep. 60. pl. 11, 204. pl. 47, 354, 577. pl. 168, 581. 2 Will. Rep. 171. pl. 43, 255, 352. pl. 103, 464. pl. 148, 606. 3 Will. Rep. 222, 337, 339. pl. 88. A voluntary Deed may be good againſt the Party who made it, though it might be ſet aſide as againſt Creditors, or a fair Purchaſer. *Bingham* v. *Bingham* in Chanc. 5 *December* 1739.

3 Co. 81. Moor 638.

And therefore if the Jury find that the Owner continued in Poſſeſſion of his Goods after his Bill of Sale of them, this is an undoubted Badge of a fraudulent Conveyance, becauſe the Poſſeſſion is the only *Judicium* of the Property of a Chattel, which is a Thing unfixed and tranſitory; ſo there are other Marks and Characters of Fraud, as a general Conveyance of them all without any Exception, for it is hardly to be preſumed, that a Man will ſtrip himſelf intirely of all his Perſonal Property, not excepting his Bedding and wearing Apparel, unleſs there were ſome ſecret Correſpondence and good Underſtanding ſettled between him and the Vendee, for a private Occupancy of all or ſome Part of the Goods for his Support; alſo a ſecret Manner of tranſacting ſuch Bill of Sale, and unuſual Clauſes in it, as that it is made honeſtly, truly, and *bona fide*, are Marks of Fraud and Colluſion, for ſuch an artful and forced Dreſs and Appearance give a Suſpicion and Jealouſy of ſome Defect varniſhed over with it.

* Page 605

5 Co. 60. Moor 615.

If a Gift be made to deceive one Creditor, it is void againſt all Creditors; but where-ever a Conveyance is conſtrued fraudulent, it muſt be with reſpect to real Creditors and Purchaſers for valuable Conſideration.

And. 233. Moor 602.

Therefore if a Man makes a fraudulent Leaſe, and then another *bona fide*, without Rent or Fine, the ſecond Leſſee ſhall not avoid the firſt Leaſe; for no Purchaſer ſhall avoid a former fraudulent Conveyance, but a Purchaſer for valuable Conſideration.

5 Co 60. *Gooche's* Caſe. Moor 615.

But though a Purchaſer for valuable Conſideration within the 27 *Eliz. c.* 4. hath Notice of a fraudulent Conveyance before he purchaſes, yet after the Purchaſe he ſhall avoid it; for the Statute expreſly avoids ſuch Conveyances, ſo that whether the Purchaſer hath Notice of them, or not, is not material.

Preced. Chan. *Lowkner* and *Freeman.*

If *A.* brings an Action againſt *B.* for lying with his Wife, after which *B.* aſſigns his Eſtate to Truſtees in Truſt to pay the ſeveral Debts mentioned in a Schedule, and ſuch other Debts as he ſhould mention within ten Days, and *A.* recovers 5000 *l.* Damage, and brings his Bill to ſet aſide this Deed as fraudulent, and made to defeat him of his Recovery; in this Caſe *A.* can have no other Relief but to come in upon the Surplus, after the Debts mentioned in the Schedule, or appointed within ten Days purſuant to it, are ſatisfied; the Deed being neither fraudulent in Law or Equity, *A.* being no Creditor at the Time of executing it; and it was conſcientious in him to prefer his Real Creditors to one, whoſe Debt, when recovered, was founded only *in Maleficio.*

2 Vern. 490. *Fletcher* and Lady *Lidley.*

A. by Bill of Sale made over his Goods to a Truſtee for *B.* who lived with him as his Wife, and was ſo reputed, and he alſo purchaſed a Leaſe of the Houſe wherein he dwelt, in the Name of a Truſtee, and declared the Truſt thereof to himſelf for Life, then in Truſt for *B.* during the Reſidue of the Term; and this Bill of Sale was held fraudulent as to Creditors, but as to the Declaration of the Truſt of the Term, the Court held it good, and not liable to *A.*'s Debts, the Term being never in him, and being ſo ſettled at the Time it was purchaſed; and *A.* might have given the Money to *B.* who might have purchaſed it for herſelf, and in her own Name.

Cro. Jac. 270. *vide* 2 And. 172.

Fraudulent Conveyances and Gifts are only void againſt Purchaſers and Creditors, and ſhall bind the Parties themſelves, and their Repreſentatives.

Yelv. 196. *Hawes* and *Louder.* Cro. Jac. 270. S. C.

And therefore where *A.* made a fraudulent Sale of his Goods to *B.* and delivered Poſſeſſion of ſome of them in his Life-time, and the Reſt coming to the Hands of his Adminiſtrator, it was held in an Action brought by *B.* for thoſe Goods, that the Adminiſtrator could not plead the Statute of 13 *Eliz. c.* 5. nor maintain the Poſſeſſion of the Goods even to ſatisfy Creditors. †

‡ See *infra* 606.

But if a Man makes a Deed of Gift of his Goods in his Life-time by Covin, to ouſt his Creditors of their Debts; yet after his Death the Vendee ſhall be (*a*) charged for them.

13 H 4. 4 b. Rol. Abr. 549.

(*a*) As an Executor of his own Wrong. Yelv. 197.

Cro. Jac. 271.

* Where by Special Verdict it was found, that *A.* being poſſeſſed of divers Goods to the Value of 250*l.* by Covin to defraud his Creditors, made a Gift of his Goods to his Daughter, upon Condition, that upon Payment of 20*s.* it ſhould be void, and died; and that *J. S.* intermeddled with the Goods; after which the Daughter took Poſſeſſion of them by Force of the Gift, and then Adminiſtration was granted to *J. S.* of all the Goods, *&c.* of *A.* and in an Action againſt him as Executor, it was held, that the Gift was apparently fraudulent within the 13 *Eliz. cap.* 5. and that by his intermeddling, before Adminiſtration granted to him, he became an Executor *de ſon Tort*, and liable as ſuch; and that the Law continued the Poſſeſſion in him from the Time of intermeddling to the Time of granting Adminiſtration.

* Page 606

Cro. Eliz 810. *Fitbel* and *Stanhope*. 2 And. 172. S. C.

If *A.* makes a Bill of Sale to *B.* a Creditor, and afterwards to *C.* another Creditor, and delivers Poſſeſſion at the Time of the Sale to neither, and after *C.* gets Poſſeſſion of them, and *B.* takes them out of his Poſſeſſion, *C.* cannot maintain Treſpaſs, becauſe the firſt Bill of Sale is fraudulent againſt Creditors, and ſo is the ſecond; yet they both bind *A.* and *B.*'s is the elder Title, and the naked Poſſeſſion of *C.* ought not to prevail againſt the Title of *B.* that is prior, where both are equally Creditors, and Poſſeſſion at the Time of the Bill of Sale is delivered over to neither.

Trin. 1706. *Baker* and *Lloyd*, *per Holt* C. J.

If a Gift be made to deceive one Creditor, it is void againſt (*b*) all the Creditors of the Party, within the Statute.

Moor 615.

(*b*) Where a Feoffment was made to deceive Creditors, and though by the Event the King was cheated of his Ward, yet being only to that Intent and Purpoſe, it ought not to be extended farther. 10 Co. 57.——So where there was a Releaſe to *A.* to the Intent the Wife of the Tenant ſhould not be endowed during the Life of *A.* and it was held that it could not be extended to any other Intent or Purpoſe. Dyer 351.——Where one held of divers Lords by Heriot Cuſtom, and to the Intent to deceive one, made a Gift of all his Beaſts Heriotable. 2 Leon. 8, 9. Dyer 351.

A Man binds himſelf in a Bond to pay Money, and then in a Statute to make ſuch a Conveyance, *&c.* a fraudulent Conveyance is made contrary to the Defeaſance of the Statute; though the Conveyance be void againſt the firſt Debtor, yet it is a Breach of the Condition of the Statute, and the Conuſee ſhall be ſatisfied before the Creditor by Bond.

Cro. Jac. 131, 132.

It is not neceſſary that he who contracted the Debt ſhould make the fraudulent Conveyance; for if a Man binds himſelf and his Heirs in a Bond, and Lands deſcend to his Heir, who makes a fraudulent Conveyance of thoſe Lands the Creditor ſhall avoid it.

5 Co. 60.

If a Perſon, intending to deceive a Purchaſer, conveys by Deed inrolled his Lands to the King, and afterwards, for valuable Conſideration, conveys to *J. S.* the Purchaſer ſhall avoid this Conveyance to the King by the 27 *Eliz. cap.* 4. for although the Statute does not by expreſs Words extend to the King, yet being a general Law, and made for ſuppreſſing of Fraud, it ſhall include him.

2 Co. 54. 11 Co. 74.

So if *A.* being Tenant in Tail, Remainder to *B.* in Tail or Fee, and *B.* under an Apprehenſion that *A.* deſigns to ſuffer a Recovery, and deſtroy his Remainder by Deed inrolled conveys his Remainder to the King; yet if *A.* for valuable Conſideration afterwards by Recovery conveys the Eſtate to *J. S.* and dies without Iſſue, the Purchaſer ſhall avoid the Conveyance to the King as fraudulent within the 27 *Eliz. cap.* 4.

11 Co. 74. a. b.

In Treſpaſs againſt a Bailiff of a Manor for diſtraining Goods, he juſtified by virtue of his Authority, and that by his Precept he was commanded to

Latch. 222. Sir *Ambrole Tarrell* ver. *Tipper*.

to diſtrain the Goods of *J. S.* which Goods came to the Plaintiff's Hands by Colour of a fraudulent Gift of them to the Plaintiff; and on Iſſue, that the Sale was made *bona fide*, it was found for the Defendant, and adjudged for him, although it was objected, that he being no Creditor could not take Advantage of the Statute, which being a Penal Law ought to be conſtrued ſtrictly.

* Page 607 6 Co. 72. b. & *vide* 1 Vern. 45. 6.

* If a Father makes a fraudulent Leaſe of his Lands, with an Intent to deceive a Purchaſer, and dies before he makes any Conveyance of the Lands, and afterwards his Son and Heir, knowing or not knowing of this Leaſe, conveys to *J. S.* for valuable Conſideration, *J. S.* ſhall avoid this Leaſe within the 27 *Eliz. c.* 4.

Co. Lit. 3. b. Sir *Richard Grobham's* Caſe.

A. has a Leaſe of certain Lands for ſixty Years, if he live ſo long, and forges a Leaſe for ninety Years abſolutely, and by Indenture reciting this forged Leaſe bargains and ſells it for valuable Conſideration, together with all his Intereſt in the Land, to *B.* in this Caſe *B.* is not a Purchaſer within 27 *Eliz. cap.* 4. for though there were general Words in the Sale to paſs the true Intereſt, yet it is plain that it was never contracted for, or originally included in the Bargain; ſo that the Bargain being made of an imaginary Intereſt, the Bargainee can never come under the Character of a real Purchaſer, to defeat the Purchaſer of the true Leaſe of ſixty Years, which *A.* was really poſſeſſed of.

Sid. 134.

A Deed, though it be fraudulent in its Creation, yet by Matter *ex poſt facto* may become good; as if one makes a fraudulent Feoffment, and the Feoffee makes a Feoffment to another for valuable Conſideration, and afterwards the firſt Feoffor alſo, for valuable Conſideration, makes a ſecond Feoffment, the Feoffee of the Feoffee ſhall hold againſt the ſecond Feoffment of the firſt Feoffor. †

† Qu. If the Feoffee of the Feoffee had purchaſed with Notice that the firſt Feoffment was fraudulent?

Preced. Chan. 377. *Eaſt-India Company* ver. *Clavel.* Gilb. Eq. Rep. 37. 2 Eq. Ca. Abr. 52. pl. 6. See Pre. Ch. 305. 2 Eq. Ca. Abr. 481. pl. 13.

A. agrees with the *Eaſt-India Company* to go as Preſident to *Bengal*, and enters into a Bond of 2000 *l.* Penalty for Performance of Articles; but before he ſet out he made a Settlement of his Eſtate, and among other Things he declared the Truſt of a Term of 1000 Years to be for the raiſing of 5000 *l.* as a Portion for his Daughter, who afterwards married *J. S.* a Gentleman of 700 *l. per Ann.* who before the Marriage was adviſed by Counſel, that the Portion was ſufficiently ſecured; and who afterwards on her Death had, on her Requeſt, expended 400 *l.* on her Funeral, but never made any Settlement on her; and *A.* having embezzled the Goods and Stock of the Company to a conſiderable Value, the Queſtion was, whether this Settlement was voluntary and fraudulent as to them; and it was held to be a prudent and honeſt Proviſion, without any Colour of Fraud; and though in its Creation it was voluntary, yet being the Motive and Inducement to the Marriage, it made it valuable.

Moor 605. 3 Co. 82. b.

On the Clauſe of the 27 *Eliz. cap.* 4. that if a Man ſettles Land to Uſes, with a Power of Revocation, and afterwards ſells the Lands for valuable Conſideration, that the former Uſes ſhall be revoked; it hath been holden, that if a Man having a future Power of Revocation bargains and ſells the Land before his Power commences, yet it is within the Act. So if the Power of Revocation be reſerved with the (*a*) Conſent of *A.* and he conveys his Land, not having revoked, the Conveyance ſhall be good; ſo if one having a Power of Revocation extinguiſhes it by Feoffment, and then ſells, the Sale ſhall be good.

This

(*a*) A Man and his Wife ſeiſed in Fee of Lands, in Right of the Wife, in Conſideration of the Marriage of their Son, and 500 *l.* paid for a Portion, levy a Fine to the Uſe of the Father and his Wife for their Lives, then to their Son and his Heirs, Proviſo, that it ſhould be lawful for the Father to revoke, with Conſent of four Perſons, the Relations of the Son's Wife; the Father dies, the Mother, without

This Branch of the Statute does not extend to Creditors, and therefore if the Conveyance was not made to deceive them, it seems they cannot avoid it; [but see *ante* 606, the first Case.]

• If Goods continue in the Possession of the Vendor, after a Bill of Sale of them, though there is a Clause in the Bill, that the Vendor shall account annually with the Vendee for them, yet it is a Fraud; since if such colouring were admitted, it would be the easiest Thing in the World to avoid the Provisions and Caution of the Act. • Page 608 Moor 638.

Where there is an absolute Conveyance or Gift of a Lease for Years, and the Person who makes it continues in Possession after such Sale, the Gift is fraudulent, because attended with that distinguishing Character of a Fraud; but if the Conveyance or Sale be conditional, as that upon Payment of so much Money the Lease shall go to the Vendee, there Continuance in Possession after the Gift does not make it fraudulent, because the Vendee is not to have the Lease in Possession till he performs the Condition.† 2 Bulst. 226. *Stone* ver. *Grantham.*

† But the whole Transaction must be *bona fide.*

If one makes a Lease for Years with a Proviso to be void upon Payment of 10*s.* this Lease will be void against Purchasers; but if it be a Mortgage for a considerable Sum of Money, though it be in the Power of the Mortgagor, yet it is not void.‡ Cro. Jac. 455.

‡ See *infra*, 609. Note.

If a Man makes a voluntary Settlement, reserving to himself a Power to mortgage and charge the Estate at what Sums he pleased, this amounts in Effect to a Power of Revocation, and therefore fraudulent as to Creditors by Judgment. 2 Vern. 510,

It seems to be clearly agreed, that if a Person makes a Settlement on his Wife, or Child, after Marriage, in Consideration of Love and Affection, and not pursuant to any Articles, or any Agreement in Consideration of the Marriage, or Marriage-Portion, that such Settlement being voluntary is fraudulent against Purchasers within the 27 *Eliz. cap.* 4. 6 Co. 73. Cro. Jac. 158, 455. Lev. 150, 237. Hard. 395.

But though the Settlement be made after Marriage, yet if it were in pursuance of Marriage Articles, to make a Provision on the Wife and the Issue of the Marriage, it is not fraudulent; and in this Case the Wife and Children become Purchasers themselves, and shall avoid a prior voluntary Conveyance, and shall in (*a*) Equity have the same Favour in not being obliged to discover Papers, Writings, &c. Cro. Jac. 158, 455. Lev. 150. Hard. 395.

(*a*) *Vide* 1 Chan. Ca. 99. 2 Vern. 701.

Vern. 440, 479.

As where a (*b*) Person promised a Woman, before Marriage, to make her a Jointure of 1000*l.* a Year; and after Marriage, for the securing the Payment thereof, made a Lease to commence after his Death for 100 Years, with a Proviso, that on making the Settlement the Lease should be void; and this Lease was held good against a Purchaser. Cro. Jac. 454, 455. Dame *Griffin* ver. *Stanhope* adjudged; and that the Wife's concealing the Conveyance in this Case did not make it fraudulent, when, upon revealing of it, it appears to be good.

(*b*) That before the Statute of Frauds and Perjuries, a verbal Agreement before Marriage was sufficient to prevent its being said to be fraudulent. Vent. 194.

So where *A.* made a Lease for Years, to the Use of such Person as should marry his Daughter, provided he was then living and approved of the Match; and it was held, that if *A.* had sold the Lands before the Marriage, Sid. 133. *Prodgers* and *Langham.*

out Consent, sells the Lands for valuable Consideration to other Persons; and it was held, that the Vendee should not avoid the Settlement, the Power of Revocation being out of the Power of them to effect, the Consent of such being necessary, over whom the Father and Mother could not be presumed to have any Power; otherwise if the Consent were lodged with those Persons, that may be supposed to be at the Disposal of the Persons to whom the Power is reserved. 2 Jon. 94, 5.

Keb. 486. S. C. that the Leaſe would be fraudulent againſt a Purchaſer; but if before the Sale the Daughter marries, the Father cannot defeat it, becauſe it was the Cauſe of the Marriage, and drew on the Stranger to engage in it, and is of the ſame Effect as if it had been a Special Agreement with this particular Perſon; and it was held not to be neceſſary that the Father approved of the Match at the Time, but that, if he approved of it ſeven Years afterwards, it was ſufficient.

Preced. Chan. 275. *Kirk ver Clerk.* So where *A.* ſurrendered the Reverſion in Fee of Copyhold Lands to his Son, to leſſen the Fine he muſt have paid in caſe it had come to him by Deſcent; and after, on the Son's Treaty of Marriage, the * Father tells the Wife's Friends, that this Copyhold was ſo ſettled on the Son, in Conſideration of which, and of ſome Leaſehold Lands ſettled by the Father, a Marriage was had, and 2000 *l.* Portion paid; and though in the Settlement no Mention was made of the Copyhold, yet it was held that the Surrender thereof, in the Manner aforeſaid, was not voluntary or fraudulent againſt a Purchaſer, becauſe it was the principal Inducement that prevailed on the Friends of the Son's Wife to conſent to the Marriage, and to give her ſuch a Fortune, and that it ought to be conſidered as if it had been ſurrendered at the Time of the Marriage.

* Page 609

Vern. 285,6. It ſeems to be holden, that if a Bond be given before Marriage to ſettle a Jointure, and after the Marriage a Settlement is made, which goes farther, and intails the Land upon the Children of the Marriage, that the Settlement may be good as to the Jointure, and fraudulent (*a*) as to the Remainders in reſpect to a Purchaſer.

(*a*) Where a Father made a Settlement, on the Marriage of his Daughter, to himſelf for Life, Remainder to the Daughter, and afterwards ſold the Land to another, whether the former Conveyance ſhall be avoided during his Life, within the 27 Eliz. c. 4. 2 Rol. Rep. 306. 2.——Where a Settlement, in Conſideration of a Marriage Portion, was made on the Huſband and Wife, and the Iſſue of that Marriage, Remainder to the Heirs of the Body of the Huſband; and it was held, that the Conſideration ſhould extend to the Iſſue of the Huſband on the ſecond Venter. Lev. 150, 237. Hard. 395. Chan. Ca. 104.

Preced. Chan. 520. *Brunſden and Stratton.* But where the intended Huſband being under Age, and ſo incapable of making a Settlement, and the Wife's Father gave a Bond for the Payment of 1500 *l.* on his making a ſuitable Jointure-Settlement on her, without taking any Notice whatſoever of the Iſſue, and the Marriage took Effect; and the Huſband ſome Years after, on the Payment of the 1500 *l.* made a Settlement of 147 *l. per Ann.* on himſelf for Life, Remainder to his Wife for Life, for her Jointure, with Remainder to their firſt and other Sons, in the uſual Form; and it was held, that this Settlement was neither voluntary nor fraudulent, being but adequate to the Wife's Fortune; and that the Words of the Bond were capable of ſuch a Conſtruction, for that a Jointure-Settlement muſt be intended a Settlement in the common Form to the Iſſue, and a Jointure for the Wife.

5 Co. 60. Hob 72. S.C. and S. P. cited and agreed; but if the Iſſue had been taken directly infeoffed, It has been held, that *Fraud* may be *given in Evidence* to defeat a fraudulent and covinous Conveyance, and that the Party who offers it need not plead it, for the Acts to prevent Fraud are to be conſtrued liberally in Suppreſſion of the Miſchief; beſides, it were an Hardſhip to force the Party to plead

or not infeoffed, the Feoffment muſt be avoided by pleading the Fraud ſpecially.——*& vide* 10 Co. 56-7. Cro. Car. 550. That Covin is not to be preſumed; and that if in a Special Verdict the Jury find ſuch Circumſtances in the Caſe, as might very well have induced them to find Fraud, yet if they do not expreſsly find it, it ſhall never be preſumed.——[Eſtates of Land, made by Parol, without Writing ſigned by the Parties, or by ſome one by them lawfully authorized, ſhall amount to Leaſes at Will only, except Leaſes for three Years. 29 Car. 2. c. 3.——Contracts upon Marriage, † or to be performed after

† This does not extend to mutual Promiſes of Marriage, where one of the Parties refuſes to fulfil his Promiſe, ſo as to bar the other from recovering Damage for Breach of the Promiſe, though not in Writing.

plead a Thing that is managed with ſo much Subtlety that he cannot attain a competent Knowledge of it to plead it in due Time.

after a Year, muſt be in Writing. ‡

Id. ſ. 4.——Contracts for Goods to the Price of 10*l.* void, except the Buyer ſhall accept Part of the Goods ſo ſold, and actually receive the ſame, or give ſomething in earneſt, *&c.* *Id.* ſ. 17.——Deviſes of Lands fraudulent againſt Creditors. 3 W. & M. c. 14.——Penalty of fraudulent Mortgages where prior Incumbrances are concealed. 4 & 5 W. & M. c. 16. But Deviſes for Payment of juſt Debts, or Children's Portions, in purſuance of Marriage Contract, good. 3 W. & M. c. 14. ſ. 4.]

‡ See *Treatiſe on Equity* 19.

* (D) In what Court Fraud is cogniſable.

* Page 610

IT is clearly agreed, that the Court of Chancery had always an original Juriſdiction in relieving againſt Frauds, and that at this Day it is the only Court where Matters of Fraud are properly cogniſable. †

2 Vern. 261-2. *vide* of the Juriſdiction of the Court of Chancery, Tit. *Courts.*

† The Court of Exchequer on the Equity Side takes Cogniſance of *Fraud*, as well as the Chancery.

But it hath been doubted, whether a Court of Equity could give Relief on the Statutes which make Conveyances and Diſpoſitions fraudulent againſt Purchaſers and Creditors, being introductive of new Laws; but it is now ſettled, that ſuch Relief may be proper in Equity, and that directing an Iſſue to be tried at Law is only diſcretionary in the Court.

Preced. Chan. 14. 2 Vern. 261, 436.

A. recovers a Judgment againſt the Defendant's Father, and the Plaintiff (the Sheriff's Bailiff) levied 24*l.* of Goods in Poſſeſſion of the Defendant's Father; the Defendant brought Trover againſt the Plaintiff, pretending the Goods to be his, becauſe the Landlord had ſeized them for Rent, and ſold them to him; but on Evidence the Sale was proved fraudulent, and that the Father was in Poſſeſſion all along, and paid Taxes for the Farm and Goods, *&c.* and therefore the Judge gave Directions to the Jury to find for the Defendant at Law; but becauſe he had not proved a Copy of the Judgment, as it was held he ought, for that only Reaſon the Jury found againſt him; and he brought his Bill for Relief; and a Demurrer to it on the arguing was over-ruled; then by Anſwer he inſiſted upon his Property under the Bill of Sale and Recovery at Law, where the Matter is properly triable, and relied on that without examining any Witneſſes; but the Plaintiff fully proved his Caſe as before, and that the Judge altered his Directions only for want of Proof of the Judgment, and diſproved the Defendant's Anſwer in ſome Particulars; and a perpetual Injunction was granted againſt the Judgment, and the Defendant to pay Coſts; for though it were examinable at Law, ſo it was in Equity too; and the Plaintiff having ſet out the whole Matter, and proved it to be true, if it were untrue the Defendant might have diſproved.

Preced. Chan. 233. *Kent* and *Bridgman.*

But it hath been held, that a Will relating to the Perſonal Eſtate cannot be ſet (*a*) aſide in a Court of Equity for Fraud and Impoſition, let the Fraud be ever ſo great or ſo ſtrongly proved; and that this is a Matter properly cogniſable in the Spiritual Court.

2 Vern. 8, 9. (*a*) But tho' a Will gained by Fraud, and proved in the Spiritual Court, cannot be controverted in Equity; yet if the Party, claiming under ſuch Will, comes for any Aid in Equity, he ſhall not have it. 2 Vern. 76.

It was once held, that a Will relating to the Real Eſtate, as well as a Deed, may be ſet aſide in Equity, for Fraud and Circumvention; as if a

2 Vern. 700. Preced. Chan. 123.

Man agrees to give the Teſtator 2000 *l.* in Bank Bills, upon Condition he deviſed his Eſtate to him, and on the Delivery of ſuch Bills he makes his Will, and deviſes his Eſtate to him, and the Bills prove to be forged and counterfeit.

Eq. Ca. Abr. 406. But it hath been lately reſolved in the Houſe of Lords, that a Will of a Real Eſtate could not be ſet aſide in a Court of Equity for Fraud or Impoſition, but muſt firſt be tried at Law on *deviſavit vel non*, being Matter proper for a Jury to inquire into.

* Page 611 * (E) **Where a Wrong-doer is further puniſhable than by making void the fraudulent Act.**

Cro. Jac. 497. 2 Rol. Abr. 78. 2 Rol. Rep. 107. Keb. 849. 6 Mod. 42. Sid. 312, 431. Noy 99, 103. Moor 630. IT is clear from many Inſtances, that groſs Frauds are puniſhable by way of Indictment or Information; ſuch as playing with falſe Dice, cauſing an illiterate Perſon to execute a Deed to his Prejudice, levying a Fine in another's Name, *&c.* and that for theſe and ſuch like Offences the Party may be puniſhed not only with Fine and Impriſonment, but alſo with ſuch further infamous Puniſhment, as the Judges in their Diſcretion ſhall think proper.

Cro. Eliz. 531. Mod. 46. 2 Jon. 64. Ld. Raym. 865. Hawk. P. C. 113.

6 Mod. 105. Salk. 379. pl. 25. 286. pl. 20. 5 Mod. 18. S. C. 11 Mod. 222. pl. 15. 2 Ld. Raym. 1013. But it hath been holden, that the deceitful receiving of Money from one Man for another's Uſe, upon a falſe Pretence of having a Meſſage and Order to that Purpoſe, is not puniſhable by any criminal Proſecution, becauſe it is accompanied with no Manner of artful Contrivance, but wholly depends on a bare naked Lie; and it is ſaid to be needleſs to provide ſevere Laws for ſuch Miſchiefs, againſt which common Prudence and Caution may be ſufficient Security. †

6 Mod. 42, 61, 104, 301, 311. 7 Mod. 40.

† Obtaining Money or Goods by falſe Pretences, is by 30 Geo. 2. c. 24. made puniſhable by Fine and Impriſonment; or by Pillory, whipping, or Tranſportation.

But by the 33 *H.* 8. *cap.* 1. it is enacted, "That if any Perſon or Perſons ſhall falſly and deceitfully obtain, or get into his or their Hands or Poſſeſſion any Money, Goods, Chattels, Jewels, or other Things of any other Perſon or Perſons, by Colour and Means of any privy falſe Token, or counterfeit Letter, made in another Man's Name, to a ſpecial Friend or Acquaintance, for the obtaining of Money, *&c.* from ſuch Perſon, and ſhall be thereof convicted by Witneſs taken before the Lord Chancellor, or before the Juſtices of Aſſiſe, or before the Juſtices of the Peace of any County, City, Borough, Town or Franchiſe, in their General Seſſions, or by Action in any of the King's Courts of Record; every ſuch Offender ſhall ſuffer ſuch Puniſhment by Impriſonment, ſetting upon the Pillory, or otherwiſe, by any (*a*) corporal Pain, except Pains of Death, as ſhall be appointed by thoſe before whom he ſhall be ſo convict."

(*a*) It is ſaid, that the Offender cannot be fined in a Proſecution upon this Statute, becauſe it is expreſsly ordained that ſome corporal Puniſhment ſhall be inflicted, and no other is mentioned. 3 Inſt. 123. But in Cro. Car. 564. there is a Precedent, by which it appears, that one convicted on ſuch a Proſecution hath been adjudged not only to ſtand in the Pillory, but alſo to pay a Fine of 500 *l.* and to be bound with Sureties to his good Behaviour.

And it is further enacted by the ſaid Statute, "That as well the Juſtices "of Aſſiſe for the Time being, as alſo two Juſtices of Peace in the ſame "County, whereof the one to be of the *Quorum*, may call and convene by "Proceſs or otherwiſe, to the ſaid Aſſiſes or General Seſſions, any Perſon "being ſuſpected of any of the Offences aforeſaid, and to commit or bail "him till the next Aſſiſes of General Seſſions, *&c.*

And by the 27 Eliz. c. 4. *par.* 3. the ſame *mutatis mutandis* is enacted as to fraudulent Conveyances to deceive Purchaſers.

By the 13 *Eliz. cap.* 5. *par.* 3. it is enacted, "That all and every the "Parties to ſuch feigned covenous or fraudulent Feoffment, Gift, Grant, "Alienation, Bargain, Conveyance, Bonds, Suits, Judgments, Executions, "mentioned in the Statute, and being privy and knowing of the ſame, or "any of them, ſhall wittingly and willingly put in ure, avow, maintain, "juſtify or defend the ſame, or any of them as true, ſimple, and done, had "or made *bona fide* and upon good Conſideration, or ſhall alien or aſſign "* any the Lands, Tenements, Goods, Leaſes, or other Things mentioned * Page 612
"in the Statute, to him or them conveyed, or any Part thereof, ſhall in-"cur the Penalty and Forfeiture of one Year's Value of the ſaid Lands, "Tenements and Hereditaments, Leaſes, Rents, Commons, or other Pro-"fits of or out of the ſame, and the whole Value of the Goods and Chat-"tels, and alſo ſo much Money, as are or ſhall be contained in ſuch co-"venous and feigned Bond; the one Moiety whereof to be to the Queen's "Majeſty, her Heirs and Succeſſors, and the other Moiety to the Party or "Parties aggrieved by ſuch feigned and fraudulent Feoffment, Gift, Grant, "Alienation, Bargain, Conveyance, Bonds, Suits, Judgments, Executions, "Leaſes, Rents, Commons, Profits, Charges, and other Things aforeſaid, "to be recovered in any of the Queen's Courts of Record, by Action of "Debt, Bill, Plaint or Information, wherein no Eſſoign, Protection or Wa-"ger of Law ſhall be admitted for the Defendant or Defendants, and alſo "being thereof lawfully convicted ſhall ſuffer Impriſonment for one half "Year, without Bail or Mainprize."

Information brought in *London* on the aforeſaid Act for juſtifying of a fraudulent Gift of Goods made by *A.* to the Defendant to defraud the Plaintiff of his Debt, the Defendant ſaith, that *A.* gave theſe Goods to him at *C. bona fide*, and that he juſtified the Gift there, and traverſes the Juſtifying it at *L.* and ruled to be no Plea; for 31 *Eliz. cap.* 5. reſtrains common Informers to bring their Actions only in the proper County where the Offence was done; yet that does not extend to a Party grieved, but that he may inform in what County he pleaſes, for he is not a common Informer.† *Dyer* 351. pl. 23. 2 Leon. 8. Cro. Eliz. 645.

† See farther as to Fraud, Com. Dig. 2 V. 460, *&c.* Tit. *Covin*,

Game.

BEFORE we take Notice of the Statutes made for the Preſervation of the Game, it may be neceſſary to obſerve how the Common Law ſtood herein, which depends upon the Difference made between tame and wild Animals.

(a) That Hens and Chickens are tame; ſo Peacocks, like other domeſtic Fowl, are tame by Nature.

The tame Animals, ſuch as (a) Horſes, Cows, Sheep, &c. are ſuch Creatures, as by reaſon of their Sluggiſhneſs and Unaptneſs for Motion do not fly the Dominion of Mankind, but generally keep within the ſame Purlieus and Paſtures, and may be eaſily purſued and overtaken if by Accident they ſhould eſcape; and therefore the Owner hath the ſame Kind of Property in them as he hath in all other inanimate Chattels and for the Violation thereof may bring an Action of Treſpaſs.

Off. of Exec. 83. Rol. Abr. 5. 18 H. 8. 2. So ſeveral Sorts of Dogs ‡ are tame, as the Maſtiff, Hound, which comprehends Greyhound, &c. Spaniel and Tumbler; and for theſe a Perſon may maintain an Action of Treſpaſs, without alledging that they were tame. Cro. Eliz. 125. *Ireland* and *Higgins*. Sand. 84. cited and agreed.———So a Perſon may juſtify in Aſſault and Battery in Defence of his Dog that is tame. Raſt. Ent. 611.———So a Replevin lieth of a Ferret. Cro. Eliz. 126.

‡ See *infra*, 619. n.

7 Co. 16. 3 Lev. 227.

The wild Animals, ſuch as Deers, § Hares, Foxes, &c. are underſtood thoſe, which by reaſon of their Swiftneſs or Fierceneſs fly the Dominion of Man, and in theſe no Perſon can have a Property, unleſs they be tamed * or reclaimed by him; and as Property is the Power that a Man hath over any other Thing for his own Uſe, and the Ability that he has to apply it to the Suſtentation of his Being, when the Power ceaſes his Property is loſt; and by Conſequence an Animal of this Kind, which after any Seiſure eſcapes into the wild Common of Nature, and aſſerts its own Liberty by its Swiftneſs, is no more mine than any Creature in the *Indies*, becauſe I have it no longer in my Power or Diſpoſal.

* Page 613

§ See *infra*— The Owner of Deer in an Incloſure, may defend them by Force, &c. 3 W. & M. c. 10. ſ. 5.

and *vide* the Statutes 5 Geo. 1. c. 15. c. 28. 10 Geo. 2. c. 32. and ſee *infra*, 615.

5 Co. 104. Cro. Eliz. 547.

Hence it appears, that by the Common Law every Man had an equal Right to ſuch Creatures, as were not naturally under the Power of Man, and that the meer Caption or Seiſure created a Property in them, except in the following Inſtances:

7 Co. 16.

1. By immediate Manucaption, or taking them and killing them; for in theſe Caſes they belong to ſuch Perſon in the ſame Manner as any other Chattels, and cannot be violated from him, ſince the firſt Seiſure and Caption was ſufficient to veſt the Property of them in him.

7 Co. 16. b. Doct. Placit. 314.

2. By taking and taming them, and then alſo they belong to the Owner, as do all the other tame Animals ſo long as they continue in this Condition, that is, as long as they can be conſidered to have the Mind of returning to their Maſters; for while they appear to be in this State they are plainly the Owner's, and ought not to be violated; but when they forſake the Houſes and Habitations of Men, and betake themſelves to the Woods, they are then the Property of any Man.

3. Ano-

3. Another Way of gaining Property in them is by Incloſure, and then the Beaſts muſt be underſtood to be mine, as the Profits of the Soil itſelf are, and they can no more be taken and carried off than any other Profits of the Land; and therefore if incloſed Deer in a Park or Paddock, Conies in a Field or Warren, they become ſo my own, that no Man ought to kill or take them away; now ſince in this Caſe it is the Incloſure only that retains them, (for take away the Incloſure and they are in their natural Liberty,) therefore the Party is ſaid to have Right as he hath to any other Profits there incloſed, and a diſtinct and independent Right in every Animal. March 49.

4. The King, as an Acknowlegment of his Dominion over the Seas and great Rivers, by his Prerogative has a Property in ſome Animals under the Denomination of Royal Creatures, as *Sturgeons*, *Whales*, and *Swans*, all which are the Natives of Seas and Rivers. 7 Co. 16.

On theſe Reaſons and Diſtinctions of the Common Law, we may now ſee how the Law ſtands with regard to Perſons qualified to kill the Game, within the Statutes made for the Preſervation thereof.

Firſt it is clear, that if a Man purſue Deer, Hares or Conies out of his Land, or the Lands of another into (*a*) mine, and there takes them, they are the Hunter's and not mine, becauſe I never had any original Property by incloſing them. Mich. 9 W. 3. *Sutton* and *Moody* agreed. *per Curiam.*

(*a*) But it is ſaid, that if a Man flies his Hawk at a Pheaſant in his own Ground, and the Hawk purſues the Pheaſant into another's Warren, the Owner of the Hawk cannot juſtify the Entering the Warren and taking the Pheaſant. 38 E. 3. 10. b. 12 H. 8. 10. 2 Rol. Abr. 567. Poph. 162. S. C. cited.

If a Man hunts Conies,† and kills them in my Ground, I may ſeiſe them, becauſe they are indeed my Property by the Incloſure; but if he hunts them out of my Ground, they are in the Condition of natural Liberty, and then I cannot take them away from the Hunter, for then the Property is in no Man; but (*b*) Damages I may have againſt the Hunter for his entering and breaking of my Incloſure. Mich. 9 W. 3. *Sutton* and *Moody*.

(*b*) That in ſuch Actions there ſhall be no more Coſts than Damages, Carth. 382. Salk. 212. pl. 2. Ld. Raym. 149. 5 Mod. 307.——[But where Plaintiff ſhall recover full Coſts for Treſpaſſes in hunting, *i. e.* after Notice, ſee 4 & 5 W. & M. c. 23. ſ. 10.]

† As to taking Conies in a Warren, ſee 22 & 23 Car. 2. c. 25. ſ. 4.——And as to taking Conies in the Night on the Borders of Warrens, *id.* ſ. 5. and taking Conies out of Warrens in the Night. 5 G. 3. c. 14. ſ. 6.

But where a Man hunts Conies in my Warren, or Deer in my Park, and the Warrener purſue them, he may retake them; for the Park or Warren is an Eſtabliſhment by the Publick to look after and preſerve * the Game; for all Things unoccupied, in which no Man hath a Civil Right, is under the Regulation of the Public; now in Parks and Warrens, Officers are eſtabliſhed by Authority to have an Eye over the Game, and to keep it within the Boundaries; ſo that the Property is not altered by driving it out of the Incloſures, unleſs it be alſo out of the Purſuit of the Officers; for, as long as he that is thus truſted doth purſue it, it is not in its natural Liberty, but is ſtill belonging to the Warren. 12 H. 8. 9.

* Page 614

Alſo the Common Law warrants the Hunting of ravenous Beaſts of Prey on another's Ground, ſuch as Foxes, Wolves, Badgers, *&c.* ſo that the Party in purſuing thoſe through the Grounds of another is ſubject to no Action whatſoever; but it hath been (*c*) reſolved, that the Hunting and Killing ſuch noxious Animals muſt be done in the ordinary and uſual Manner; and that therefore the Digging for a Badger is unlawful, and the Party ſubject to an Action of Treſpaſs. Poph. 167. Latch. 119. *vide* the Statute 8 Eliz. c. 15. which gives a Reward for killing of Vermin.

(*c*) Cro. Jac. 321. *Gench* and *Mynns*. 2 Bulſ. 60. S. C.

A War-

Cro. Jac. 44. 3 Lev. 28. *cont.* Rol. Abr. 567. †

A Warrener or Keeper of a Park may juſtify the Killing of Dogs and Cats, as well as other Vermin, which he finds diſturbing the Game in thoſe Places.

† By 16 Geo. 3. c. 30. ſ. 9. Rangers or Keepers of Foreſts, Chaſes, Purlieus, *&c.* may in and upon the ſame ſeize Dogs, brought for courſing Deer, in the ſame Manner as Game-keepers of Manors are impowered by Law. *Vide* the Statute. The Power given to Game-keepers is by 22 & 23 Car. 2. c. 25. See alſo 5 Ann. c. 14. ſ. 4. and 3 Geo. 1. c. 11.

5 Co. 104. Cro. Eliz. 547. Moor 420, 421, 423. Rol. Abr. 90, 405. 2 Lev. 291.

A Man cannot have an Action of Treſpaſs on the Caſe, for another Man's Conies breaking into his Ground, becauſe they are no longer the other's than while they are incloſed; ſo that no Violation ariſes to the Property of one Man by the Beaſts of another, but the Conies being in their natural Liberty may be lawfully killed by the Owner of the Soil.

March 49. Godb. 174. Raſt. Ent. 650. Reg. 93. but 7 Co. 17. *cont. & vide* Cro. Car. 553.

An Action of Treſpaſs may be bronght for taking a Man's Deer in a Park or Chaſe, or of Conies in his Warren, becauſe the Law takes Notice that they are incloſed, becauſe theſe are the proper Incloſures for that Purpoſe; and conſequently thoſe Beaſts are not in their natural Liberty, and therefore the Property is in the Plaintiff.

That Treſpaſs lies for breaking his Cloſe, and fiſhing *in ſeparali Piſcaria ſua*, and for taking *Piſces ſuas*, *&c.* for being alledged to be *in ſeparali Piſcaria ſua*, he may ſay they were *Piſces ſuas*.

Mich. 9 W. 3. *Sutton* and *Moody*.

In an Action of Treſpaſs *Quare Clauſum fregit, & damas ipſius le Plaintiff cepit & aſportavit*, they ſhall be intended to be incloſed after a Verdict; becauſe when a Verdict hath found that they are the Deer of the Plaintiff, that Verdict muſt be intended to be true; therefore the Deer muſt be intended ſo to be incloſed, as to be under the Plaintiff's Power; otherwiſe he could not have Property according to the Verdict.

3 Lev. 227. *Matlock* and *Eaſtly* adjudged.

But if in Treſpaſs *Quare duas damas ipſius le Plaintiff in quodam clauſo ipſi Plaintiff, vocat' le Park, cepit & aſportavit*, the Defendant demurs generally; this hath been ruled to be ill, becauſe the Court will not intend them to be tamed or incloſed; and in Beaſts, that are in their natural Liberty, the Plaintiff hath no Property; for being only a Place called a Park, it cannot be underſtood to be a Park.

2 Rol. Abr. 138. Poph. 141. Cro. Jac. 382. Godb. 259. Cro Eliz. 548. Rol. Rep. 136, 200. 2 Rol. Rep. 3, 30. 5 Co. 104.

Any Perſon, upon his own Frank Tenement, may erect a Dove-houſe; nor can he for ſuch Building be indicted in the Leet; this was a Matter often controverted, becauſe the Pigeons and Doves ‡ were to be accounted as tame Animals, in as much as they had *Animum revertendi*; and then whoever did erect ſuch Houſes, were anſwerable for the Damage; and becauſe they were not liable to every Man's Action, to avoid Multiplicity of Suits, it was formerly held, that they were indictable in the Leet; but the contrary Opinion prevailed, becauſe it was allowed the Lord of the Manor might erect, or permit by his Licence any Perſon to erect a Dove-houſe; but no perſon could raiſe himſelf, or authoriſe another to create a Nuſance; beſides, theſe Animals are rather to be accounted * *Feræ Naturæ*; and by Conſequence, the only Remedy any Perſon had for the Damage ſuſtained by the Birds feeding on his Ground, was to kill them and take them to himſelf, which was the proper Relief according to the Common Law, in as much as the Birds were accounted no Man's Property.

* Page 615

‡ As to wilfully ſhooting at or deſtroying any Houſe-Doves, or Pigeons, ſee 2 Geo. 3. c. 29. on Penalty of 20 *s.* to be paid to the Proſecutor on Conviction before one Juſtice, or Commitment to hard Labour from three to one Month. See alſo *infra*, 618.

Thus it appears by the Common Law, that a Property in thoſe living Creatures, which by Reaſon of their Swiftneſs or Fierceneſs were not naturally under the Power of Man, was gained by the mere Caption or Seiſure

of them, and that all Men had an equal Right to hunt and kill them; but as by this Toleration Perſons of Quality and Diſtinction were deprived of their Recreations and Amuſements, it was thought neceſſary to make Laws for preſerving the Game from idle and indigent People, who by their Loſs of Time and Pains in ſuch Purſuits were mightily impoveriſhed.

The Statutes to this Purpoſe are very numerous, ſuch as the 11 *H.* 7. *cap.* 17. againſt taking Pheaſants or Partridges in another's Ground; the 23 *Eliz. cap.* 10. againſt taking or killing of Pheaſants or Partridges in the Night, and againſt Hawking in ſtanding or cared Corn; the 14 & 15 *H.* 8. *c.* 10. againſt tracing and killing of Hares in the Snow; alſo thoſe of the 1 *Jac.* 1. *cap.* 27. 3 *Jac.* 1. *cap.* 13. 7 *Jac.* 1. *cap.* 11. and 13. 22 & 23 *Car.* 2. *cap.* 25. 4 & 5 *W.* & *M.* *cap.* 25. for preſerving the Game, and inflicting Penalties on Perſons deſtroying thereof.

Thoſe for preſerving the young Fry of Fiſh, prohibiting the taking them at unſeaſonable Times of the Year, *&c.* ſuch as the 13 *E.* 1. *cap.* 47. 13 *R.* 2. *cap.* 19: 17 *R.* 2. *cap.* 9. 2 *H.* 6. *cap.* 15. (*a*) 1 *Eliz. cap.* 17. 5 *Eliz.* *cap.* 21. 22 & 23 *Car.* 2. *cap.* 25 *par.* 7. againſt Fiſh in the Ponds, Pools, Rivers, *&c.* of the Owners; the 30 *Car.* 2. *cap.* 9. 4 & 5 *W.* 3. *cap.* 23. *par.* 5. and 6. 4 & 5 *Ann. cap.* 21. 1 *Geo.* 1. *cap.* 18. 22 *Geo.* 2. *c.* 49. 23 *Geo.* 2. *c.* 26.

(*a*) Made perpetual by 3 Car. c. 4.

Thoſe againſt Deer-ſtealers, ſuch as the 19 *H.* 7. *cap.* 7. 7 *Jac.* 1. *cap.* 13. 13 *Car.* 2. *cap.* 10. 3 & 4 *W.* & *M.* *cap.* 10. 5 *Geo.* 1. *cap.* 15. and *cap.* 28. and 9 *Geo.* 1. *cap.* 22. (*b*) called the Black-Act, by which it is made Felony for Perſons offenſively armed, and having their Faces blacked, or otherwiſe diſguiſed, to appear in any Foreſt, Park, *&c.* or in any Warren, *&c.* and hunt, wound or kill any Deer, *&c.* or ſteal Fiſh out of any River or Pond, *&c.*

(*b*) Made perpetual by 31 Geo. 2. c. 42. ſ. 2.

The 33 *H.* 8. *cap.* 6. and 2 & 3 *E.* 6. *cap.* 14. which enact, That none ſhall ſhoot, or keep in his Houſe a Croſs-Bow, Hand Gun, *&c.* unleſs he had Lands to the Value of 100 *l. per Ann.* in Pain to forfeit 10 *l.* for every Offence; and that any Perſon may carry the Offender before the next Juſtice of Peace, who, upon due Examination and Proof, hath Power to commit him till he pay the Penalty, *&c.*

For the Conſtruction of theſe Statutes *vide* Jon. 170. Saund. 263. Vent. 33, 39. Sid. 419. 2 Keb. 521.

Raym. 378. 3 Mod. 280. 4 Mod. 49, 147. Show. 339. 10 Mod. 26, 213, 248, 341, 378. Fitzgib. 124. Ld. Raym. 150, 902, 1220, 1387, 1415, 1478, 1545. Stra. 66. Seſſ. Caſ. 125. Stra. 608. 2 Ld. Raym. 1375. 2 Stra. 919. Andr. 84. 2 Barnard. *K. B.* 16, 73. Seſſ. Caſ. 331. Comyns 274. pl. 152, 522. pl. 215, 576. pl. 249.

But the principal Statutes relating to this Matter are the 22 & 23 *Car.* 2. *cap.* 25. by which it is declared, "That all and every Perſon and Perſons "not having Lands and Tenements, or ſome other Eſtate of Inheritance, "in his own or his Wife's Right, of the clear yearly Value of 100 *l. per* "*Ann.* or for Term of Life; or having Leaſe or Leaſes of 99 Years, or "for any longer Term, of the clear yearly Value of 150 *l.* other than the "Son and Heir Apparent of an Eſquire, or other Perſon of higher Degree; "and the Owners and Keepers of Foreſts, Parks, Chaſes or Warrens, are "hereby declared to be Perſons, by the Laws of this Realm, not allowed "to have or keep for themſelves, or any other Perſon or Perſons, any "Guns, Bows, Greyhounds, Setting-Dogs, Ferrets, Cony-Dogs, Lur-"chers, Hayes, Nets, Lowbels, Hare-Pipes, Gins, Snares, or other En-"gines aforeſaid, but ſhall be, and are hereby prohibited to have, keep "or uſe the ſame.

* By the 5 *Anne cap.* 14. it is enacted, "That if any Higler, Chapman, * Page 616 "Carrier, Inn-keeper, Victualler, or Alehouſe-keeper, ſhall have in his

Made perpetual by 9 Ann. c. 25. By 28 Geo. 2. c. 12. Perſons ſelling, or expoſing to Sale, any Game liable to the Penalties in this Act, on Higlers, *&c.* offering Game to ſell. And by ſ. 2. of the ſame Act, Game found in the Houſe or Poſſeſſion of a Poulterer, Saleſman, Fiſhmonger, Cook or Paſtry-cook, deemed expoſing thereof to Sale. Forfeitures and Penalties to be recovered and applied as directed by the above Act of 5 Ann. c. 14.

" or their Cuſtody, or Poſſeſſion, any Hare, Pheaſant, Partridge, Moor, " Heath Game or Grouſe, or ſhall buy, ſell or offer to ſell any Hare, Phea- " ſant, Partridge, Moor, Heath Game or Grouſe, every ſuch Higler, &c. " (unleſs ſuch Game, in the Hands of ſuch Carrier, be ſent up by a Perſon " or Perſons qualified to kill the Game,) ſhall upon every ſuch Offence be " carried before ſome Juſtice of the Peace for the County, Riding, City or " Town Corporate, or Liberties, where the ſaid Offence is committed; " and if upon View, or upon the Oath of one or more credible Witneſſes, " ſhall be convicted of the ſame, ſhall forfeit for every Hare, Pheaſant, " Partridge, Moor, Heath Game or Grouſe, the Sum of 5*l.* one Half to the " Informer, and the other Half to the Poor of the Pariſh where the Offence " was committed; the ſame to be levied by Diſtreſs and Sale of the Of- " fender's Goods, by Warrant under the Hand and Seal of the Juſtice or " Juſtices of the Peace, before whom ſuch Offender or Offenders ſhall be " convicted, rendering the Overplus, (if any be) the Charge of diſtraining " being firſt deducted; and for Want of Diſtreſs, the Offender or Offen- " ders to be committed to the Houſe of Correction for the firſt Offence for " the Space of three Months, without Bail or Mainpriſe; and for every " ſuch other Offence for the Space of four Months, provided that ſuch " Conviction be made within three Months after ſuch Offence committed; " and that no *Certiorari* ſhall be allowed to remove any Conviction " made, or other Proceedings of or concerning any Matter or Thing in " this Act, into any of the Courts at *Weſtminſter*, upon any Pretence what- " ſoever, unleſs the Party or Parties, againſt whom ſuch Conviction ſhall " be made, ſhall, before the Allowance of ſuch *Certiorari*, become bound " to the Perſon or Perſons proſecuting the ſame, in the Sum of fifty " Pounds, with ſuch ſufficient Securities, as the Juſtice or Juſtices of the " Peace, before whom ſuch Offender ſhall be convicted, ſhall think fit, with " Condition to pay unto the Proſecutors, within fourteen Days after ſuch " Conviction or *Procedendo* granted, their full Coſts and Charges, to be " aſcertained upon their Oaths; and that in Default thereof, it ſhall be " lawful for the ſaid Juſtice or Juſtices, or other, to proceed for the due " Execution of ſuch Conviction, in ſuch Manner as if no ſuch *Certiorari* " had been awarded.

" And for the better Diſcovery of ſuch Higler, Chapman, Carrier, Inn- " keeper, Alehouſe-keeper and Victualler, as ſhall offer to buy or ſell any " Hare, Pheaſant, Partridge, Moor, Heath Game or Grouſe, it is enacted, " That any perſon, that ſhall deſtroy, ſell or buy any Hare, Pheaſant, " Partridge, Moor, Heath Game or Grouſe, and ſhall within three Months " make Diſcovery of any Higler, Chapman, Carrier, Inn-keeper, Ale- " houſe-keeper or Victualler, that hath bought or ſold, or offered to buy " or ſell, or had in their Poſſeſſion, any Hare, Pheaſant, Partridge, Moor, " Heath Game or Grouſe, ſo as any one ſhall be convicted of ſuch Offence " in Manner as aforeſaid, ſuch Diſcoverer to be diſcharged of the Pains " and Penalties hereby enacted for killing or ſelling ſuch Game as afore- " ſaid, ſhall receive the ſame Benefit or Advantage, as any other Informer " ſhall be intitled to, by Virtue of this Act, for ſuch Diſcovery and Infor- " mation.

And it is further enacted, " That if any Perſon or Perſons, not qua- " lified by the Laws of this Realm ſo to do, ſhall keep or uſe any Grey- " hounds, Setting-Dogs, Hayes, Lurchers, Tunnels, or any other En- " gine to kill or deſtroy the Game, and ſhall be thereof convicted upon " the Oath of one or two credible Witneſſes, by the Juſtice or Juſtices " of the Peace where ſuch Offence is committed as aforeſaid, the Perſon " or Perſons ſo convicted ſhall forfeit the Sum of five Pounds; one Half " to be paid to the Informer, and the other Half to the Poor of the

* Page 617 " * Pariſh where the ſame was committed, the ſame to be levied by Diſtreſs

" and

" and Sale of the Offender's Goods, by Warrant under the Hand and Seal " of such Justice or Justices, before whom such Person or Persons shall be " convicted as aforesaid, and for want of such Distress, the Offender or " Offenders shall be sent to the House of Correction for the Space of three " Months for the first Offence, and for every such other Offence four " Months; and that it shall and may be lawful to and for any of her " Majesty's Justices of the Peace in their respective Counties, Ridings, " Cities, Towns Corporate or Liberty, and the Lords and Ladies of his, " her, their or any of their respective Manors, within the said Manors, to " take away any such Hare, Pheasant, Partridge, Moor, Heath Game or " Grouse, or any other Game, from any such Higler, Chapman, Inn- " keeper, Victualler or Carrier, or any other Person or Persons not quali- " fied by the Laws to keep the same, to their own proper Use, without " being accountable to any Person or Persons for the same; and that it " shall and may be lawful for any Lord or Lady of his or her respective " Lordship or Manor, by Writing under his or her Hand and Seal, to " impower his or her Game-keeper or (a) Game-keepers upon his or her " own Lordship or Manor as aforesaid, to kill Hare, Pheasant, Partridge, " or any other Game whatsoever; but if the said Game-keeper shall, under " Colour or Pretence of the said Power and Authority to kill or take the " same for the Use of such Lord or Lady, afterwards sell or dispose thereof, " to any Person or Persons whatsoever, without the Consent or Knowledge " of the Lord or Lady of such Manor or Manors that hath given such " Power or Authority in Manner as aforesaid, and shall be thereof con- " victed, upon the Complaint of such Lord or Lady of any Manor, and " upon the Oath of one or more credible Witnesses, before any one or " more of her Majesty's Justices of the Peace as aforesaid, upon such Con- " viction, such Game-keeper shall be committed to the House of Cor- " rection for the Space of three Months, and there to be kept to hard " Labour.

(a) *Vide* the 9 Ann. c. 25. by which it is enacted, that no Lord or Lady of a Manor shall make or appoint above one Person to be a Game-keeper within any one Manor, whose Name shall be entred with the Clerk of the Peace,

&c. and by 3 Geo. 1. c. 11. it is enacted, that no Lord or Lady of any Manor shall make or constitute any Person to be a Game-keeper, with Power and Authority, to take and kill Hare, Pheasant, Partridge, or any other Game whatsoever, unless such Person be qualified by the Laws of this Realm so to do, or unless such Person be truly and properly a Servant to the said Lord or Lady, or such Person be immediately employed and appointed to take and kill the Game for the sole Use and Benefit of the said Lord or Lady, *&c.* ——[A Lord of a Manor may appoint a Game-keeper, with Power to kill Game, though *he* is neither a Person qualified, nor a menial Servant of the Lord; and such Game-keeper hath a Right to carry a Gun any where, though out of the Manor; and though he kills Game, or sports out of the Manor, his Gun cannot be taken from him; but if he kills Game out of the Manor he is liable to the Penalty. Mic. 9 G. 3. 2 Wil. 387.]

" By the 9 *Ann. cap.* 25. *par.* 2. it is enacted, That if any Hare, " Pheasant, Partridge, Moor, Heath Game or Grouse shall be (*b*) found in " the Shop, House or Possession of any Person or Persons whatsoever not " qualified, in his own Right, to kill Game, or being intitled thereto under " some Person so qualified, the same shall be adjudged, deemed and taken " to be an Exposing thereof to Sale within the true Intent and Meaning of " the above Statute 5 *Ann. cap.* 14.

(*b*) Must it seems be understood of Proof made, that it was found.

6 Mod. 57. 10 Mod. 26.

Comyns 274. pl. 152, 522. pl. 215, 576. pl. 249. 2 Ld. Raym. 1220, 1368, 1387, 1415, 1478, 1546. Stra. 496, 711. Sess. Cas. 298. 2 Stra. 1098. Andr. 255. 2 Sess. Cas. 385. 2 Stra. 1120.

" And it is further enacted by the said Statute, *par.* 3. That if any " Person or Persons whatsoever shall take, kill or destroy any Hare, For the punishing of Persons who unlawfully hunt or take any Red or Fallow Deer in Forests or Chases, or who beat or wound Keepers or other Officers in Forests, Chases, or Parks; and for the more effectually securing the Breed of wild Fowl, see 10 Geo. 2. c. 32. s. 9, 10. N. B. Sect. 9. is made perpetual by 31 Geo. 2. c. 42. s. 5. For the Preservation of the Game in *Scotland*, see 24 Geo. 2. c. 34. For preventing the burning or destroying of Gors, Furze or Fern in Forests or Chases, see 28 Geo. 2. c. 19. s. 3.

Phea-

" Pheaſant, Partridge, Moor, Heath Game or Grouſe in the Night-time,
" the Perſon or Perſons ſo offending ſhall likewiſe for every ſuch Offence
" incur ſuch Forfeitures, Pains and Penalties, as by the ſaid Statute of
" 5 *Ann.* is declared and enacted, to be recovered by ſuch Means as by the
" ſaid Statute is preſcribed.

" Alſo by the ſaid Statute 9 *Ann. cap.* 25. *ſect.* 4. reciting, That
" whereas very great Numbers of Wild Fowl of ſeveral Kinds are de-
* Page 618 " * ſtroyed by the pernicious Practice of Driving and Taking them with
" Hayes, Tunnels, and other Nets, in the Fens, Lakes and Broad Waters,
" where Fowl reſort in the Moulting-time; and that at the Seaſon of the
" Year when the Fowl are ſick and moulting their Feathers, and the Fleſh
" unſavoury and unwholeſome, to the Prejudice of thoſe who buy them,
" and to the great Damage and Decay of the Breed of Wild Fowl; it is
" therefore enacted, That if any Perſon or Perſons whatſoever, between
" the firſt Day of *July* and the firſt Day of *September*, as they ſhall yearly
" happen, ſhall by Hayes, Tunnels, or other Nets, drive and take any
" Wild Duck, Teal, Widgeon, or any other Fowl, commonly reputed
" Water Fowl, in any of the Fens, Lakes, broad Waters, or other Places
" of Reſort for Wild Fowl in the moulting Seaſon, ſuch Perſon or Perſons
" who ſhall ſo offend, and thereof ſhall be convicted before any one or
" more of her Majeſty's Juſtices of the Peace for the County where ſuch
" Offence ſhall be committed, by the Oath of one or more credible Witneſs,
" ſhall, for every Wild Duck, Teal, or other Water Fowl ſo taken as
" aforeſaid, forfeit and pay the Sum of five Shillings; one Moiety thereof
" to be paid to the Informer, and the other Moiety to the Poor of the
" Pariſh where ſuch Offence ſhall be committed; the ſame to be levied by
" Diſtreſs and Sale of the Offender's Goods, by Warrant under the Hand
" and Seal of the Juſtice and Juſtices of the Peace before whom the Of-
" fender ſhall be convicted, rendering the Overplus, if any be, above the
" Penalty and Charge of the Diſtreſs, and for Want of Diſtreſs the Of-
" fender ſhall be committed to the Houſe of Correction for any Time not
" exceeding one Month, nor leſs than fourteen Days, there to be whipped
" and kept to hard Labour; and the Juſtice or Juſtices of the Peace,
" before whom ſuch Perſon or Perſons ſo offending ſhall be convicted, ſhall
" order ſuch Hayes, Nets or Tunnels, that were uſed in driving and taking
" the ſaid Wild Fowl as aforeſaid, to be ſeized and immediately deſtroyed
" in the Preſence of ſuch Juſtice or Juſtices.

See 28 Geo. 2. c. 4. and 30 Geo. 2. c. 6. ſ. 47. to the ſame Purport.

" By the 6 *Geo.* 2. *cap.* 3. for the better Preſervation of the Game in
" or near ſuch Place where any Officers or Soldiers ſhall at any Time be
" quartered, it is enacted, That no Officer or Soldier ſhall, without Leave
" of the Lord of the Manor, under his Hand and Seal firſt had and ob-
" tained, take, kill or deſtroy any Hare, Coney, Pheaſant, Partridge,
" Pigeon, or any other Sort of Fowls, Poultry or Fiſh, or his Majeſty's
" Game within the Kingdom of *Great Britain*; and upon Complaint
" thereof ſhall be, upon Oath of one or more credible Witneſs or Wit-
" neſſes, convicted before any Juſtice of the Peace, who is and are hereby
" impowered and authoriſed to hear and determine the ſame, (that is to
" ſay) every ſuch Officer ſo offending ſhall, for every ſuch Offence, forfeit
" the Sum of five Pounds, to be diſtributed among the Poor of the Place
" where ſuch Offence ſhall be committed; and every Officer commanding
" in Chief upon the Place, for every ſuch Offence committed by any
" Soldier under his Command, ſhall forfeit the Sum of twenty Shillings, to
" be paid and diſtributed in Manner aforeſaid; and if upon ſuch Convic-
" tion made by the Juſtices of the Peace, and Demand thereof alſo made
" by the Conſtable or Overſeers of the Poor, ſuch Officer ſhall refuſe or
" neglect, and not within two Days pay the ſaid reſpective Penalties, ſuch
" Officer ſo refuſing or neglecting ſhall forfeit, and is hereby declared to

" have

" have forfeited his Commiſſion, and his Commiſſion is hereby declared to " be null and void.

" By the 8 *Geo.* 1. for the rendring more effectual the Laws now in " Being for the better Preſervation of the Game, it is enacted, That " whereſoever any Perſon ſhall, for any Offence to be hereafter committed " againſt any Law now in Being, for the better Preſervation of the Game, " be liable or ſubject to pay any pecuniary Penalty or Sum of Money, upon " Conviction before any Juſtice or Juſtices of the Peace, it ſhall and may " be lawful for any other Perſon whatſoever, either to proceed to recover * Page 619 " the ſaid Penalty by Information and Conviction before a Juſtice or " Juſtices of the Peace, in ſuch Manner as is in ſuch Law contained, or " to ſue for the ſame by Action of Debt, or on the Caſe, Bill, Plaint or " Information, in any of his Majeſty's Courts of Record, wherein no " Eſſoin, Protection, Wager of Law, or more than one Imparlance ſhall " be allowed, and wherein the Plaintiff, if he recovers, ſhall likewiſe have " his double Coſts.

By 26 Geo. 2. c. 11. Suits for the Recovery of pecuniary Penalties for Offences committed after 25 *March* 1753, againſt the Game Laws, may be brought before the End of the ſecond Term after the Offence committed.——Any Perſon may ſue within ſix Months after Offence, for the whole Penalty, (though the ſame be given to the Poor) to his own Uſe, and have double Coſts. Stat. 2 Geo. 3. c. 19.

" Provided, That all Suits and Actions to be brought by Force of this " Act, ſhall be brought before the End of the next Term § after the Of- § See *infra* n. " fence committed, and that no Offender againſt any of the Laws now in " Being, for the better Preſervation of the Game, ſhall be proſecuted for " the ſame Offence, both by the Way preſcribed by this Law, and by the " Way preſcribed by any of the ſaid former Laws; and, that in caſe of any " ſecond Proſecution, the Perſon ſo doubly proſecuted may plead in his " Defence the former Proſecution pending, or the Conviction or Judgment " thereupon had."

[By 2 *Geo.* 3. *c.* 19. None ſhall take, kill, or have any Partridge, from *February* 12 to *September* 1, nor Pheaſant, from *February* 1 to *October* 1, (except taken in lawful Time, and kept in a Mew) nor any Black Game from *January* 1 to *Auguſt* 20, nor Grouſe, from *December* 1 to *July* 25, on Pain of 5*l. per* Bird.——All Penalties on the Game Laws, ſued for in *Weſtminſter-Hall*, ſhall go to the Informer, and no Part to the Poor of the Pariſh.——By 13 *Geo.* 3. *cap.* 55. None ſhall kill or have Black Game from *December* 10 to *Auguſt* 20, nor Grouſe, from *December* 10 to *Auguſt* 12, on Pain from 20*l.* to 10*l.* for firſt, and from 30*l.* to 20*l.* for ſubſequent Offence, by Suit, or before a Juſtice.——By 26 *Geo.* 2. *c.* 2. Actions for the Recovery of any Penalty may be brought before the End of the ſecond Term after the Offence.——By 28 *Geo.* 2. *cap.* 12. Every Perſon, qualified or not, who offers to Sale Game, is liable to the Penalties on Higlers, *&c.* offering to Sale, by 5 *Ann. c.* 14. And Game found in Poſſeſſion of a Poulterer, *&c.* is deemed expoſing to Sale.——By 13 *Geo.* 3. *cap.* 80. Perſons killing Hare, Pheaſant, *&c.* or uſing Gun, Dog, Engine, *&c.* to kill or take, between *Seven* at *Night* and *Six* in the *Morning*, from *October* 12 to *February* 12; and between *Nine* at *Night* and *Four* in the *Morning*, from *February* 12 to *October* 12, convicted before one Juſtice, forfeits for the firſt Offence from 20*l.* to 10*l.* and for the ſecond from 30*l.* to 20*l.* and Coſts, or, for Want of Diſtreſs, ſhall be committed for three Months; and for Offence after ſecond Conviction ſhall be committed till the Quarter Seſſion, or give Surety to appear to Indictment, and if convicted forfeits 50*l.* and Coſts, or, for Want of Diſtreſs, committed from *Twelve* to *Six Months*, and PUBLICKLY WHIPPED. Half the Forfeiture to the Informer, and Half to the Poor.——Killing, or uſing an Engine on *Sunday*, or *Chriſtmas-Day*, liable to the like Penalty. The Juſtice where the Offence is committed may grant a Warrant to be indorſed

by a Juſtice in another County where the Offender lives, and the Offender thereby be brought before the firſt Juſtice, or Diſtreſs be made. An Appeal is given, but no *Certiorari*.——Such is the Care taken by modern Legiſlators of the Game! And ſuch the Laws they make to bind the Subjects of the freeſt State in the World, if it was not for ſuch Laws!——We ſhould add here, that by 10 *Geo.* 3. *c.* 18. A Perſon ſtealing any Dog, or receiving it, knowing it to be ſtolen, convicted before *two Juſtices*, forfeits from 30*l.* to 20*l.* or Impriſonment from TWELVE to SIX Months; and for the ſecond Offence from 50*l.* to 30*l.* or from EIGHTEEN to TWELVE Months Impriſonment, and WHIPPING. An Appeal is final, and there is not any *Certiorari*!——See farther as to *Game*, 6 *Com. Dig.* 386, *&c.*]

Gaming.

(A) How far reſtrained by the Common Law. 619.
(B) How far reſtrained by Statute. 621.

(A) How far reſtrained by the Common Law.

2 Vent. 175. 5 Mod. 13. Salk. 100. pl. 10. See the Preamble to the Statute 16 Car. 2. c. 7.

IT ſeems that by the Common Law, the Playing at Cards, Dice, *&c.* when practiſed innocently and as a Recreation, the better to fit a Perſon for Buſineſs, is not at all unlawful, nor puniſhable as any Offence whatſoever.

3 Lev. 118. 6 Mod. 128. 2 Ld. Raym. 1034. 3 Salk. 14.

Alſo it is agreed, that a Perſon who wins Money at Gaming may maintain a ſpecial *Indebitatus Aſſumpſit* for it; for the Contract is not (*a*) unlawful in itſelf, and the Winner's Venturing his Money is a ſufficient Conſideration to intitle him to the Action

pl. 1. 175. pl. 1. Holt 329. pl. 4. 12 Mod. 81. 2 Show. 82. pl. 69. Carth. 336. 5 Mod. 13. Vent. 175. (*a*) And therefore the Defendant to an Action for Money won at play, where the Contract is for a Sum allowed of by the Statutes, muſt put in Special Bail. Salk. 100. pl. 10.

Ld. Raym. 69, 89. 6 Mod. 128. Lutw. 180.

But it ſeems to be the better Opinion, That a general *Indebitatus Aſſumpſit* will not lie for Money won at Play, for the Contract is exe-

5 Mod. 13. and Carth. 338. S. P. where it is ſaid, that the chief Reaſon of this Opinion was, becauſe the Court would not countenance Gaming, by giving ſuch an eaſy Remedy for Money won at play, *& vide* 3 Lev. 118. and Vent. 175. where it ſeems to have been holden, that ſuch Action will lie.

* cutory, (*a*) and but a Wager, which is but a collateral Promiſe; and this Action will lie in no Caſe but where Debt will lie, which muſt be on a Contract executed, ſuch as Labour done, or ſome other meritorious Cauſe. * Page 620

(*a*) But if the Money be ſtaked down the inſtant that the Game is determined, the Property is veſted in the Winner, and it is as much a Violation of his Right to with-hold it from him as it would be if he had come to it by any other Means. 5 Mod. 13.

But an *Indebitatus Aſſumpſit* lies againſt him who (*b*) holds the Wager, becauſe it is a Promiſe in Law to deliver it if won. 5 Mod. 15. *per Holt* C. J.

(*b*) If upon a Wager the Money is depoſited in the Hands of a third Perſon, and the Determination left to two, and one of them refuſes to determine the Matter, no Action lies on ſuch a Wager till the Adjudication, and the Party may juſtify the Detainer; but if it happened that the Wager became impoſſible to be determined, as if the Judges died, or the Time were paſt, then the Wager diſſolves, and each Party ſhall have his Money again.

And although Gaming in the Manner, as has been ſaid, may be lawful, yet if a Perſon be guilty of Cheating, as by Playing with falſe Cards, Dice, &c. he may be indicted for it at Common Law, and fined and impriſoned according to the Circumſtances of the Caſe and Heinouſneſs of the Offence. That a common Player of Hazard, and uſing falſe Dice, may be

indicted for it at Common Law, and ſet in the Pillory. 2 Rol. Abr. 78.——So an Information againſt a Perſon for uſing the Game of Cock-fighting, may be at Common Law. 3 Keb. 463, 510.

Alſo all common Gaming-houſes are Nuſances in the Eye of the Law, not only becauſe they are great Temptations to Idleneſs, but alſo becauſe they are apt to draw together great Numbers of diſorderly Perſons, which cannot but be very inconvenient to the Neighbourhood. Hawk. P. C. 198.

Alſo from the deſtructive and pernicious Conſequences which muſt neceſſarily attend exceſſive Gaming, both the Courts of Law and Equity have ſhewn their Abhorrence of it. Hence in a Caſe where *A.* came to the Houſe of *B.* and won of him 900 *l.* which he carried away, and afterwards won 1500 *l.* more, which he had in his Poſſeſſion, which *B.* and his Servants took from him by Violence, and *A.* having brought an Action of Treſpaſs, the Court of Chancery granted an Injunction. Vern. 489. Sir *Bazil Firebraſſe* verſ. *Bret.* 2 Vern. 71. S. C. where the Cauſe came to a Hearing, and

the Defendant finding that the Court inclined ſo ſtrongly againſt him, ſubmitted to a Propoſition made by the Counſel, which was afterwards decreed, as by Conſent; and on this Occaſion my Lord Chancellor cited the Caſe of Sir *Cecil Biſhop* and Sir *Thomas Staples*, that came before the Lord Chief Juſtice *Hale* in the King's Bench, upon a Wager won at a Horſe-race, where Lord *Hale* declared, he would give the Defendant Leave to ſuperſ from Time to Time. †

† *Sed qu.* If that would now be done, as Horſe-racing ſeems to receive Countenance from the Statutes made to encourage the Breed of Horſes, if they run for the Sum allowed by Law, and the Money loſt on Credit does not exceed 100 *l.*? See *infra*, 621, 622, & 625. a.

So where one Apprentice loſt to another 100 *l.* at two Sittings at *Whiſt*, 50 *l.* of which was paid in ready Money; and for the other 50 *l.* he gave his Bond of 100 *l.* Penalty, and on a Bill to be relieved againſt it, the Court of Chancery decreed the Bond to be delivered up and cancelled, although the Defendant inſiſted by his Anſwer, that he was unwilling, and declined playing for ſo much, and that he was preſſed to it by the Plaintiff. 2 Vern. 291. *Woodroffe* and *Farnham*; and *note*, that by the Cuſtom of *London*, it is a ſufficient

Cauſe for a Maſter to turn away his Apprentice becauſe he frequents Gaming; and may juſtify it before the Chamberlain.

*Page 621

* (B) How far reſtrained by Statute.

Of Gaming by Perſons becoming Bankrupts, *vide* Tit. *Bankrupts.*
See Dalt. c. 46.
10 Mod. 336, 337.

THERE have been ſeveral Statutes made for reſtraining of Gaming, ſuch as the 33 *H.* 8. *cap.* 9. 2 & 3 *Pb. & M. cap.* 9. 16 *Car.* 2. *cap.* 7. 9 *An. cap.* 14 and 2. *Geo.* 2. *cap.* 28. which reciting the 33 *H.* 8. and that no Power is given unto Juſtices of the Peace to demand and take from Perſons found playing contrary to Law, any other Security than their own Recognizances, *&c.* enacts, "That where it ſhall be proved upon the "Oath of two or more credible Witneſſes, before any Juſtice or Juſtices "of the Peace, as well as where ſuch Juſtice or Juſtices ſhall find, upon his "or their own View, that any Perſon or Perſons have or hath uſed or ex- "erciſed any unlawful Game, contrary to the ſaid Statute, the ſaid Juſtice "or Juſtices ſhall have full Power and Authority to commit all and every "ſuch Offender and Offenders to Priſon, without Bail or Mainprize, unleſs "and until ſuch Offender and Offenders ſhall enter into one or more Recog- "nizance or Recognizances, with Sureties, or without, at the Diſcretion "of the ſaid Juſtice or Juſtices of the Peace, that he or they reſpectively "ſhall not from thenceforth play at, or uſe ſuch unlawful Game.

But the moſt remarkable Statutes to this Purpoſe are the 16 *Car.* 2. *cap.* 7. and the 9 *Ann. cap.* 14.

Lutw. 180, 484, 487.
2 Mod. 54, 279.
Salk. 344. pl. 2.
Com. Rep. 4.
12 Mod. 96, 97.
5 Mod. 170.
Carth. 356.
Skin. 572. pl. 16.
8 Mod. 57, 187.
10 Mod. 336, 337.
12 Mod. 336, 540.
Ld. Raym. 87.
2 Ld. Raym. 1034, 1035.

By the firſt of which it is enacted, "That if any Perſon or Perſons of "any Degree or Quality whatſoever, at any Time or Times do or ſhall "by any *Fraud*, *Shift*, *Coſenage*, *Circumvention*, *Deceit*, or *unlawful De-* "*vice*, or *ill Practice* whatſoever, in playing at or with Cards, Dice, Ta- "bles, Tennis, Bowls, Kittles, Shovelboard, or in or by Cock-fighting, "Horſe-races, Dog-matches or Foot-races, or other Paſtimes, Game or "Games whatſoever, or in or by bearing a Share or Part in the Stakes, "Wagers, Adventures, or in or by Betting on the Sides or Hands of ſuch "as do or ſhall play, act, ride, or run as aforeſaid, win, obtain or acquire "to him or themſelves, or to any other or others, any Sum or Sums of "Money, or other valuable Thing or Things whatſoever, that then every "Perſon and Perſons ſo offending, as aforeſaid, ſhall *ipſo facto* forfeit and "loſe treble the Sum or Value of Money, or other Thing or Things ſo "won, gained, obtained or acquired; the one Moiety thereof to our Sove- "reign Lord the King, his Heirs and Succeſſors, and the other Moiety "thereof unto the Perſon or Perſons grieved, or who ſhall loſe the Money "or other Thing or Things ſo gained, ſo as every ſuch Loſer and Perſon "grieved in that Behalf do or ſhall proſecute and ſue for the ſame within "ſix Kalendar Months next after ſuch Play, and in Default of ſuch Pro- "ſecution, the ſame other Moiety to ſuch Perſon or Perſons as ſhall or will "proſecute or ſue for the ſame, within one Year next after the ſaid ſix "Months expired, and that the ſaid Forfeitures ſhall and may be ſued for "or recovered by Action of Debt, Bill, Plaint or Information, in any of his "Majeſty's Courts at *Weſtminſter*, wherein no Eſſoin, Protection or Wager "of Law ſhall be allowed, and that all and every ſuch Plaintiff or Plaintiffs, "Informer or Informers, ſhall, in every ſuch Suit and Proſecution, have "and recover his and their *treble* Coſts againſt the Perſon offending and "forfeiting as aforeſaid.

And by *p.* 3. of the ſaid Statute it is further enacted, "That if any Perſon "or Perſons ſhall at any Time play at any of the ſaid Games, or any other "Paſtime, Game or Games whatſoever, (other than with and for Ready "Money,) or ſhall Bet on the Sides or Hands of ſuch as do or ſhall play "thereat, and ſhall loſe any Sum or Sums of Money, or other Thing or
Page 622 " Things ſo played for, *exceeding the Sum of One hundred Pounds*, at any "Time or Meeting upon Ticket or Credit, or otherways, and ſhall not

" pay down the ſame at the Time when he or they ſhall ſo loſe the ſame; " the Party and Parties who loſeth or ſhall loſe the ſaid Monies, or other " Thing or Things ſo played, or to be played for, *above the ſaid Sum of* " *One hundred Pounds*, ſhall not in that Caſe be bound or compelled, or " compellable to pay or make good the ſame, but the Contract (*a*) or Con- " tracts for the ſame, and for every Part thereof, and all and ſingular Judg- " ments, Statutes, Recognizances, Mortgages, Conveyances, Aſſurances, " Bonds, Bills, Specialties, Promiſes, Covenants, Agreements, and other " Acts, Deeds and Securities whatſoever, which ſhall be obtained, made, " given, acknowledged, or entered into for Security or Satisfaction of or " for the ſame, or any Part thereof, ſhall be utterly void and of none Effect, " and that the Perſon or Perſons ſo winning the ſaid Monies or other " Things, ſhall forfeit and loſe treble the Value of all ſuch Sum and Sums " of Money, or other Thing or Things which he ſhall ſo win, gain, obtain " or acquire above the ſaid Sum of One hundred Pounds; the one Moiety " thereof to our ſaid Sovereign Lord the King, his Heirs and Succeſſors, " and the other Moiety thereof to ſuch Perſon or Perſons as ſhall proſecute " or ſue for the ſame within one Year next after the Time of ſuch Offence " committed, and to be ſued for by Action of Debt, Bill, Plaint or In- " formation, in any of his Majeſty's Courts of Record at *Weſtminſter*, " wherein no Eſſoin, Protection, or Wager of Law ſhall be allowed; and " that every ſuch Plaintiff or Plaintiffs, Informer or Informers, ſhall in every " ſuch Suit or Proſecution have and receive his treble Coſts againſt the " Perſon or Perſons offending and forfeiting, as aforeſaid."

(*a*) The Words "Contract or Contracts for the ſame" are not in 9 Ann. c. 14. and were probably left out deſignedly. 2 Bur. Rep. 1081.

In the Conſtruction of this Statute the following Opinions have been holden:

1. That if the Loſer draws a Bill for 120 Guineas on his Banker, who accepts the Bill, to an Action brought againſt him by the Winner, the Drawee may well plead this Statute, although it was objected, that the Nature of the Duty was altered, and a new Contract created by the Acceptance, and that it would indanger the Credit of ſuch Bills, if they could be avoided on this Account; but theſe Reaſons did not prevail, for though it be in the Nature of a new Contract; yet all is founded on the illegal and tortious Winning, to which the Plaintiff is privy.

Salk. 344. pl. 2. *Huſſey* and *Jacob* adjudged, Carth. 356. and 5 Mod. 175. S. C. adjudged. Holt 328. pl. 2.

Comyns 4. 12 Mod. 96. Ld. Raym. 87.

2. But it ſeems, that if the Winner had aſſigned this Bill or Note *bona fide*, upon good Conſideration, to a Stranger, he had not been within the Statute, not being privy to the Tort, but an honeſt Creditor. Salk. 345. pl. 3. Carth. 357.

3. Alſo it hath been adjudged, that if a Man wins above the Sum mentioned in the Statute at Play, and the Winner owes *J. S.* the like Sum, who demands his Money, and thereupon the Winner tell him, that ſuch a one, *viz.* the Loſer, was indebted to him, and that he would give him his Bond for the Money, which he accordingly does; in this Caſe, if *J. S.* is not privy to the Monies being won at Play, he is not within the Statute. 2 Mod. 279. See Ld. Raym. 452. 2 Ld. Raym. 1035.

4. It ſeems to be the better Opinion, that a Perſon's Loſing 80 *l.* at one Meeting, for which he gives Security, and 70 *l.* more at another Meeting, to the ſame Perſon, is not within the Statute; but if theſe ſeveral Meetings were appointed to evade the Statute, it might be otherwiſe. 2 Mod. 54. *Hill* and *Pheaſant*. 8 Mod. 57, 187. 10 Mod. 312, 336. 12 Mod. 64, 81, 97, 258, 336, 540. 2 Ld. Raym. 1034. 2 Vern. 70, 291. Stra. 495. 2 Stra. 1048, 1079. Andr. 70. 12 Mod. 295. 2 Stra. 1155, 1159, 1249.

5. But it hath been adjudged, that if *A.* and *B.* enter into Articles to run a Horſe-race ſuch a Day for 100 *l.* which is won by *A.* and further in the ſame Articles, that on a ſubſequent Day, *A.* ſhould, at *B.*'s Requeſt, bring his Lev. 94. *Edgebury* and *Roſindale* adjudged,

Vent. 253. S. C. adjudged.

his Horſe to run againſt his for 200 *l.* more, which *B.* never requeſts, tho' only 100 *l.* is won by *A.* which is not above the Sum mentioned in the Statute, yet the Contract being for more than 100 *l.* makes the whole Bargain void *ab initio*, and within the Statute; which being made to prevent

* Page 623

* the Uſe of exceſſive Gaming, ought to be conſtrued in the moſt extenſive Manner that can be to anſwer that End.

Lev. 244. *Danvers* and *Thiſtlethwayte*. Sid. 394. S. C. Salk. 345. pl. 4. S. C. cited as Law by *Holt* Ch. Juſt.

6. If *A.* wins a Watch from *B.* of 10 *l.* Value, which is preſently delivered, and alſo 100 *l.* for which a Bond is given; this is not within the Statute, which extends only to thoſe Caſes where *Credit* is given for any Sum loſt at Play *above* 100 *l.* without any Regard to what was loſt in Ready Money; and here the Watch, is in Nature of Ready Money, and therefore not within the Statute.

5 Mod. 351. *Stanhope* and *Smith*. Salk. 345. pl. 4. *Dickſon* and *Pawlet* S. P. adjudged, unleſs they go Shares fraudulently and join in the Stakes; for then, as to the Change of the Game they are as one Perſon.

7. It hath been adjudged, that if a Perſon loſes 60 *l.* to one, and 60 *l.* to another, at one Sitting, or if he loſes to each of three or four People 50 *l.* or any other Sum not exceeding 100 *l.* that this is not within the Statute.

Salk. 344. pl. 1. *Pope* verſus *St. Leger*. 4 Mod. 409. 10 Mod. 336. 12 Mod. 81. 5 Mod. 1. Skin. 572. pl. 16. Lutw. 487. Carth. 322. S. C. but note, the Judgment in this Caſe was reverſed for a Fault in the Pleading.

8. If Two are at Play at Backgammon, and one of the Players ſtirs a Man, but does not move it from the Point, upon which there enſues a Wager of 100 Guineas, *viz.* whether he who ſtirred the Man was obliged to play it, and the Determination left to the Groom-Porter, who determines that he was not; this is not within the Statute, for the Money was not loſt on the Chance of the Play, but on the Right of the Play, which is a collateral Matter.

8 Mod. 57, 187. 2 Stra. 1048. Andr. 70. 12 Mod. 295. 2 Stra. 1249. By 12 Geo. 2. c. 28. ſ. 2. The Game of Ace of Hearts, Faro, Baſſet and Hazard, ſhall be deemed Games or Lotteries by Cards or Dice; and every Perſon who ſhall ſet up or keep theſe Games ſhall be liable to all the Penalties for ſetting up or keeping any of the Games or Lotteries in this Act mentioned. By 13 Geo. 2. c. 19. ſ. 9. The Game of Paſſage, and every other Game with one or more Die or Dice, or with any other Inſtrument, Engine or Device, in the Nature of Dice, having one or more Figures or Numbers thereon (Backgammon and the other Games played with Backgammon Tables only excepted), ſhall be deemed Games or Lotteries by Dice with-

By the 9 *Ann. cap.* 14. it is enacted, "That all Notes, Bills, Bonds, Judgments, Mortgages, or other Securities or Conveyances whatſoever given, granted, drawn or entered into, or executed by any Perſon or Perſons whatſoever, where the Whole, or any Part of the Conſideration of ſuch Conveyances or Securities ſhall be for any Money, or other valuable Thing whatſoever won by Gaming or Playing at Cards, Dice, Tables, Tennis, Bowls, or other Game or Games whatſoever, or by Betting on the Sides or Hands of ſuch as do game at any of the Games aforeſaid, or for the reimburſing or repaying any Money knowingly lent or advanced for ſuch Gaming or Betting, as aforeſaid, or lent or advanced at the Time and Place of ſuch Play, to any Perſon or Perſons ſo Gaming or Betting, as aforeſaid, or that ſhall, during ſuch Play, ſo play or bet, ſhall be utterly void, fruſtrate, and of none Effect, to all Intents and Purpoſes whatſoever; and that where ſuch Mortgages, Securities, or other Conveyances, ſhall be of Lands, Tenements or Hereditaments, or ſhall be ſuch as incumber or affect the ſame, ſuch Mortgages, Securities, or other Conveyances, ſhall enure, and be to and for the ſole Uſe and Benefit of, and ſhall devolve upon ſuch Perſon or Perſons as ſhould or might have, or be intitled to ſuch Lands, Tenements or Hereditaments, in caſe the ſaid Grantor or Grantors thereof, or the Perſon or Perſons ſo incumbring the ſame, had been naturally dead, and as if ſuch Mortgages, Securities, or

" or other Conveyances had been made to ſuch Perſon or Perſons ſo in-
" cumbring the ſame, and that all Grants or Conveyances to be made for
" * the Preventing of ſuch Lands, Tenements or Hereditaments from
" coming to, or devolving upon ſuch Perſon or Perſons hereby intended
" to enjoy the ſame, as aforeſaid, ſhall be deemed fraudulent and void,
" and of none Effect to all Intents and Purpoſes whatſoever.

* Page 624 in the ſaid Act.

By 18 Geo. 2. c. 34. No Perſon ſhall keep any Houſe, Room or Place for playing, or ſuffer any Perſon whatſoever within any ſuch Houſe, Room or Place, to play at the Game of Rowlet, otherwiſe Roly-poly, or at any other Game with Cards or Dice prohibited by Law, and the Offender ſhall incur the Penalties, and be liable to ſuch Proſecution as directed by this Act. By ſ. 5. No Perſon incapable of being a Witneſs (except the Parties) for having played, betted, *&c.* By ſ. 7. No Privilege of Parliament to be allowed in Proſecutions, *&c.* By 30 Geo. 2. c. 24. ſ. 14. If any Publican permits Journeymen, *&c.* to game in his Houſe, he ſhall forfeit 40*l.* and ten Pounds for every ſubſequent Offence, to be levied by Diſtreſs and Sale.——A Bill of Exchange given for a gaming Debt is a void Security both in *France* and *England*, and Plaintiff cannot recover by Force of the Writing. 2 Bur. Rep. 1078. *Wilmot* Ch. Juſt. C. P. ſaid, that Stat. 9 Ann. c. 14. did not mean to make the Contract void, where the Money was fairly and *bona fide* lent. 2 Bur. Rep. 1082.

" And it is further enacted, That any Perſon who ſhall at any Time or
" Sitting, by Playing at Cards, Dice, Tables, or other Game or Games
" whatſoever, or by Betting on the Sides or Hands of ſuch as do play at any
" of the Games aforeſaid, loſe, to any one or more Perſon or Perſons ſo
" Playing or Betting in the Whole, the Sum or Value of ten Pounds, and
" ſhall pay or deliver the ſame, or any Part thereof, the Perſon or Perſons
" ſo loſing and paying, or delivering the ſame, ſhall be at Liberty within
" three Months then next to ſue for and recover the Money or Goods ſo loſt,
" and paid or delivered, or any Part thereof, from the reſpective Winner
" and Winners thereof, with Coſts of Suit, by Action of Debt founded on
" this Act, to be proſecuted in any of her Majeſty's Courts of Record, in
" which Actions or Suits, no Eſſoin, Protection, Wager of Law, Privilege
" of Parliament, or more than one Imparlance ſhall be allowed; in which
" Actions it ſhall be ſufficient for the Plaintiff to alledge, that the Defen-
" dant or Defendants are indebted to the Plaintiff, or received to the
" Plaintiff's Uſe, the Monies ſo loſt or paid, or converted the Goods won
" of the Plaintiffs to the Defendants Uſe, whereby the Plaintiff's Action
" accrued to him, according to the Form of this Statute, without ſetting
" forth the Special Matter; and in caſe the Perſon or Perſons, who ſhall
" loſe ſuch Money or other Thing as aforeſaid, ſhall not within the Time
" aforeſaid, really and *bona fide*, and without Covin or Colluſion, ſue and
" with Effect proſecute for the Money or other Thing, ſo by him or them
" loſt and paid or delivered, as aforeſaid, it ſhall and may be lawful to and
" for any Perſon or Perſons, by any ſuch Action or Suit, as aforeſaid, to
" ſue for and recover the ſame, and treble the Value thereof, with Coſts of
" Suit, againſt ſuch Winner or Winners, as aforeſaid; the one Moiety
" thereof to the Uſe of the Perſon or Perſons that will ſue for the ſame,
" and the other Moiety to the Uſe of the Poor of the Pariſh where the Of-
" fence ſhall be committed.

" And for the better Diſcovery of the Monies, or other Thing ſo won
" and to be ſued for and recovered, as aforeſaid, it is further enacted, that
" all and every the Perſon or Perſons, who by virtue of this preſent Act
" ſhall or may be liable to be ſued for the ſame, ſhall be obliged and com-
" pellable to anſwer upon Oath ſuch Bill or Bills as ſhall be preferred againſt
" him or them, for diſcovering the Sum and Sums of Money, or other
" Thing ſo won at Play, as aforeſaid.

" Provided, That upon the Diſcovery and Repayment of the Money, or
" other Thing ſo to be diſcovered and repaid, as aforeſaid, the Perſon or
" Perſons, who ſhall ſo diſcover and repay the ſame, as aforeſaid, ſhall be
" acquitted, indemnified and diſcharged from any further or other Puniſh-
" ment, Forfeiture or Penalty, which he or they might have incurred by

" the

" Playing for, or winning ſuch Money or other Thing ſo diſcovered and " repaid, as aforeſaid.

" And it is further enacted, That if any Perſon do or ſhall, by any Fraud " or Shift, Coſenage, Circumvention, Deceit or unlawful Device or ill Prac- " tice whatſoever, in playing at or with Cards, Dice, or any the Games " aforeſaid, or in or by bearing a Share or Part in the Stakes, Wagers or " Adventures, or in or by Betting on the Sides or Hands of ſuch as do or " ſhall play, as aforeſaid, win, obtain, or acquire to him or themſelves, or " to any other or others, any Sum or Sums of Money, or other valuable " Thing or Things whatſoever, or ſhall at any one Time or Sitting win of any " one or more Perſon or Perſons whatſoever, above the Sum or Value of ten " Pounds; that then every Perſon or Perſons ſo winning by ſuch ill Prac- " tice, as aforeſaid, or winning at any one Time or Sitting, above the ſaid " Sum or Value of ten Pounds, and being convicted of any of the ſaid " Offences, upon an Indictment or Information to be exhibited againſt him " or them for that Purpoſe, ſhall forfeit five Times the Value of the " Sum or Sums of Money, or other Thing ſo won, as aforeſaid; and in
* Page 625 " * caſe of ſuch ill Practice as aforeſaid, ſhall be deemed infamous, and " ſuffer ſuch corporal Puniſhment as in Caſes of wilful Perjury; and ſuch " Penalty to be recovered by ſuch Perſon or Perſons as ſhall ſue for the " ſame by ſuch Action as aforeſaid.

" And whereas divers lewd and diſſolute Perſons live at great Expences, " having no viſible Eſtate, Profeſſion or Calling to maintain themſelves, " but ſupport thoſe Expences by Gaming only; it is further enacted That " it ſhall and may be lawful for any two of her Majeſty's Juſtices of the " Peace in any County, City or Liberty whatſoever, to cauſe to come, or " to be brought before them, every ſuch Perſon or Perſons within their " reſpective Limits, whom they ſhall have juſt Cauſe to ſuſpect to have no " viſible Eſtate, Profeſſion or Calling to maintain themſelves by, but do " for the moſt Part ſupport themſelves by Gaming; and if ſuch Perſon " or Perſons ſhall not make it appear to ſuch Juſtices, that the principal " Part of his or their Expences is not maintained by Gaming, that then " ſuch Juſtices ſhall require of him or them ſufficient Sureties for his or " their good Behaviour for the Space of twelve Months, and in Default of " his or their finding ſuch Securities, to commit him or them to the com- " mon Gaol, there to remain until he or they ſhall find ſuch Sureties.

" And it is further enacted, That if ſuch Perſon or Perſons ſo finding Sure- " ties ſhall, during the Time for which he or they ſhall be ſo bound to the " good Behaviour, at any one Time or Sitting, play or bet for any Sum or " Sums of Money, or other Thing exceeding in the Whole the Sum or " Value of twenty Shillings, that then ſuch Playing ſhall be deemed or " taken to be a Breach of his or their Behaviour, and a Forfeiture of the " Recognizance given for the ſame.

" And for preventing of ſuch Quarrels as ſhall or may happen on the " Account of Gaming, it is further enacted, That in caſe any Perſon or " Perſons whatſoever ſhall aſſault and beat, or ſhall challenge or provoke to " fight, any other Perſon or Perſons whatſoever, upon Account of any " Money won by Gaming, Playing or Betting at any of the Games afore- " ſaid, ſuch Perſon or Perſons aſſaulting and beating, or challenging or pro- " voking to fight, ſuch other Perſon or Perſons, upon the Account aforeſaid, " ſhall, being thereof convicted upon an Indictment or Information to be " exhibited againſt him or them for that Purpoſe, forfeit to her Majeſty all " his Goods, Chattels and Perſonal Eſtate whatſoever, and ſhall alſo ſuffer " Impriſonment without Bail or Mainprize, in the common Gaol of the " County where ſuch Conviction ſhall be had, during the Term of two " Years.

" Provided, That nothing in this Act ſhall extend to prevent or hinder any " Perſon or Perſons from Gaming or Playing at any of the Games aforeſaid, " within any of her Majeſty's Palaces of *St. James* or *Whiteball*, during ſuch " Time as her Majeſty, her Heirs or Succeſſors, ſhall be actually reſident at " either of the ſaid two Palaces, or in any other Royal Palace, where her " Majeſty, her Heirs or Succeſſors, ſhall be actually reſident, during the " Time of ſuch actual Reſidence, ſo as ſuch Playing be not in any Houſe, " Lodging, or other Part of any of the ſaid Palaces, the Freehold and In- " heritance whereof is or ſhall be out of the Crown, or is or ſhall be in " Leaſe to any Perſon or Perſons, during ſuch Time as ſuch Freehold " and Inheritance ſhall be out of the Crown, or ſuch Leaſe ſhall continue, " and ſo as ſuch Playing be for Ready Money only.

[Houſes and Gardens of Entertainment, not to be kept without Licence. 25 *Geo.* 2. *c.* 36. *ſ.* 2.——Horſe-racing for Plates under 50 *l.* or with Horſes carrying ſmall Weights, prohibited. 13 *Geo.* 2. *c.* 19. *ſ.* 2.—— Horſes may run for the Value of 50 *l.* with any Weight, and at any Place. 18 *Geo.* 2. *c.* 34. *ſ.* 11.——Horſes at Races muſt be entered by the Owners. 13 *Geo.* 2. *c.* 19.]

* Gaol and Gaoler.

* Page 626

(A) Gaols, by what Authority erected, and to whom they belong. 626.
(B) Who are to be at the Charge of Repairing them. 627.
(C) To what Place Offenders are to be committed; and herein what ſhall be ſaid a Gaol, and where to be kept. 629.
(D) Of the Duty and Power of Gaolers and Keepers of Priſons. 630.

And herein,

1. What Acts they may lawfully do, and for what Abuſes they are puniſhable. 630.
2. For what Offences they ſhall forfeit their Offices. 631.

(E) At whoſe Charge Priſoners are to be carried to Gaol. 632.
(F) How maintained there. 633.
(G) Of the Offence of breaking Gaol. 635.

(A) Gaols, by what Authority erected, and to whom they belong.

2 Inſt. 705. (a) Hence the Coroner is to inquire of the Death of all Perſons whatſoever who die in Priſon, to the End that the Public may be ſatisfied whether ſuch Perſons came to their End by the common Courſe of Nature, or by ſome unlawful Violence, or unreaſonable Hardſhips, put on them by thoſe under whoſe Power they were confined 3 Inſt. 52, 91.

GAOLS are of ſuch univerſal Concern to the (a) Public, that none can be erected by any leſs Authority than by Act of Parliament.

2 Inſt. 100. (b) Where a Perſon may be Judge and Gaoler, as the Sheriff of *London* is of the *Compter* both Judge and Keeper. Rol. Abr. 806. Show. Rep. 162. cited.

Alſo all Priſons or Gaols belong to the King, although a Subject may have the (b) Cuſtody or Keeping of them.

And to this Purpoſe by the 5 *H.* 4. *cap.* 10. reciting, "That divers "Conſtables of Caſtles within the Realm, being aſſigned Juſtices of "Peace by the King's Commiſſion, had by Colour of ſuch Commiſſion "uſed to take People to whom they bore evil Will, and impriſoned "them within the ſaid Caſtles till they had made Fine and Ranſom with "the ſaid Conſtables for their Deliverance; and thereupon it is enacted, "that none be impriſoned by any Juſtice of the Peace but only in the "* common Gaol, ſaving to Lords and others, which have Gaols, their "Franchiſe in this Caſe.

* Page 627

And. 345. 4 Co. 34. a. 9 Co. 119. Cro. Eliz. 829, 830.

And it hath been holden, that the King's Grant, ſince this Statute, to private Perſons to have the Cuſtody of Priſoners committed by Juſtices of Peace, is void; and that the Sheriff ſhall have the Cuſtody of all Perſons taken by virtue of any Precept or Authority to him directed notwithſtanding any Grant by the King of the Cuſtody of Priſoners to another Perſon.

Salk. 343. pl. 1. Fareſt. 31. *per Holt* C. J.

Alſo it is ſaid, that none can claim a Priſon as a Franchiſe, unleſs they have alſo a Gaol-Delivery; and that therefore the Dean and Chapter of *Weſtminſter*, though they have the Cuſtody of the *Gate-houſe* Priſon, yet as they have no Gaol-Delivery, they muſt ſend a Kalendar of the Priſoners to *Newgate*.

This Statute confirmed by 19 H. 7. c. 10. & 5 Ann. c. 9.

By the 14 *E.* 3. *ſtat.* 1. *cap.* 10. it is enacted, "In the Right of the "Gaols, which were wont to be in Ward of the Sheriffs, and annexed to "their Bailiwicks, it is aſſented and accorded that they ſhall be rejoined to "the Sheriffs; and the Sheriffs ſhall have the Cuſtody of the ſame Gaols "as before this Time they were wont to have, and they ſhall put in ſuch "Under-keepers for whom they will anſwer. †

† And by 11 & 12 W. 3. c. 19. ſ. 3. The Sheriffs ſhall have the Cuſtody of Gaols.——As to the *King's Bench* Priſon and the *Fleet*, ſee *infra*, 632.

By the 3 *Geo.* 1. *cap.* 15. "None ſhall purchaſe the Office of Gaoler, or "any other Office pertaining to the High Sheriff, under Pain of 500*l.*

(B) The

(B) Who are to be at the Charge of Repairing them.

ALTHOUGH divers Lords of Liberties have the Cuſtody of Priſons and ſome in Fee, yet the Priſon itſelf is the King's *pro bono publico*, and therefore it is to be repaired at the common Charge. 2 Inſt. 589.

But this Matter is now regulated by the (a) 11 & 12 W. 3. *cap.* 19. by which it is enacted, "That it ſhall and may be lawful for the Juſtices of "the Peace, or the greater Number of them, within the Limits of their "Commiſſions, upon Preſentment of the Grand Jury or Grand Juries, at "the Aſſiſe, Great Seſſions, and General Gaol-Delivery held for the ſaid "County, of the Inſufficiency or Inconvenience of their Gaol or Priſon, to "conclude and agree upon ſuch Sum or Sums of Money, as upon Exa-"mination of able and ſufficient Workmen ſhall be thought neceſſary for "the Building, Finiſhing or Repairing a public Gaol or Gaols belonging "to the Shire or County whereof they are Juſtices of the Peace; and by "Warrant under their Hands and Seals, or under the Hands and Seals of "the greater Number of them, by equal Proportion, to diſtribute and "charge the Sum or Sums of Money, to be levied for the Uſes aforeſaid, "upon the ſeveral Hundreds, Lathes, Wapentakes, Rape, Ward or other "Diviſions of the ſaid County; and the Juſtices of Peace are hereby au-"thorized and impowered at the General Quarter-Seſſions held for the re-"ſpective Diviſion of the ſaid County, to direct their Warrants or Precepts "to High Conſtables, Petty Conſtables, Bailiffs, or other Officer or Of-"ficers, as they in their Diſcretion ſhall think moſt convenient for levying "and collecting the ſame.

(a) Revived and continued for ſeven Years, by 10. Ann. c. 14. and made perpetual by 6 Geo. c. 19. and 10 Ann: c. 14. is made perpetual by ſaid 6 Geo. c. 19. For building a Gaol for the Weſtern Diviſion of *Kent*, ſee 9 Geo. 2. c. 12. For building one for the County of *Bucks*, ſee 10 Geo. 2. c. 10. For rebuilding one at *Derby*, ſee 29 Geo. 2. c. 48. [For *Eſſex*, 10 Geo. 3. c. 28. As to the Priſon of *Newgate*, in *London*, ſee 7 Geo. 3. c. 37.]

And it is further enacted by the ſaid Statute, "That if any Perſon "ſhall refuſe or neglect to pay his or their Aſſeſſment, by the Space of "four Days, after Demand thereof by the proper Officer appointed to "* collect the ſame, or ſhall convey away his or their Goods or Eſtate, "whereby the Sum or Sums of Money ſo aſſeſſed cannot be levied, then "it ſhall and may be lawful to and for the ſaid Collectors, by Warrants "from any one of the Juſtices of the Peace preſent at the ſaid General "Quarter-Seſſions as aforeſaid, to levy the Sum ſo aſſeſſed by Diſtreſs and "Sale of the Goods and Chattels of ſuch Perſons ſo refuſing or neglecting "to pay; and the Goods and Chattels then and there found, and the "Diſtreſs ſo taken, to keep by the Space of four Days at the Coſts and "Charges of the Owner thereof; and if the ſaid Owner do not pay the "Sum or Sums of Money ſo rated or aſſeſſed within the Space of the ſaid "four Days, then the ſaid Diſtreſs to be appraiſed by two or more of the "Inhabitants where the ſame ſhall be taken, or other ſufficient Perſons, and "to be ſold by the Collector for Payment of the ſaid Money, and the "Overplus of ſuch Sale, (if any be) over and above the Sum ſo aſſeſſed, "and Charges of taking and keeping of the Diſtreſs, to be immediately "returned to the Owner thereof; and the ſaid Juſtices of the Peace are "hereby authorized and impowered, under their Hands and Seals, or under "the Hands and Seals of the greater Number of them, to conſtitute and "appoint one or more ſufficient Perſon or Perſons to be Receiver of the "Money ſo aſſeſſed; the ſaid Receiver firſt giving Security to be account-"able, when thereunto required, for all Sums of Money received or diſ-"burſed by him, in purſuance of ſuch Order as he ſhall have received

* Page 628

" under the Hands and Seals of the Juſtices of the Peace, or the greater " Number of them; and if the ſaid Receiver or Receivers, High Con- " ſtable, Petty Conſtable, or other Officers, ſhall by the Space of four " Days after Demand refuſe to account for all Sums of Money received by " them in purſuance of this Act; then it ſhall and may be lawful for the " Juſtices of the Peace, or the greater Number of them, to commit him " or them to Priſon, there to remain without Bail or Mainpriſe, until he " or they ſhall have made a true Account, and ſatisfied or paid ſuch Sum " or Sums of Money as ſhall appear to remain in his or their Hands; and " the Receipt of ſuch Receiver ſhall be a ſufficient Diſcharge to all High " Conſtables, Petty Conſtables, or other Officer or Officers, paying their " Proportion of ſuch Aſſeſſments; and the Diſcharge under the Hands and " Seals of the Juſtices of the Peace, or the greater Number of them, at the " Aſſiſe, Great Seſſions, and General Gaol-Delivery, to ſuch their Receivers, " ſhall be deemed and allowed as a good and ſufficient Releaſe, Acquittance " or Diſcharge in any Court of Law or Equity, to all Intents and Purpoſes " whatſoever; and the ſaid Juſtices of the Peace are hereby authorized and " impowered to covenant, contract and agree with any Perſon or Perſons " for the well and ſufficient Building, Finiſhing and Repairing of the ſaid " Gaol or Gaols.

" Provided that this Act be not any wiſe hurtful or prejudicial to any " Perſon or Perſons having any common Gaol by Inheritance, for Term of " Life or for Years; but that they ſhall have and enjoy the ſaid Gaols, and " the Profits, Fees and Commodities of the ſame, as they had, or might " lawfully have had before the making this Act, and as if this Act never " had been made.

" Provided alſo, that this Act ſhall not extend to charge any Perſon inha- " biting in any Liberty, City, Town or Borough Corporate, which have " common Gaols for Felons taken in the ſame, and Commiſſions of Aſſiſe, " or Gaol-Delivery of ſuch Felons, for any Aſſeſſment, to the making the " common Gaol or Gaols of the reſpective Shire or County.

And it is further enacted by the ſaid Statute, " That where any " Priſons or Gaols (belonging to any County of this Realm, or the Do- " minions of *Wales*, are ſituate upon any Lands or Hereditaments of " or belonging to the King's Majeſty) in Right of the Crown, that " * the ſaid Lands and Hereditaments, with their and every of their Ap- " purtenances, ſhall not at any Time be alienated from the Crown, but " remain and be for the publick Service and Benefit of the County."

* Page 629

(C) To what Place Offenders are to be committed; and herein, what ſhall be ſaid a Gaol, and where to be kept.

2 Inſt. 43. That this Statute is only declarative of the Common Law.

BY the 5 *H.* 4. *cap.* 10. it is enacted, " That none ſhall be impriſoned " by any Juſtice of the Peace but only in the Common Gaol, ſaving " to Lords and others, who have Gaols, their Franchiſe in this Caſe.

Moor 666. pl. 913. Sid. 145.

But the Court of *King's Bench* may commit Offenders to any Priſon in the Kingdom which they ſhall think moſt proper, and the Offenders ſo committed or condemned to Impriſonment cannot be removed or bailed by any other Court.

But by the 31 *Car.* 2. *cap.* 12. it is enacted, "That no Subject of "this Realm, being an Inhabitant or Reſiant of this Kingdom of *En-* "*land*, Dominion of *Wales*, or Town of *Berwick* upon *Tweed*, ſhall or "may be ſent Priſoner into *Scotland*, *Ireland*, *Jerſey*, *Guernſey*, *Tangier*, "or into Parts, Garriſons, Iſlands, or Places beyond the Seas, which "then were, or at any Time hereafter ſhall be within or without the Do- "minions of his Majeſty, his Heirs or Succeſſors, and that every ſuch Im- "priſonment is by the ſaid Statute enacted and adjudged to be illegal; "and that every Subject ſo impriſoned ſhall have an Action of falſe Im- "priſonment, *&c.* and recover treble Coſts, and no leſs Damages than "five Hundred Pounds againſt the Perſon making ſuch Warrant, who "ſhall incur a *Præmunire*.

And as Priſoners ought to be committed at firſt to the proper Priſon ſo ought they not to be removed from thence, except in ſome Special Caſes.

To which Purpoſe, by the 31 *Car.* 2. *cap.* 2. *par.* 9. it is enacted, "That if any Subject of this Realm ſhall be committed to any Priſon, "or in Cuſtody of any Officer or Officers whatſoever, for any criminal or "ſuppoſed criminal Matter, that the ſaid Perſon ſhall not be removed from "the ſaid Priſon and Cuſtody into the Cuſtody of any other Officer or "Officers, unleſs it be by *Habeas Corpus*, or ſame other legal Writ; or "where the Priſoner is delivered to the Conſtable or other inferior Officer, "to carry ſuch Priſoner to ſome common Gaol; or where any Perſon is "ſent by Order of any Judge of Aſſiſe, or Juſtice of the Peace, to any "common Work-houſe, or Houſe of Correction; or where the Priſoner is "removed from one Priſon or Place to another within the ſame County, in "order to a Trial or Diſcharge by due Courſe of Law; or in Caſe of ſud- "den Fire (*a*) or Infection, or other Neceſſity; upon Pain that he, who "makes out, ſigns, or counterſigns, or obeys or executes ſuch Warrant, "ſhall forfeit to the Party grieved one Hundred Pounds for the firſt Of- "fence, two Hundred Pounds for the ſecond, *&c.*"

(*a*) *Vide* the 19 Car. 2. c. 4. ſ. 2. for impowering Juſtices of the Peace to remove Priſoners in caſe of Infection.

[Felons ſhall be kept apart from Priſoners for Debt 22 & 23 *Car.* 2. *cap.* 20. *ſect.* 13. ſee *infra* 631.——Felons ſhall be impriſoned in the common Goal, 11 & 12 *W.* 3. *cap.* 19. *ſect.* 3.——Vagrants and other Offenders may be committed to Gaol, or the Houſe of Correction. 6 *Geo.* 1. *cap.* 19. *ſect.* 2.]

* (D) Of the Duty and Power of Gaolers and Keepers of Priſons: And herein,

* Page 630

1. What Acts they may lawfully do, and for what Abuſes puniſhable.

A Gaoler is conſidered as an Officer relating to the Adminiſtration of Juſtice, and is ſo far under the Protection of the Law, that if a Perſon threatens him for keeping a Priſoner in ſafe Cuſtody, he may be indicted and fined and impriſoned for it. 2 Rol. Abr. 76.

If a Criminal endeavouring to break the Gaol aſſault his Gaoler, he may be lawfully killed by him in the Affray. Jenk. 23. Hawk. P. C. 71.

But if a Priſoner gets out of Gaol, and the Gaoler in Purſuit of him kills him, he is guilty of an Eſcape though he never loſt Sight of him, and could Fitz. Coron. 328, 346.

Staundf. P. C. 33. 2 Hawk. P. C. 130.

not otherwiſe take him; not only becauſe the King loſes the Benefit he might have had from the Attainder of the Priſoner by the Forfeiture of his Goods, &c. but alſo becauſe the publick Juſtice is not ſo well ſatisfied by killing him in ſuch an extrajudicial Manner.

9 Co. 50. Raym. 216. (a) That a Gaoler *de facto*, who takes upon him without any legal Authority to keep Priſoners, as alſo Feme Coverts and Infants, are anſwerable for their Miſcarriages. 2 Inſt. 381. 8 Co. 44.

Beſides the Duties injoined (a) Gaolers by Acts of Parliament, and the Abuſes for which by Statute they are puniſhable, the Common Law ſubjects them to Fine and Impriſonment, as alſo to the Forfeiture of their Offices, for groſs and palpable Abuſes in the Execution of their Offices, ſuch as ſuffering Priſoners to eſcape, barbarouſly miſuſing them, &c.

By the 14 *E.* 3. *cap.* 10. "If any Keeper of a Priſon, or Under-Keeper, "by too great Dureſs of Impriſonment, and by Pain, make any Priſoner "that he hath in his Ward to become an Appellor againſt his Will, he is "guilty of Felony.

Staundf. P. C. 36. 3 Inſt. 91.

In the Conſtruction of this Statute it is ſaid to be no way material, whether the Approvement be true or falſe, or whether the Appellee be acquitted or condemned; but at Law this Offence was eſteemed a Miſpriſion only, unleſs the Appellee were hanged by Reaſon of the Appeal.

2 Hawk. P. C. 151, & *vide* Tit *Habeas Corpus*. (b) But a Gaoler is not puniſhable by Attachment for the bare Eſcape of a Perſon in his Cuſtody by Civil Proceſs, but the Party grieved by ſuch Eſcape ought to take his Remedy by Action.

Alſo Gaolers are puniſhable by (b) Attachment, as all other Officers are by the Courts to which they more immediately belong, for any groſs Miſbehaviour in their Offices, or Contempts of the Rules of ſuch Courts, and puniſhable by any other Courts for diſobeying Writs of *Habeas Corpus* awarded by ſuch Courts, and not bringing up the Priſoner at the Day prefixed by ſuch Writs.

By the 4 *E.* 3. *cap.* 10. reciting, that whereas in Times paſt, Sheriffs, and Gaolers of Gaols would not receive Thieves, Perſons appealed, indicted or found with the Manner, taken and attached by the Conſtables and Townſhips, without taking great Fines and Ranſoms of them for their Receipt, whereby the ſaid Conſtables and Townſhips have been unwilling to take Thieves and Felons becauſe of ſuch extreme Charges, and the Thieves and the Felons the more encouraged to offend, it is enacted, "That the Sheriffs and Gaolers ſhall receive, and ſafely keep "in Priſon from henceforth, ſuch Thieves and Felons, by the Delivery "of the Conſtables and Townſhips, without (c) taking any Thing for "* the Receipt; and the Juſtices aſſigned to deliver the Gaol ſhall have "Power to hear their Complaints, that will complain againſt the Sheriffs "and Gaolers in ſuch Caſe, and moreover to puniſh the Sheriffs and Gaolers, if they be found Guilty.

* Page 631

(c) By 23 H. 8. c. 10. a Gaoler upon a Commitment may take 4 *d.*

By the 3 *H.* 7. *cap.* 3. it is enacted, "That every Sheriff, Bailiff of "Franchiſe, and every other Perſon having Authority or Power of keeping "of Gaol, or of Priſoners for Felony, do certify the Names of every ſuch "Priſoner in their keeping, and of every Priſoner to them committed for "any ſuch Cauſe, at the next general Gaol-Delivery, in every County or "Franchiſe where any ſuch Gaol or Gaols have been, or hereafter ſhall be, "there to be kalendered before the Juſtices of the Deliverance of the ſame "Gaol, whereby they may, as well for the King, as for the Party, pro-"ceed to make Deliverance of ſuch Priſoners according to Law; upon "Pain to forfeit to the King for every Default there recorded one hundred Shillings.

By the 22 & 23 *Car.* 2. *cap.* 20. *par.* 12. it is enacted, " That the " ſeveral Rates of Fees, and the future Government of Priſoners, be ſigned " and confirmed by the Lord Chief Juſtices, and Lord Chief Baron, or " any two of them for the Time being; and the Juſtices of the Peace in " *London*, *Middleſex* and *Surrey*; and by the Judges for the ſeveral Cir- " cuits, and Juſtices of the Peace, for the Time being, in their ſeveral Pre- " cincts, and fairly written and hung up in a Table in every Gaol and Pri- " ſon, and likewiſe be regiſtered by each and every Clerk of the Peace " within his or their particular Juriſdiction; and after ſuch Eſtabliſhment, " no other or greater Fee or Fees, than ſhall be ſo eſtabliſhed, ſhall be de- " manded or received.

But for the more effectual regulating the Fees of Gaolers, *vide* 2 Geo. 2. c. 22. 3 Geo. 2. c. 27. 8 Geo. 2. c. 24. 21 Geo. 2. c. 33. 32 Geo. 2. c. 28.

And by the ſaid Statute *par.* 13. it is enacted, " That it ſhall not be law- " ful hereafter for any Sheriff, Gaoler or Keeper of any Gaol or Priſon to " put, keep or lodge Priſoners for Debt and Felons together in one Room " or Chamber, but that they ſhall be put, kept and lodged ſeparate and " apart one from another in diſtinct Rooms; upon Pain that he, ſhe or " they, which ſhall offend againſt this Act, or the true Intent and Meaning " thereof, or any Part thereof, ſhall forfeit and loſe his or her Office, Place " or Employment, and ſhall forfeit treble Damages to the Party grieved, " to be recovered by virtue of this Act."

2. For what Offences they ſhall forfeit their Offices.

It ſeems clearly agreed, that a Gaoler by ſuffering voluntary Eſcapes, by abuſing his Priſoners, by extorting unreaſonable Fees from them, or by detaining them in Gaol after they have been legally diſcharged, and paid their juſt Fees, forfeits his Office; for that in the Grant of every Office, it is implied that the Grantee execute it faithfully and diligently. Co. Lit. 233. 9 Co. 5. 3 Mod. 143.

As where the King granted to the Abbot of *St. Albans* to have a Gaol, and to have a Gaol Delivery, and divers Perſons were committed to that Gaol for Felony; and becauſe the Abbot would not be at the Coſt to make Deliverance, he detained them in Priſon long Time without making lawful Deliverance; and it was reſolved, that the Abbot had for that Cauſe forfeited his Franchiſe, and that the ſame might be ſeiſed into the King's Hand. 2 Inſt. 43.

So the Lady *Broughton*, Keeper of the *Gatehouſe* Priſon in *Weſtminſter*, was informed againſt, and upon Not guilty pleaded, ſhe was found Guilty; and her Crime was Extortion of Fees, and hard Uſage of the Priſoners in a moſt barbarous Manner; and after ſhe had by her Counſel moved in Arreſt of Judgment and could not prevail, ſhe had Judgment given againſt her, *viz.* ſhe was fined one hundred Marks, removed from her Office, and the Cuſtody of the Priſon was at preſent delivered * to the Sheriff of *Middleſex*, till the Dean and Chapter ſhould farther order the ſame, *ſalvo jure cujuſlibet*. Raym. 216. 2 Lev 71. Lady *Broughton*'s Caſe. * Page 632

And by the 8 & 9 *W.* 3. *cap.* 27. it is enacted, " That if any Marſhal " or Warden, or their reſpective Deputy or Deputies, or any Keeper of any " other Priſon within this Kingdom, ſhall take any Sum of Money, Re- " ward or Gratuity whatſoever, or Security for the ſame, to procure, aſſiſt, " connive at, or permit any Eſcape, and ſhall be thereof lawfully con- " victed, the ſaid Marſhal or Warden, or their reſpective Deputy or De- " puties, or ſuch other Keeper of any Priſons as aforeſaid, ſhall for every " ſuch Offence forfeit the Sum of 500 *l.* and his ſaid Office, and be for " ever after incapable of executing any ſuch Office.

It hath been reſolved, that a Forfeiture by a Gaoler who hath but a particular Intereſt, as of him who hath Cuſtody of a Gaol for Life or Years, does not affect him in Remainder or Reverſion who hath the Inheritance, Poph. 119. Lev. 71. Raym. 216. 3 Lev. 288.

heritance, but that upon ſuch Forfeiture his Title ſhall accrue, and not go to the King.

But by the 8 & 9 *W.* 3. *cap.* 27. it is enacted, "That the Offices of "Marſhal of the *Kings Bench* Priſon, and Warden of the *Fleet*, ſhall be "executed by the ſeveral Perſons to whom the Inheritance of the Priſons, "Priſon-houſes, Lands, Tenements, and other Hereditaments of the ſaid "Priſons of *King's Bench* and *Fleet*, or either of them, ſhall then belong or "appertain reſpectively, in his or their reſpective proper Perſon or Perſons, "or by his or their ſufficient Deputy or Deputies, for which Deputy or "Deputies, and for all Forfeitures, Eſcapes, and other Miſdemeanors, in "their reſpective Offices, by ſuch Deputy or Deputies permitted, ſuffered "or committed, the ſaid Perſon or Perſons, in whom the aforeſaid Inhe-"ritances reſpectively are, or ſhall then be, ſhall be anſwerable; and the "Profits and aforeſaid Inheritances of the ſaid ſeveral Offices ſhall be ſe-"queſtered, ſeiſed or extended to make Satisfaction for ſuch Forfeitures, "Eſcapes or Miſdemeanors reſpectively, as if permitted, ſuffered or com-"mitted by the Perſon or Perſons themſelves, or either of them, in whom "the reſpective Inheritances of the ſaid Priſons ſhall then be.

(E) At whoſe Charge Priſoners are to be carried to Gaol.

By 27 Geo. 2. c. 3. The Expence of conveying poor Offenders to Gaol, or the Houſe of Correction, to be paid by the Treaſurer of the County, except in *Middleſex*.

BY the 3 *Jac.* 1. *cap.* 10. it is enacted, "That every Perſon or Per-"ſons, that ſhall, be committed to the common or uſual Gaol, "within any County or Liberty within this Realm, by any Juſtice or "Juſtices of the Peace for any Offence or Miſdemeanor, having Means "or Ability thereunto, ſhall bear their own reaſonable Charges for ſo "conveying or ſending them to the ſaid Gaol, and the Charges alſo of "ſuch as ſhall be appointed to guard them to ſuch Gaol, and ſhall ſo "guard them thither; and if any ſuch Perſon or Perſons, ſo to be "committed, ſhall refuſe at the Time of their Commitment, and ſending "to the ſaid Gaol, to defray the ſaid Charges, or ſhall not then pay or "bear the ſame, that then ſuch Juſtice or Juſtices of the Peace ſhall "and may by writing under his or their Hand and Seal, or Hands "and Seals, give Warrant to the Conſtable or Conſtables of the Hun-"dred, or Conſtable or Tithing-man of the Tithing or Townſhip "where ſuch Perſon or Perſons ſhall be dwelling and inhabit, or from "whence he or they ſhall be committed, or where he or they ſhall "have any Goods within the County or Liberty, to ſell ſuch and ſo "* much of the Goods and Chattels of the ſaid Perſons, as by the Diſcre-"tion of the ſaid Juſtice or Juſtices of the Peace ſhall ſatisfy and pay the "Charges of ſuch his or their Conveying or ſending to the ſaid Gaol; the "Appraiſement to be made by four of the honeſt Inhabitants of the Pariſh "or Tithing where ſuch Goods or Chattels ſhall remain and be, and the "Overplus of the Money which ſhall be made thereof, to be delivered to "the Party to whom the ſaid Goods ſhall belong.

*Page 633

And it is further enacted, "That if the ſaid Perſons ſhall not have or "be known to have any Goods or Chattels, which may be ſold for the "Purpoſe aforeſaid, within the County or Liberty, an indifferent Aſſeſſ-"ment ſhall be made by the Conſtables and Churchwardens, and two or "three other the honeſt Inhabitants of the Pariſh or Tithing where ſuch "Offenders ſhall be taken or apprehended; the ſaid Taxation being al-"lowed under the Hand of one or more Juſtice or Juſtices of the Peace,

" if there be ſuch Conſtables or Churchwardens there inhabiting, and in " Default of them, by four of the principal Inhabitants of the ſaid Pariſh, " Townſhip or Tithing where ſuch Offenders ſhall be taken or apprehend- " ed; and if any ſo aſſeſſed ſhall refuſe to pay their ſaid Taxation, then " the Juſtice or Juſtices of the Peace by whom the ſaid Offenders ſhall be " committed to Priſon, or any Juſtice of Peace near adjoining, ſhall and " may give Warrant, as aforeſaid, to the Conſtable, Tithingman, or other " Officer, there to diſtrain the Goods of any ſo aſſeſſed which ſhall refuſe " to pay the ſame, and to ſell the ſame, and that ſuch Perſon or Perſons ſo " authoriſed ſhall have full Power ſo to diſtrain, and by Appraiſement " of four ſubſtantial Inhabitants of the ſaid Place, to ſell a ſufficient Quan- " tity of the Goods and Chattels of the ſaid Perſon ſo refuſing, for the " Levying of the ſaid Taxation; and if any Overplus of the Money come " by the Sale thereof, the ſame to be delivered to the Owner."

(F) How maintained in Priſon.

BY (*a*) ſome Opinions, a Gaoler is compellable to find his Priſoner Suſtenance; but as this is denied by (*b*) others, and as there are ſeveral Statutes which provide for the Maintenance of Priſoners, without ſuppoſing the Gaoler any Way obliged to it, it ſeems this Opinion is not maintainable.

(*a*) As 9 Co. 87. ſo Co. Lit. 295. a. where my Lord *Coke* ſays, that in an Action of Debt by a Gaoler againſt the Priſoner for his Victuals, the Defendant ſhall not wage his Law; for he cannot refuſe the Priſoner, and ought not to ſuffer him to die for Default of Suſtenance; otherwiſe it is for tabling a Man at large. (*b*) As Plow. 68. a. 2 Rol. Abr. 32.

By the 14 *Eliz. cap.* 5. it is enacted, " That it ſhall and may be lawful " for the Juſtices of Peace of every Shire within this Realm, at their Ge- " neral Quarter-Seſſions of the Peace to be holden within the ſame Shires, " or the moſt Part of the ſaid Juſtices, being then preſent, to rate and " tax every Pariſh within the ſaid Shires, at ſuch reaſonable Sums of Mo- " ney, for and towards the Relief of Priſoners, as they ſhall think conve- " nient, by their Diſcretions, ſo that the ſaid Taxation and Rate doth not " exceed above 6 *d.* or 8 *d.* by the Week, out of every Pariſh, and that " the Churchwardens of every Pariſh within this Realm, for the Time " being, ſhall every *Sunday* levy the ſame, and once every Quarter of a " Year pay the High Conſtables or Head Officers of every Town, Pariſh, " Hundred, Riding or Wapentake within this Realm, all ſuch Sums of " * Money as their Pariſh ſhall be rated and taxed, for and towards the Re- " lief of the ſaid Priſoners within their ſaid ſeveral Pariſhes, and that the " ſaid High Conſtables and Head Officers, and every of them, ſhall pay all " ſuch Sums of Money ſo to them paid by the ſaid Churchwardens, at every " General Quarter-Seſſions, to be holden within the ſaid ſeveral Shires, to " ſuch ſufficient Perſons dwelling nigh the ſaid Gaols, as ſhall be appointed " by the ſaid Juſtices in their ſaid open Quarter-Seſſions, to be there ready to " receive the ſaid Money ſo collected as is aforeſaid; and that the Collectors " for the ſaid Priſoners ſhall weekly diſtribute and pay all ſuch Sums of " Money as they and every of them ſhall receive for the Relief of the ſaid " Priſoners as aforeſaid; upon Pain, as well the ſaid Churchwardens of every " Pariſh, Conſtables and Head Officers of every Hundred or Wapentake, " as alſo the ſaid Collectors appointed for the Collection and Contribution " of the ſaid Priſoners ſo making Default as aforeſaid, to forfeit 5 *l.* the

* Page 634

" one Moiety thereof ſhall be to the Uſe of the Queen's Majeſty, her Heirs " and Succeſſors, and the other Moiety to the Relief of the Priſoners.

" Provided, That the Juſtices of Peace within any County of this " Realm or *Wales* ſhall not intromit or enter into any City, Borough, Place " or Town Corporate, for the Execution of any Branch, Articles or Sen- " tence of this Act, for or concerning any Offence, Matter or Cauſe grow- " ing or ariſing within the Precincts, Liberties or Juriſdictions of ſuch " City, Borough, Place or Town Corporate, but that it may and ſhall be " lawful, to the Juſtice and Juſtices of the Peace, Mayor, Bailiffs, and other " Head Officers of thoſe Cities, Boroughs, Places and Towns Corporate, " where there be Juſtice or Juſtices, to proceed to the Execution of this " Act within the Precinct and Compaſs of their Liberties, in ſuch Man- " ner and Form as the Juſtices of Peace in any County may or ought to " do within the ſame County by virtue of this Act; any Matter or Thing " in this Act expreſſed to the contrary thereof notwithſtanding.

And by the 19 *Car.* 2. *cap.* 4. it is enacted, " That the Juſtices of " Peace of the reſpective Counties, at any their General Seſſions, or the " major Part of them then there aſſembled, if they ſhall find it needful ſo " to do, may provide a Stock of ſuch Materials as they find convenient " for the ſetting poor Priſoners on Work, in ſuch Manner and by ſuch " Ways, as other County Charges by the Laws and Statutes of the Realm " are and may be levied and raiſed, and to pay and provide fit Perſons to " overſee and ſet ſuch Priſoners on Work, and make ſuch Orders for Ac- " counts of and concerning the Premiſſes, as ſhall by them be thought " needful, and for Puniſhment of Neglects and other Abuſes, and for be- " ſtowing the Profit ariſing by the Labour of the Priſoners ſo ſet on Work " for their Relief, which ſhall be duly obſerved, and may alter, revoke or " amend ſuch their Orders from Time to Time; provided that no Pariſh " be rated above 6*d.* by the Week towards the Premiſſes, having Reſpect " to the reſpective Values of the ſeveral Pariſhes.

The like Clauſe in 2 Geo. 2. c. 22. p. 3. and 32 Geo. 2. c. 28. p. 4

By the 22 & 23 *Car.* 2. *cap.* 20. *par.* 10. it is enacted, " That every " Under-Sheriff, Gaoler, Keeper of Priſon or Gaol, and every Perſon or " Perſons whatſoever, to whoſe Cuſtody any Perſon or Perſons ſhall be " delivered or committed by virtue of any Writ or Proceſs, or any Pre- " tence whatſoever, ſhall permit and ſuffer the ſaid Perſon or Perſons at " his and their Will and Pleaſure to ſend for and have any Beer, Ale, " Victuals, and other neceſſary Food, where and from whence they pleaſe, " and alſo to have and uſe ſuch Bedding, Linen, and other Things, as the " ſaid Perſon or Perſons ſhall think fit, without any Purloining, Detain- " ing or paying for the ſame, or any Part thereof.

* Page 635 Like Clauſe in 22 & 23 Car. 2. c. 20. p. 12. and 32 Geo. 2. c. 28. p. 9.

* By the 2 *Geo.* 2. *cap.* 22. it is enacted, " That the Lords Chief Juſti- " ces, Lord Chief Baron, Judges of Aſſiſe, and Juſtices of the Peace, in " their reſpective Juriſdictions, and all Commiſſioners for charitable Uſes, " do their beſt Endeavours and Diligence to examine and diſcover the ſe- " veral Gifts, Legacies and Bequeſts beſtowed and given for the Benefit " and Advantage of the poor Priſoners in the ſaid ſeveral Gaols and Pri- " ſons, and to ſend for any Deeds, Wills, Writings, and Books of Account " whatſoever, and any Perſon or Perſons concerned therein, and to exa- " mine them upon Oath to make true Diſcovery thereof, (which they have " full Power and Authority to do), and to order and ſettle the Payment, " Recovery and Receipt of the ſame, when ſo diſcovered and aſcertained, " in ſuch eaſy and expeditious Manner and Way, that the Priſoners for " the future may not be defrauded, but receive the full Benefit thereof " according to the true Intent of the Donors, and that Liſts or Tables of " ſuch Gifts, Legacies and Bequeſts, for the Benefit of the Priſoners in " every Gaol or Priſon reſpectively, fairly written, ſhall be likewiſe hung " up in ſuch Gaols and Priſons reſpectively, in ſome open Room or Place,

" to which the Priſoners may have Reſort, as Occaſion ſhall require, with-
" out Fee, and ſhall be regiſtred by the Clerks of the Peace of the reſpec-
" tive Counties and Places in Manner aforeſaid."

[The Money for the *King's Bench* and *Marſhalſea* Priſoners to be paid by the Treaſurers of the Counties, and inforced by Rule of the *King's Bench*. 11 *Geo.* 2. *cap.* 20. 12 *Geo.* 2. *cap.* 19. *ſect.* 23.——Regulation of Priſons and Impriſonment in *Scotland*, 20 *Geo.* 2. *c.* 43. *ſ.* 8.]

(G) Of the Offence of Breaking Gaol.

THE Offence of Breaking a Gaol or Priſon by the Common Law was no leſs than Felony; and this, whether the Party were committed in a Criminal or Civil Caſe, or whether he were actually in the Walls of a Priſon, or only in the Stocks, or in the Cuſtody of any Perſon who had lawfully arreſted him, or whether he were in the King's Priſon, or one belonging to a Lord of Franchiſe. 2 Inſt. 589. Staundf. P. C. 31. Cro Car. 210.

But now by the 1 *E.* 2. *ſt.* 2. the Severity of the Law is relaxed, and the Breaking of Priſon is *(a)* only Felony, as herein declared, *de Priſonariis frangentibus Priſonam Dominus Rex vult & præcipit, quod nullus de cætero, qui priſonam fregerit, ſubeat vitæ vel membrorum damnum pro fractione Priſonæ tantum, niſi cauſa pro qua captus & impriſonatus fuerit tale judicium requirit, ſi de illa ſecundum Legem & conſuetudinem terræ fuiſſet convictus, licet temporibus præteritis aliter fieri conſuevit.* 2 Inſt. 589. (*a*) But Offences of this Kind, which are not Felony within 1 E. 2. are ſtill puniſhable as High Miſdemeanors by Fine and Impriſonment. Hale's P. C. 116. 2 Hawk. P. C. 128.

In the Conſtruction of this Statute the following Opinions have been holden:

1. That any Place whatſoever, wherein a Perſon under a lawful Arreſt for a ſuppoſed capital Offence is reſtrained from his Liberty, whether in the Stocks or Street, or in the common Gaol, or the Houſe of a Conſtable or private Perſon, or the Priſon of the Ordinary, is a Priſon within the Statute. 2 Inſt. 589. Dyer 99. pl. 60. Cromp. 38. Cro Car. 210. Hale's P. C. 107.

2. That if the Party who breaks from Priſon was taken on a *Capias* on an Indictment or Appeal, it is not material, whether any ſuch Crime, as that of which he is accuſed, were in Truth committed, or not, for there is an Accuſation againſt him on Record, which makes the Commitment lawful, be he ever ſo innocent. 2 Inſt. 590. Hale's P. C. 109.

Alſo if an innocent Perſon be committed by a lawful *Mittimus* on ſuch a Suſpicion of Felony, actually done by ſome other, as will juſtify his Impriſonment, though he be neither indicted nor appealed, he is within the * Statute if he break the Priſon, for that he was legally in Cuſtody, and ought to have ſubmitted to it till he had been diſcharged by due Courſe of Law. * Page 636 Hale's P. C. 109. 2 Inſt. 590. Dyer 99. pl. 60. Cromp. 38. a.

But if no Felony at all were done, and the Party be neither indicted or appealed, no *Mittimus* for ſuch a ſuppoſed Crime will make him guilty within the Statute by breaking the Priſon, for that his Impriſonment was unjuſtifiable. Haln's P. C. 109. 2 Inſt. 590. *cont.* 2 Leon. 166.

Alſo if a Felony were done, yet if there were no juſt Cauſe of Suſpicion either to arreſt or commit the Party, and the *Mittimus* be not in ſuch Form as the Law requires, his Breaking of the Priſon cannot be Felony, becauſe the 2 Inſt. 591. H. P. C. 109. But for this *vide* 5 Mod. 80.

2 Hawk. P. C. 124-5. the Lawfulneſs of the Impriſonment, in ſuch Caſe, depends wholly on the *Mittimus*, which, if it be not according to Law, the Impriſonment will have nothing to ſupport it.

2 Inſt. 589, 590. Hale's P. C. 108. Staundf. P. C. 31. 3. That there muſt be an actual Breaking, for the Words *Felonice fregit Priſonam*, which are neceſſary in every Indictment for this Offence, cannot be ſatisfied without ſome actual Force or Violence; and therefore if the Priſoner, without the Uſe of any violent Means, go out of the Priſon-Doors, which he finds open by the Negligence or Conſent of the Gaoler, or if he eſcape through a Breach made by others without his Privity, he is guilty of a Miſdemeanor only, and not of Felony.

Plow. 136. 2 Inſt. 590. Hale's P. C. 108. Nor will the Breaking of Priſon, which is neceſſitated by an inevitable Accident, happening without any Default of the Priſoner, as where the Priſon is fired by Lightning, or otherwiſe, without his Privity, and he breaks out to ſave his Life, come within the Statute.

Keilw. 87. a. Nor is it Felony to break a Priſon, unleſs the Priſoner eſcape.

Hale's P. C. 108. 2 Inſt. 591. Plow. 258. 4. That if the Impriſonment be for an Offence made capital by a ſubſequent Statute, the Breach of Priſon is as much within the Act of 1 *E.* 2. *ſt.* 2. as if the Offence had always been Felony; but if the Offence, for which a Man is committed, were but a Treſpaſs at the Time when he breaks the Priſon, and afterwards become Felony by Matter ſubſequent, as where one committed for having dangerouſly wounded a Man, who afterwards dies, breaks the Priſon before he dies, the Fiction of Law, which to many Purpoſes makes the Offence a Felony *ab initio*, ſhall not be carried ſo far as to make the Priſon-breach alſo a Felony, which at the Time when it was commited was but a Miſdemeanor.

But for this *vide* 2 Hawk. P. C. 126-7. Alſo it ſeems the better Opinion, That if the Offence, for which the Party was committed, be in Truth but a Treſpaſs, the calling it Felony in the *Mittimus*, will not make the Breaking of the Priſon amount to Felony; and that on the other Side, if the Offence were in Truth a Capital one, the calling it a Treſpaſs in the *Mittimus* will not bring it within the Statute; for the Cauſe of the Impriſonment is what the Statute regards, and that is the Offence, which can neither be leſſened nor increaſed by a Miſtake in the *Mittimus*. †

† But *vide* Hawk. for the Opinions differ, and he leaves it in doubt.

2 Hawk. P. C. 127. 5. That the Breach of Priſon by a Perſon attainted is within the Statute, though his Crime doth not now require any Judgment, becauſe it hath been given already, whereby he is out of the ſtrict Letter of the Statute, but clearly ſtill within the Meaning of the Words.

2 Hawk. P. C. 127. 6. That the Offence of breaking Priſon is but Felony, whatſoever the Crime were for which the Party was committed, unleſs his Intent were to favour the Eſcape of others alſo who were committed for Treaſon, for that will make him a Principal in the Treaſon.

2 Hawk. P. C. 127-8. 7. That he that breaks Priſon may be proceeded againſt for ſuch Crime before he be convicted of the Crime for which he is committed, becauſe the Breach of Priſon is a diſtinct independent Offence; but the Sheriff's Return of a Breach of Priſon is not a ſufficient Ground to arraign a Man without an Indictment.

* Page 637 Hale's P. C. 109. 2 Inſt. 591. * 8. That it is not ſufficient to indict a Man generally for having feloniouſly broken Priſon; but the Caſe muſt be ſet forth ſpecially, that it may appear that he was lawfully in Priſon, and for a capital Offence.

[By the *ſtat.* 16 *Geo.* 2. *c.* 31. Aſſiſting Priſoners to eſcape from any Gaol, although no Eſcape be actually made, in caſe ſuch Priſoners then were attainted or convicted of Treaſon or any Felony, except petty Larceny, or lawfully committed to, or detained in Gaol for Treaſon, or any Felony except petty Larceny, expreſſed in the Warrant of Commitment, or Detainer, is made Felony, and the Perſons aſſiſting, *&c.* are to be tranſported

ed for ſeven Years; and in caſe ſuch Priſoners then were convicted of, committed to, or detained in any Gaol, for petty Larceny, or other Crime not being Treaſon or Felony, expreſſed in the Warrant of Commitment, *&c.* or then was in Gaol upon Proceſs for any Debt, Damages, *&c.* amounting to 100*l.* the Perſons aſſiſting, *&c.* are adjudged guilty of a Miſdemeanor, for which they ſhall be liable to Fine and Impriſonment.

By *ſect.* 2. of the ſame Statute, Any Perſon conveying any Diſguiſe, Inſtrument, or Arms, to help an Eſcape without the Knowledge of the Keeper, if the Priſoner be attainted of Treaſon or Felony, or committed for Treaſon or Felony; being thereof convicted, is deemed guilty of Felony, and ſhall be tranſported for ſeven Years.——Diſguiſe, Inſtrument, *&c.* given to any one detained for any leſs Crime, or for Debt, Damages, *&c.* amounting to 100*l.* the Offender being convicted, adjudged guilty of a Miſdemeanor for which he ſhall be fined and impriſoned.

The Profits of the Office of the Marſhal and the Warden of the *Fleet*, to be ſequeſtered to ſatisfy Eſcapes. 8 & 9 *W.* 3. *cap.* 27.——A Penalty of 500*l.* on the Marſhal, *&c.* for a wilful Eſcape. *Id. ſect.* 4.——Penalty of 500*l.* on a Gaoler ſuffering Bankrupts to eſcape. 5 *Geo.* 2. *cap.* 30. *ſect.* 18, 36.]

Gavelkind.

(A) Of the Original, Continuance and ſeveral Properties of this Cuſtom. 637.

(B) The particular Caſes which have been adjudged relating to this Cuſtom. 642.

(A) Of the Original, Continuance and ſeveral Properties of this Cuſtom.

OF the many Opinions concerning the Original of this Cuſtom the moſt propable ſeems to be, that it was firſt introduced by the *Roman* Clergy, and therefore propagated more extenſively in *Kent*, becauſe there the Chriſtian Religion was firſt propagated.

This Tenure is reckoned by the beſt Antiquaries to be the ſame with the *Saxon Bocland*, which was Allodial and exempt from the Feudal Services. Somner 12, 35, 37.

How this Property came to eſcape, and to remain intire down to the People of *Kent* from their *Saxon* Anceſtors, is not agreed among the ſeveral

Seld. Jan. 129. Crag. 13.

Taylor's Hiſtory of Gavelkind 132, 171. Somner 12.

veral Antiquaries; ſome of them tell us, that the *Kentiſhmen* came with Boughs, and demanded their Cuſtoms to be confirmed by the Conqueror, or elſe reſolved to oppoſe his March; others reject that Story as a Monkiſh Fable, and think the *Kentiſhmen* ſubmitted, and that the Cuſtom came with *Odo*, Biſhop of *Bayeux*, from *Normandy*; which hath leſs Probability, conſidering the many Exemptions of the *Kentiſh* Lands from feudal Slaveries. Probably, notwithſtanding the Rejecting this Story as to the Oppoſition of the Conqueror with Arms, it might thus far be true, that they came with their Boughs to ſubmit themſelves to him on his firſt Entry, and might Petition for the Eſtabliſhment of their Rights and Cuſtoms; and the Conqueror, who was a very Politick Prince, might, to gain Reputation with his new People, ſhew this Inſtance of his Clemency; which ſeems the more probable, becauſe the Monks, the Hiſtorians of thoſe Times, drop the Story, and we all know they have not been at all favourable to his Character; and the Romantick Part of the Story might be invented by *Spot*, to aggrandize his own Monaſtery.

* Page 638

* The firſt Quality of this Land was, that it was alienable, without any Licence, according to the true Nature of the *Roman* Patrimonial Property, and very different from the Feudal Servitude.

Their Grants were likewiſe Patrimonial, in Nature of the Contracts in the *Roman* Law, and without any Feudal Words or Reſervation of Tenure. Somner 88.

Lamb. 610, 611.

The next Property is, that theſe Lands are not forfeitable for Felony, but for Treaſon they are; for the Feudal Forfeitures only held in Lands where there were Tenures, and not in the Allodial Property; and the Allodial Property was only forfeitable, according to the *Roman* Civil Law, for the *Crimen Læſæ Majeſtatis*; and therefore the Clergy, that were Judges with the Earl, never allowed this Land to be forfeited but for the Crime of High Treaſon; but ſubſequent Statutes comprehend Gavelkind, becauſe ſuch Laws extend to the whole Land of the Kingdom, unleſs Gavelkind were excepted; but if a Man be outlawed, or abjure the Realm for Felony, † he ſhall forfeit his Lands in Gavelkind, and his Wife her Dower in them; and though the Strictneſs in which the Cuſtom is to be taken, becauſe derogatory from the Common Law, is uſually given as a Reaſon for this Conſtruction, yet the true Reaſon is, that Outlawry and Abjuring the Realm are Puniſhments introduced ſince the Conqueſt, and conſequently ſince the Eſtabliſhment of Gavelkind in *Kent*, and therefore like other new Laws ſhall extend to that Cuſtom.

Bro. Tit. *Cuſtom* 54.

† Gavelkind Lands in *Kent*, belonging to Felons, to revert to the Heir after the Year and Day. in *Margine*.

17 E. 2. ſt. 1. c. 16. If outlawed or abjured, the Cuſtom does not prevail. Dyer 310. b.

Lamb. 611, 612, 624, 625.

Where any Tenant died, his Heir within Age, might and did commit the Guardianſhip to the next Relation in the Court of Juſtice within whoſe Juriſdiction the Land was; but the Lord was bound on all Occaſions to call him to an Account, and if he did not ſee that the Accounts were fair, the Lord himſelf was bound to anſwer it. This Province the Chancellor hath taken from inferior Courts ſince the Conqueſt, only in *Kent*, where theſe Cuſtoms are continued; but the Cuſtom is not uſed even in *Kent* to this Day, becauſe the Lords in giving Tutors do it at their own Peril in the Account, and therefore every Man thinks it dangerous to intermeddle.

Lamb. 624.

The Infant at fifteen was reckoned at full Age to ſell for Money; this they undoubtedly took from the Civil Law, which reckons fourteen the *Ætas Pubertatis*; for they reckoned, that though the Infant had ended his Years of Guardianſhip at fourteen, yet he might not have compleated his

Account with his Guardian till the Age of fifteen, and that was eſteemed to be the Age when he was compleatly out of Guardianſhip.

This Guardian appointed by the Lord is to have the ſame Allowance, and no other, with the Guardian in Socage at Common Law, and is ſubject to the Account of the Heir for his Receipts, and to the Diſtreſs of the Lord for the ſame Cauſe. Lamb.

The Liberty of ſelling was allowed at the Age of fifteen for the Convenience and Neceſſity of Commerce, which in theſe ſmall divided Shares was abſolutely neceſſary; yet it was allowed under ſuch Limitations and Reſtrictions, that the Infant could not be wronged or impoſed upon; therefore an Infant that ſells muſt have a valuable Conſideration, becauſe otherwiſe it is a plain Sign that the Infant was defrauded. If a Woman ſold at the Age of fifteen *cauſâ Matrimonii prælocuti*, this was a good Conveyance; for Marriage was reckoned to be a good and ſufficient Conſideration. Lamb 625. And. 193.

It muſt paſs by Feoffment, and the Livery upon the Feoffment muſt be made by the Infant in Perſon, becauſe an Infant cannot appoint an Attorney by the Common Law; and ſince the expreſs Words of the *Cuſtom do not derogate from the Common Law in that Point, an equitable Conſtruction ſhall not be admitted to make it derogate, for all Cuſtoms are to be conſtrued ſtrictly. *Page 639 Lamb. 628.

Whether the Ceremony of Livery was ever annexed to thoſe Allodial Grants in the *Saxon* Times, or whether it came in with the Feudal Grants, ſeems doubtful; yet if the Lands did formerly paſs by a Grant, when the other Way of Conveyance was introduced, they always paſt them by Feoffment, as the moſt ſolemn Manner; for ſubſequent Laws having made that ſolemn Ceremony before the Men of the Country abſolutely neceſſary to convey Land, the Ceremony paſt without Diſtinction into the Being of this Cuſtom, and ſo it hath always, I ſuppoſe, continued ever ſince the *Norman* Times; but it hath been doubted, whether a Leaſe and Releaſe will not be a good Sale, as amounting to a Feoffment. 9 Co. 76. Rol. Abr. 568. Lamb. 625.

This Cuſtom, like all others that are derogatory from the Common Law, is to be conſtrued ſtrictly; becauſe as far as the particular Cuſtom hath not derogated from the Law, the general Cuſtom of the whole Kingdom ought to prevail; and we are not to preſume that the particular Cuſtom goes farther than by notorious Facts may appear; therefore in this Caſe, if an Infant in Gavelkind be diſſeiſed, and releaſe to his Diſſeiſor, or releaſe to a Diſcontinuee, it is not within the Cuſtom, and therefore void; ſo if he make a Feoffment with Warranty, the Warranty is not comprehended within the Cuſtom, and ſo void; for the Cuſtom reaches no farther than a Conveyance by a naked Feoffment. Rol. Abr. 568.

It muſt be Lands in Poſſeſſion, and not in Reverſion or Remainder, becauſe the true Value of a Reverſion or Remainder cannot be known or computed, and therefore the greater Need of more than ordinary Diſcretion in ſuch a Caſe, which is not found in Infants; beſides, a Reverſion or Remainder could not be immemorial; and therefore the Cuſtom could not be thereunto appendant, becauſe the immemorial Cuſtoms only were confirmed by the Conqueror; ſo that ſince the *Norman* Conqueſt ſuch a Sale cannot be adjudged legal. Bendl. 33. pl. 52. Lamb. 627.

It muſt be Land coming by Deſcent, and not by Purchaſe, becauſe the Infant's Purchaſe could not be a ſubject Matter for the Cuſtom; for the Conqueror muſt, as is ſaid, be preſumed to confirm nothing but a Privilege that is immemorial; therefore it muſt be governed by the general Laws of the Kingdom. Bend. 33. pl. 52. Lamb. 627.

An Infant in Gavelkind ſhall have his Age, and all other Privileges of the Infant at Common Law, becauſe though he hath the Privilege of Alienation at fifteen, yet that doth not take from him any Privilege he had before at the Common Law. Rol. Abr. 144.

As to the *Geld*, or *Allodial Rent*, that was reſerved upon the Lands, the Lord might diſtrain, having the ſame Privilege for his Rent as when the Lamb. 612.

Tenant held it *in Modum Beneficii*; for though the Lord parted with the Lands, yet the Rent ſtill remained to be the Lord's as it was before, and therefore he had it for the ſame Remedy as all other Perſons had for Rents reſerved out of Feudal Lands; but if the Land lay fallow, and did not afford the Lord his Rent, the Lord after ſuch Ceſſing of his Tenant ought, by Award of his three Weeks Court, to ſeek whether there were Diſtreſs to anſwer his Rent, and this Award of the Court ought to be executed in the Preſence of good Witneſſes; and the ſame ought to be renewed for three Courts, till the fourth Court, and in the fourth Court it ſhall be awarded, that the Lord ſhall take the Tenements into his Hands as a Diſtreſs or Pledge for the Rents and Services, and ſhall detain them for a Year and a Day without manuring them; within which Time, if the Tenant come and make Agreement with the Lord for his Arrears, he ſhall take the Lands into his Hands again; but if he come not within that Space, the Lord ought openly to declare all his Proceedings to the County-Court, which being done likewiſe at his own Court next following, the Land ſhall be finally awarded to him.

Lamb. 628. We come now to the Deſcent to all the Children, which runs through all the Lands in *Kent*, and it is probable that all *Bocklands* in *England* were thus partible, though it further happened, that all the Lands in *Kent* were all Allodial without Villain, and for the moſt part without Copyhold; for it is a ſufficient Plea in Villenage to ſay, that the Defendant's Father was born in *Kent*, though not to ſay, that the Party himſelf was
* Page 640 * born there; becauſe for the Father to be born is a Suppoſition that the Defendant could by no Means be a Villain, that being a Country totally free; it is probable that this happened, becauſe they made all their Slaves Allodial Proprietors, *Kent* being, by Reaſon of the *Cinque Ports*, a Trading Country; and they were better pleaſed with the Rent, than if they had their Work in Specie; and this Country being untouched by the Conqueror, there could be no Villains.

Seld. Jur. of Inteſtates 26. As to the Deſcent, that was, it ſeems, introduced by the Notions of the Clergy from the *Roman* Law, where all the Land was equally divided among the Children and next Relations; ſo are the Laws of the *Confeſſor*.

Co. Lit. 10. Lamb. 607. Hob. 31. But there is a great Difference between the Deſcent of Gavelkind Land and the Words of Purchaſe of the ſame Land; for if a Remainder be limited to the right Heir of *J. S.* the Heir at Common Law ſhall take it, and not the Heirs in Gavelkind; the Reaſon is, becauſe this Remainder being newly created could not be reckoned to be within the old Cuſtom; for the Confirmation of the Conqueror was only to the old Privileges, by which the Land had been enjoyed, and not to make Expoſition of any Grant afterwards ariſing.

14 H. 8. 9. 26 H. 8. 4. Noy 15. But as to Lands deſcending, the Cuſtom is the Law of the Place, and cannot be altered but by Act of Parliament, for being the ancient *Saxon* Law, and ſtill continuing under the *Normans*, it cannot be altered but by the Legiſlature; therefore if Lands eſcheat to the Crown, and be enjoyed in ſeveral Deſcents, and be after granted out by the King in Knights Service, yet they deſcend in Gavelkind, for the Law of the Place cannot be controuled by the King's Charter.

Mod. 96, 97, *Randal* ver. *Jenking*. Bro. Tit. *Cuſtom* 58. *cont.* 2 Lev. 187. 2 Danv. Abr. The Gabel or Rent iſſuing out of any Gavelkind Land ſhall enſue the Nature of the Land; for the Conqueror confirming the Privileges relating to the Land, doth confirm alſo the Privileges relating to the Tribute or Rent, which is but the Profits of it. From hence, ſince the Rent deſcends in the ſame Manner the Land did, it follows that all Rents iſſuing out of ſuch Lands ſhall deſcend in Gavelkind, nor is there any Difference, that can be

2 Rol. Abr. 780. pl. 6. Noy 15. Cro. Car. 411. Cro. Jac. 496. 8 Mod. 208. 10 Mod. 417. 11 Mod. 160. 2 Ld. Raym. 1028, 1292. Will. Rep. 64, 475. 3 Will. Rep. 63. See 2 Danv. Abr. 548. Hard. 325. Sid. 135. Raym. 59, 76. Lev. 80.

well conceived, between a Rent-Service and a Rent-Charge in this Caſe; and it has been adjudged accordingly, that a Rent-Charge, granted out of Gavelkind Land, ſhall deſcend according to the Rules of Deſcent in that Cuſtom, becauſe it is Part of the Profits of the Land, and iſſues out of the Land, and ſo ſhall ſubmit to thoſe Rules which govern the Land out of which it ſprings.

For a Condition broken, the Heir at Law ſhall enter, becauſe the Condition is a Thing of new Creation, and altogether collateral to the Land, being not in any Manner like the Rent, which is Part of the Profits of the Land itſelf; but when the eldeſt Son hath entered for the Condition broken, the younger Children ſhall enjoy the Land with him; and the Reaſon is, becauſe the eldeſt Son is in of the old Eſtate, which is ſtill under the Control and Direction of the Cuſtom. Lamb. 608. Co. Lit. 11, 12.

Touching the Manner of Deſcent, it is firſt to Male Children, then to the Female, then to Collateral Relations; and the Deſcent had, after the Manner of the Civil Law, Regard to the *Stirpes*; and therefore, if the eldeſt Son had Iſſue a Daughter, ſhe ſhould inherit her Father's Share with the younger Sons. Lit. Sect. 210. Co. Lit. 140. a. Lamb. 608.

As to Warranty, and its Manner of affecting Heirs in Gavelkind, the Law ſtands thus; if a Man enfeoffs another of Lands with Warranty, and dies, leaving Iſſue ſeveral Sons, and Lands in Gavelkind to deſcend to them, the Warranty ſhall deſcend only on the eldeſt Son, as Heir at Common Law; for *Warranty* being a *Covenant diſtinct from* and *collateral to* Lands, it could not come under the Character and Denomination of Privileges belonging to Lands which the Conqueror confirmed, and therefore muſt be governed by the Rules of Common Law, which will carry it to the Heirs at Common Law; however, in this Caſe, * if the Feoffee is impleaded, he may vouch all the Heirs in Gavelkind, that he may have the full Benefit of his Warranty; and that their Lands being ſubject to the Warranty, they may be called in to the Defence, that they may not loſe their Lands without being concerned in the Defence againſt the oppoſite Title; but in this Caſe the Feoffee may, if he pleaſes, vouch only the Heir at Common Law, as the Perſon on whom the Warranty deſcends; ſo that it is left to his Choice, either to vouch all the Heirs by the Cuſtom, that he may recover in Value from them all, or only vouch the Heir at Common Law. Hob. 31. Co. Lit. 376. a. b. *Page 641

But the great Queſtion is, in caſe all the Heirs are vouched, and the Heir at Common Law happens to have nothing at the Time of the Voucher, ſo that the Recovery in Value lies upon the younger Brothers, who in ſuch Caſe ſhall deraign the Warranty Paramount, and recover the Recompence in Value. Some have been of Opinion, that as they are vouched together, they ſhall all vouch over, and that the Recompence in Value ſhall enure according to the Loſs. Co. Lit 376. b.

Others have held, that it is againſt the Maxim in Law, that they who are not Heirs to the Warranty ſhould join in Voucher, or take Benefit of a Warranty which did not deſcend to them; and therefore the Heir at Common Law only, on whom the Warranty deſcended, ſhall deraign it, and recover in Value; but this is denied to be Law on the other Side; for by the Rule of Law, the Vouchee ſhall never ſue to have Execution in Value till Execution is ſued againſt him, and therefore he cannot have Execution in Value; they urge farther, it would be contrary to the Rules of Reaſon, and Equity, that the Heir at Common Law ſhould have all the Benefit, while the Special Heirs ſuſtain all the Loſs; and to ſtrengthen this Opinion, my Lord *Coke* adds, that the Reaſon given in the Books, why the Special Heirs ſhould not be vouched only, is, becauſe if they only were vouched, they would loſe the Benefit of the Warranty Paramount; and therefore the Co. Lit. 376. b.

Heir at Common Law, ſhall be called upon with the Reſt, that they may all deraign the Warranty Paramount; but Q.

Lamb. 608. Co. Lit. 27. a. Cro. Eliz. 431. Leon. 112. pl. 154. But Q. for in the laſt of theſe Books there is a Caſe to this Effect: *A Formedon in Deſcender* was brought by three Sons of Lands in Gavelkind, and the Warranty of their Anceſtor was pleaded againſt them in Bar; upon which they were at Iſſue, if Aſſets by Deſcent; and it was found by ſpecial Verdict, that the Father of the Demandants was ſeiſed in Fee of Lands in Gavelkind, and deviſed them to the Demandants, and to their Heirs, equally to be divided among them; and the Court was of Opinion, that they were in as Purchaſers by the Deviſe, and conſequently that the Lands were not Aſſets; ſo that in this Caſe the Rebutter of all the Sons, and not of the Heir at Law only, was admitted.

The eldeſt Son is only rebutted by the Warranty; for a Warranty being a Covenant diſtinct from Lands, the Confirmation of the Conqueror, which related only to Lands, and the Privileges belonging to Lands, could not extend to it; ſo that in its Deſcent it muſt be directed by the Rules of the Common Law, and ſo go to the eldeſt Son and bind him.

Lamb. 615. Co. Lit. 30. a. 111. a.

By the Cuſtom of Gavelkind, a Huſband, after the Deceaſe of his Wife, is to have a Moiety of ſuch Gavelkind Land whereof his Wife had an Eſtate of Inheritance, whether he had Iſſue by her or not, which he is to hold without committing Waſte, and the like, as in Tenancy by the Curteſy, as long as he continues unmarried.

Cro. Eliz. 121. Lamb. 616. Leon. 133. Rol. Abr. 558.

Likewiſe the Wife, by the ſame Cuſtom, is to have, after the Death of her Huſband, a Moiety of his Inheritance in Gavelkind, to hold as long as ſhe continues unmarried and chaſte, the Preſumption of her Chaſtity to continue till ſhe can be proved to have been delivered of a Child got during her Widowhood. †

† Women for being incontinent, or marrying, loſe their Dower. 17 E. 2. c. 16.

Savil 91. Leon. 83.

A Woman cannot wave this Dower, and claim her Dower at Common Law; for where Gavelkind is the *Lex loci*, it muſt govern the Property of the Place; and all Controverſies concernings Lands, where ſuch Law obtains, muſt be determined with a ſtrict Regard to the Cuſtoms which are annexed to ſuch Law; for if ſuch Law and its Cuſtoms are not made the * Rules to decide the Differences by, that ariſe within the Precinct where they obtain, they are not the Law there.

* Page 642

Lamb. 618, 619.

Lambert is of Opinion, that a *legal Seiſin* of Lands in Gavelkind in a Huſband will not intitle a Wife to Dower, as it will of an Inheritance at Common Law, but that an *actual Seiſin* is required; and he founds his Opinion on the Words of the *Kentiſh* Cuſtom, which he hath placed in the latter End of his Book; the Words are theſe, that a Woman ſhall be endowed *des tenements dont ſon baron moruſt ſeiſe & veſtu*; which Word *veſtu*, in his Opinion, muſt mean an actual Seiſin; and conſequently, ſince Cuſtoms derogatory from the Common Law muſt receive a ſevere Conſtruction, a Wife will not be received to claim her Dower in Gavelkind without ſuch Seiſin of the Huſband. §

§ In general a Wife ſhall be endowed where the Huſband had a Seiſin in Law. Co. Lit. 31. a. Therefore qu. as to Gavelkind Land?

Cro. Eliz. 561, 562. But by the expreſs Words of the Statute of Frauds, 29 Car. 2. c. 3. ſ. 5. the Deviſe of theſe, as of other Lands, muſt be in Writing.

All Gavelkind Land is deviſeable, for the Allodial Property doth follow the Rules of the Civil Law, which permits any Perſon to make his Will, and to diſpoſe of his Eſtate; and this Notion the Clergy ſeem to have brought over into all thoſe Allodial Poſſeſſions, and the Cuſtom hath continued ever ſince.

All

All the Children ſhall join in a Writ of Attaint, and in a Writ of Error touching the Gavelkind Lands; for ſince they have a joint Title, they are to join in all Actions for the Recovery of their Rights.

(B) The particular Caſes which have been adjudged relating to this Cuſtom.

IN Dower brought by a Huſband and Wife, the Defendant pleads, that the Land, of which Dower is demanded, is of the Nature of Gavelkind; and that the Cuſtom is in Land of ſuch Nature to endow the Wife of a Moiety *Tenendum quamdiu non maritata remanſerit, & non aliter*; upon which the Demandants demurred, and Judgment was given againſt them, becauſe the Cuſtom is well pleaded againſt the Dower in the Affirmative, with the Negative *& non aliter*, and is confeſſed by the Demurrer; and therefore the Feme cannot be endowed contrary to the Cuſtom ſo expreſsly allowed. Lenn. 133. pl. 82.

If a Man ſeiſed of Lands in Gavelkind give or deviſe them to a Man and his eldeſt Heirs, this does not alter the cuſtomary Inheritance, or hinder the Deſcent, according to the Rules in Gavelkind, for that can be only done by Act of Parliament. Ca. Lit. 27. a

If Lands in Gavelkind deſcend to the King and his Brother, the King ſhall take one Moiety, and his Brother the other; but if the King dies, his Moiety ſhall deſcend to his eldeſt Son, and not according to the Rules of Deſcent in Gavelkind; for the King was ſeiſed of his Moiety *Jure Coronæ*, therefore it ſhall attend the Crown, and conſequently go to the eldeſt Son. Plow. 205. Ca. Lit. 15.

A. ſeiſed of Lands in Gavelkind had Iſſue three Sons, and deviſed Part to one, Part to another, and another Part to a third; and appointed by his Will, that if any of them died without Iſſue, that the other ſhould be his Heir; and it was adjudged, that each of them had an Eſtate-tail by Implication, by that Part of the Will, *that if any of them died without Iſſue, the other*, &c. and likewiſe that the Word *Heir* makes a Fee-ſimple in that Part that deſcends to the Survivor, upon the Death of the Reſt without Iſſue. Moor 854. *Spark ver. Parnell.*

* A Man ſeiſed of Land in Gavelkind makes a Feoffment to the Uſe of himſelf and his Wife in Tail, the Remainder to his right Heirs, the Word *Heirs* in the Remainder is a Word of Limitation, and not of Purchaſe; and therefore the Remainder ſhall deſcend according to the Cuſtom of Gavelkind. ‡ * Page 643 Bro. Tit. *Cuſtom* (1).

‡ See *infra*, 644. n. different in caſe of an executory Deviſe.

Lands in *Kent* were diſgavelled †(by 31 *H.* 8. *cap.* 3. and a private Act made 2 *&* 3 *E.* 6) to all Intents, Conſtructions and Purpoſes whatſoever; and that they ſhould deſcend as Lands at Common Law, any Cuſtom to the contrary notwithſtanding; and the Queſtion was, whether theſe Lands loſt by theſe Statutes all their other Qualities or Cuſtoms belonging to Gavelkind, as well as their Partibility; and reſolved that they loſe only their Partibility. Raym. 55. 76, 77. 1 Sid. 77, 135. Lev. 79. 2 Keb. 288. Hard. 325.

† 'Tis ſuppoſed there is not any one Eſtate in the County of *Kent*, that can be proved to be diſgavelled, the Lands that originally were diſgavelled by theſe Statutes, not having ſufficiently deſcribed them, ſo as that they may be known at this Day.

For firſt, theſe Acts were made at the Petition of thoſe Gentlemen whoſe Lands were diſgavelled, to prevent the Extinction of their Families by the frequent Diviſions of thoſe Lands; therefore it is to be preſumed, that the Legiſlature intended only to deſtroy Partibility, as that Part of the

Cuſtom which tended to the Crumbling of Families; and not thoſe other beneficial Cuſtoms annexed to ſuch Lands in *Kent*, ſuch as Deviſing, Forfeiture for Treaſon only, *&c.*

2. To expound this private Act of the 2 & 3 *E.* 6. literally in the Clauſe, (*that they ſhould be as Lands at Common Law to all Intents and Purpoſes*) would take away all Manner of Power of deviſing thoſe Lands, for Lands at Common Law were not deviſeable; and this Act being ſubſequent to 32 *H.* 8. *cap.* 1. and 34 & 35 *H.* 8. *cap.* 5. of Wills, muſt repeal them, and conſequently prevent all future Deviſes; but this Reſtraint cannot be intended to be within the View of the Petitioners, nor of the Legiſlature that framed the Act upon the Petition.

Sid. 137. Raym. 59, 77.

3. Though in the Beginning of the Clauſe the Words *to all Intents and Purpoſes*, &c. are large, yet they are reſtrained by the laſt Words of the Clauſe, *viz.* that they ſhould deſcend as Lands at Common Law, and conſequently the Cuſtom of Partibility is only deſtroyed; moreover it is very much to be doubted, whether the Power of deviſing, and the other Qualities annexed to the Partible Lands in *Kent*, be eſſential to Gavelkind; for the Cuſtom of Gavelkind prevails in other Countries beſides *Kent*; and yet it may be very much queſtioned, whether the Gavelkind of *Kent*, and that in other Countries, agree in any Thing but the Manner of Deſcent; and if this Doubt may be admitted, then thoſe extraordinary Cuſtoms in *Kent* cannot be extinguiſhed in a Statute, without particular Words for that Purpoſe.

Sid. 138. Cro. Car 562. 2 Sid. 153. *Brown* ver. *Brooks*. Lamb. 595.

To illuſtrate this Point farther, it will be neceſſary to take Notice, that it is ſufficient for any one, who will intitle himſelf by the Cuſtom of Gavelkind, to plead that the Land is in *Kent*, and of the Nature of Gavelkind, without pleading the Cuſtom ſpecially; but if any one will plead the Cuſtom of deviſing, or of having a Moiety as Tenant by the Curteſy, or in Dower, he muſt plead the Cuſtom ſpecially, and not in that general Manner he may plead Gavelkind; and the Reaſon of this Difference ſeems to be this, That Gavelkind in *Kent* is the general Law of the Place, and no particular Cuſtom; ‡ and therefore when it is generally alledged, the Court ſhall take Notice of it as of a Law that prevails in a conſiderable Part of the Kingdom; but as for the other Cuſtons, they are not an eſſential Part of Gavelkind, and ſo are not laid before a Court upon a general Pleading of Gavelkind, but require a particular Manner of Pleading them, as all other private Cuſtoms do which are derogatory to the Laws of the Kingdom, that the Judges may be apprized of them, and where they obtain, and ſo give their Deciſions with Regard to them.

‡ And all the Lands in *Kent* are preſumed to be in Gavelkind, becauſe it is morally impoſſible now to ſhew to a Certainty what Lands were diſgavelled.

* Page 644 Co. Lit 175. b. Lit. Sect. 265.

* Heirs in Gavelkind ſhall make Partition as Parceners, and a Writ of Partition lies between them as it does between Parceners; and in the Declaration upon ſuch Writ the Cuſtom muſt be mentioned; as to ſay, that the Land is of the Cuſtom of Gavelkind, but they need not preſcribe; for though the Cuſtom, as different from the general Law of the Kingdom, muſt be taken Notice of to the Judges, yet there is no Neceſſity for preſcribing, becauſe it is *Lex loci*.

2 Ld. Raym. 1025.

A. ſeiſed of Gavelkind has three Sons, *B. C.* and *D. D.* dies, leaving a Daughter *E.* and then *A.* dies, *E.* ſhall inherit *D.*'s Part.

[If a Man deviſes Gavelkind Lands to Truſtees, and directs them to convey them to the Uſe of his Daughter for Life, for her ſole Uſe, and after her Death in Truſt for the Heirs of her Body for ever; the Lands ſhall go according to the Rules of the Common Law, and not according to the Cuſtom of Gavelkind, this being an executory Deviſe. *Roberts* v. *Dixwell*. *M.* 1738. 1 *Atkyns* 609.——*Vide ante* 643, different in caſe of Limitation of Remainder by Feoffment.]

Grants.

THE Word *Grant* is regularly applied to Things Incorporeal, such as Advowſons, Rents, Commons, Reverſions, *&c.* which are therefore ſaid to lie in Grant, and not in (*a*) Livery, becauſe they cannot paſs from one to another without (*b*) Deed. Co.Lit.172.a. 332. a.

(*a*) What Things lie in Grant, and not in Preſcription, *& vice verſa, vide* Dav. 13. (*b*) That a Rent granted by one Coparcener to another, for Equality of Partition, is good without Deed, becauſe they don't claim from each other, but as making one Heir to their Anceſtor. Co. Lit. 169. a.

On this Difference between Things Corporeal and Incorporeal, it hath been held, that there can be no Diſcontinuance of Things which lie in Grant; and therefore if Tenant in Tail of a Rent, Advowſon, Common, or Remainder, or Reverſion *expectant* on a Freehold, make a Grant by Deed or Fine, or diſſeiſe the Tenant of the Land out of which the Rent is iſſuing, whereof he is ſeiſed in Tail, and make a Feoffment with Warranty, that theſe Acts work no Diſcontinuance of the Intail, for nothing paſſes but during the Life of Tenant in Tail, which is lawful. Lit.Sect.627. Co.Lit.327.a. 3 Co. 85. Leon. 111. *& vide* 2 And. 110.

Alſo of Things which may be transferred without the Notoriety of Livery and Seiſin, ſuch as Rents, Advowſons, *&c.* which lie in Grant, a Man cannot by any Diſpoſition or Act *in pais* forfeit them; and therefore if a Man ſeiſed of a Rent, Advowſon or Common for Life, grants them by Deed to another in Fee, this is no Forfeiture, for this can be no way prejudicial to him in Reverſion, becauſe, ſhould the Grantee claim an Eſtate in Fee, he can make no Title without the original Grant made to his Grantor, by which it muſt appear what Intereſt he had, and conſequently what Eſtate he could convey; and ſo the Grantee, notwiſtanding the Grant in Fee, can claim no larger Eſtate than his Grantor had Power to make, and ſo he in Reverſion can receive no Prejudice. Co Lit.233.b 8 Co. 45. a.

So there can be no Occupant of Things which lie in Grant, and which cannot paſs without Deed, as Rents, *&c.* becauſe theſe Things having no natural Exiſtence, but conſiſting purely in the Agreement, and depending on the Inſtitution of the Society for their Being, no Man can enter to poſſeſs them; beſides, as theſe Things are framed, and have their Exiſtence by the Municipal Laws of the Nation; ſo thoſe Laws have eſtabliſhed the Solemnity of a Deed to tranſfer them; from whence it follows, that ſince no Man can make himſelf a Title to thoſe * Things without Deed, whoever claims them, muſt ſhew he is a Party to the Deed before he can derive himſelf a Title to the Things contained in the Deed. Co.Lit. 41. b. 2 Rol. Abr. 150. Cro.Eliz.721, 901. Vaugh. 199. * Page 645

But for the better Underſtanding of this Head we ſhall conſider,

(A) What Perſons may make good Grants. 646.

And herein,

1. Of Grants by Corporations. 646.
2. Of Grants by Eccleſiaſtical Perſons. 646.

Grants.

3. Of Grants by Infants. 647.
4. Of Grants by Feme Coverts. 648.
5. Of Grants by Ideots and Perſons of Inſane Memory. 649.
6. Of Grants by Perſons under Dureſs. 649.

(B) What Perſons may take by Grant. 650.
(C) What Name or Deſcription of the Grantor, or the Grantee, will make the Grant certain enough. 651.
(D) Of what Intereſt in the Grantor he may diſpoſe. 654.

And herein,

1. Where by Reaſon of Maintenance a Thing cannot be granted or aſſigned over. 654.
2. Where the Grantor muſt have the abſolute Property, ſo that the Grant be not to the Prejudice of a third Perſon. 655.
3. Whether a bare Right or Poſſibility may be granted or aſſigned over. 656.
4. What Seiſin or Poſſeſſion in the Grantor will enable him to grant it over. 658.
5. Where the Grantor's Right, being joined with a Truſt or Confidence, is incapable of being granted or aſſigned over. 658.

(E) What Ceremony is requiſite to the Perfection of a Grant; and herein, of the Neceſſity of a Deed. 659.
(F) What Words are ſufficient to create a good Grant. 660.
(G) Where a Thing ſhall be ſaid to paſs by Grant, or ſome other Conveyance. 661.
(H) Where Grants ſhall be ſaid to be good, or void, for Incertainty. 661.

And herein,

1. What ſhall be a ſufficient Deſcription of the Thing granted, notwithſtanding any Miſrecital thereof. 661.
2. Where a Defect in the Deſcription may be aided by Relation to a Thing certain. 663.
3. Where by an Election given to the Grantee, he may reduce an uncertain Grant to a Certainty. 664.

(I) How Grants are to be expounded. 665.

And herein,

1. How to be conſtrued where there appears a Repugnancy in the Words. 665.

* 2. Where the Premiſſes differ from the *Habendum*, and therein how far the *Habendum* may enlarge or abridge the Grant in the Premiſſes. 667. * Page 646
3. How the Words of a Grant are to be conſtrued as to the Things intended to be granted. 667.
4. Where a Thing ſhall be ſaid to paſs as appendant, appurtenant, or incident. 669.
5. What Eſtate or Intereſt ſhall be ſaid to be granted. 670.
6. At what Time the Thing granted becomes veſted, and when the Grantee muſt take the ſame. 671.

(A) What Perſons may make good Grants: And herein,

1. Of Grants by Corporations.

COrporations Aggregate, although they be inviſible, and exiſt only in Suppoſition and Intendment of Law, yet are they capable of making Grants and parting with their Poſſeſſions. But for this *vide* Tit. *Corporations*.

But a Dean without the Chapter, a Mayor without his Commonalty, the Maſter of a College or Hoſpital without his Fellows, cannot grant or make any Contract that will bind the Corporation. 21 E. 4. 12. Moor 51. Perk. Sect. 31, 32.

2. Of Grants by Eccleſiaſtical Perſons.

The Grants of all dead Perſons in Law, as Monks, Friars, Canons profeſſed, and ſuch like religious Perſons, were always held void. Perk. Sect. 3.

But it ſeems that by the Common Law, Deans and Chapters, Maſters and Fellows of Colleges, Maſters and Brethren of Hoſpitals and ſuch like Corporations Aggregate of many, might of themſelves alone, without the Conſent or Confirmation of any, have made long Leaſes for Lives or Years, or Gifts in Tail, or Eſtates in Fee to others of their Poſſeſſions, at their Wills and Pleaſure. Comp. Incumb. 415.

So Biſhops, Deans, *&c.* ſeiſed in the Right of their Biſhopricks, Deaneries, *&c.* ſo Archdeacons, Prebends, Parſons, Vicars, *&c.* with the Conſent and Confirmations of others, might grant their Poſſeſſions in the ſame Manner as other Aggregate Corporations. Comp. Incumb. 415.

But now by the Statutes of *1 Eliz. cap.* 19. and *13 Eliz. cap.* 10. all Gifts, Grants, Feoffments, or other Conveyance by Biſhops, Maſters, and Fellows of Colleges, Deans and Chapters, *&c.* are void, except Leaſes for the Term of twenty one Years or three Lives, being made conformable to the Rules preſcribed by theſe Statutes. *Vide* theſe Statutes and the Explanation of them, Tit. *Leaſes and Terms for Years.*

If a Perſon obtain a Grant to build Houſes on Church or College Land, and this is confirmed (where Confirmation is neceſſary); this Grant makes no Alienation, but is only as a Licence or Covenant; for the Soil remains in the Grantor, and ſo by Conſequence the Houſes are alſo in him. Hetley 57.

Eccleſiaſtical Perſons ſeiſed of Advowſons in Right of their Churches are reſtrained from alienating the ſame, or granting the next or other Biſhop, though confirmed by Dean and Chapter, are void. 7 Co. 7. *Bedford's* Caſe, if made by a

Avoid-

Avoidance thereof, to the Prejudice of their Succeſſors; for theſe are *Parcels of the Poſſeſſions and Hereditaments of the Church, and not Things whereof an annual Rent or Profit can be reſerved.

* Page 647

Cro. Eliz. 207, 440, 690. Ander. 241.

But though theſe Grants are void againſt their Succeſſors and the King, yet the Grant of a Biſhop, in ſuch Caſe, is good againſt himſelf; ſo that he cannot avoid it during the Time that he continueth Biſhop, the Statutes being made only for the Benefit of the Succeſſors and the King, that by the preceding Poſſeſſors they might not be prejudiced in their reſpective Rights; but not to reſtrain thoſe in Poſſeſſion from doing any Thing to bind themſelves during their own Time.

3 Co. 60. Cro. Jac. 173. —The Grant of the next Avoidance by a Chapter, not being made by the Head of the Corporation, is void immediately. 2 Mod. 56.

The like Law in caſe of Grants made by Deans and Chapters, for they are void when the Dean (being Principal Member of the Corporation) dies, and binds both Dean and Chapter during his Life only.

10 Co. 60. Keb. 182. Hard. 366.

As the Grant of the next Avoidance of an Advowſon is only void againſt the Succeſſor himſelf, but ſhall bind the Biſhop, *&c.* So if an Annuity be granted by a Biſhop out of the Poſſeſſion of the Biſhoprick, this is not void (*a*) againſt the Biſhop that makes the Grant thereof.

(*a*) So if a Biſhop makes a Leaſe for above twenty-one Years, this ſhall bind the Biſhop during his Time. 2 Leon. 134.—Or if a Biſhop lets Tithes for three Lives, which is a void Leaſe againſt the Succeſſor, becauſe there is not any Remedy for the Rent; yet it is not void againſt the Biſhop himſelf. Cro. Jac. 173.——So where a Biſhop by Deed inrolled granted to the Queen, without the Conſent of the Dean and Chapter; it was held that this was not void againſt the Biſhop himſelf. Rol. Rep. 151.

Gouldſ. 138. Hetley 24.

So if an (*b*) Archdeacon, Dean, Prebend, *&c.* make Leaſes, or other Grants of any of their ſole Poſſeſſions, not warranted by Statute, they ſhall be bound by their own Grants for the Time.

(*b*) But where there is a Chapter that hath no Dean, as the Chapter of the Collegiate Church of *Southwel*, Grants or Leaſes made by them, contrary to the Statute of 13 Eliz. c. 10. are void *ab initio*, for they muſt be either ſo, or good for ever. Mod. 204.————So in all Caſes where a Corporation Aggregate makes a Leaſe not warranted by the Statute of 13 Eliz. c. 10. ſuch Leaſe is void *ab initio* againſt themſelves; but where a ſole Corporation makes ſuch Leaſe, it ſhall bind him that makes it, but ſhall be void againſt his Succeſſors. Leon. 308. Hard. 326.

11 Co. 67. Rol. Rep. 151. Leon. 306.

Where the Maſter and Fellows of a College by Deed inrolled made a Leaſe not warranted by the Statute, and levied a Fine, and five Years paſſed without Claim; in this Caſe, though it was held, that the Leaſe was void againſt the ſucceeding Maſter, yet that it was good during the Life of the Maſter that was Party to the Leaſe, and made no Claim, becauſe he is the Head and Principal Part of the Corporation.

3. Of Grants by Infants.

Vide Head of *Infancy and Age.*

Infants in regard to their Want of Underſtanding are ſo far protected by the Law, that (*c*) regularly all their Grants are void in the ſame Manner as their Contracts are.

(*c*) Where an Infant may diſpoſe of Lands in Gavelkind, *vide* Tit. *Gavelkind*, *ante* 638.——That an Infant Coparcener ſhall be bound by Partition, Tit. *Coparceners*.——What Acts he may do when Executor, Tit. *Executors and Adminiſtrators*.

Perk. Sect. 12, 19.

But herein the Law diſtinguiſhes between ſuch Grants as are void, or only voidable; the Firſt of which are all ſuch Gifts, Grants or Deeds made by an Infant, which do not take Effect by Delivery of his Hand; as if an Infant give a Horſe, and do not deliver the Horſe with his Hand, and the Donee

Donee take the Horſe by Force of the Gift, the Infant ſhall have an Action of Treſpaſs, for the Grant was merely void.

* But if an Infant enters into an Obligation, makes a Feoffment, levies a Fine, or ſuffers a Recovery, theſe are not merely void, but only voidable by him. * Page 648 Perk. Sect. 12, 13.

If an Infant being ſeiſed of a Carve of Land, grant a Rent-charge to be iſſuing out of the ſame Carve by Deed, and the Grantee diſtrain, he ſhall puniſh him as a Treſpaſſer, notwithſtanding that the Infant delivered the Deed with his own Hand. Perk. Sect. 13.

If an Infant grant a Rent by Fine, this Grant is voidable by himſelf during his Nonage, by Writ of Error; but if he do not avoid it during his Nonage, it is good for ever; alſo if he dies during his Nonage, his Heir ſhall not avoid it. Perk. Sect. 8, 19 but for this *vide* Head of *Fines and Recoveries, ante* 526, &c.

An Infant being Lord of a Copyhold Manor may grant Copyholds, for thoſe Eſtates have their Force and Effect from the Cuſtom of the Manor by which they have been demiſed, and are demiſable, Time out of Mind, without any Regard to the Perſon of the Grantor.† Noy 41. 4 Co. 23. 8 Co. 63.

† And the Lord is but the Inſtrument.

4. Of Grants by Feme Coverts.

A Grant by a Feme Covert is void, for no Act of hers can transfer that Intereſt which the Intermarriage has veſted in the Huſband; and therefore (*a*) if a Man be ſeiſed of Land in Right of his Wife, and his Wife grant a Rent iſſuing out of the ſame Lands, without the Knowledge of the Huſband; this Grant is void; and ſo it is notwithſtanding that the Huſband had Conuſance of it, if it be made and delivered without his Aſſent, or with his Aſſent, if it be made in the Name of the Wife, and not in the Name of the Huſband; and notwithſtanding the Huſband be abroad out of the Country, at the Time of ſuch Grant made and delivered, ſo that it is not known whether he be alive or dead; yet ſuch Grant is void if the Huſband be living; inaſmuch as if the Grantee, by Force of ſuch Grant, enter into the Land and diſtrain, the Huſband, at his Return ſhall have, for his Entry and Diſtreſs, an Action of Treſpaſs. *Vide* Tit *Baron and Feme.* (*a*) Perk. Sect. 6.

So if there be a Difference betwixt the Huſband and Wife, by Reaſon whereof certain Lands of the Huſband, are aſſigned unto the Wife by the Friends of the Huſband, and by his Aſſent, and the Wife grant a Rent-charge to be iſſuing out of the ſame Lands unto a Stranger, the Grant is void. Perk. Sect. 8.

If a ſingle Woman being ſeiſed of a Carve of Land, by Deed grant a Rent-charge thereout, and ſhe delivers the Deed to a Stranger as an Eſcrol, upon Condition, that if the Grantee go to *Rome* and return back again before the Feaſt of *Eaſter* then next following, that then he ſhall deliver the ſame Eſcrol as her Deed unto the Grantee; the Woman marries, and before the Feaſt of *Eaſter*, and during the Coverture, the Grantee goes to *Rome*, and returns again, and the Stranger delivers the Eſcrol unto him as the Deed of the Woman; this Grant is good, notwithſtanding that the Huſband was ſeiſed of the Land in the Right of his Wife, before that the Grant took Effect, for it ſhall have Relation to the firſt Delivery, at which Time ſhe was a Feme Sole. Perk. Sect. 9.

But in this Caſe the Grantee ſhall not have any Rent by Force of the ſaid Grant before the laſt Delivery, when the ſame took Effect as a compleat Deed. Perk. Sect. 10.

Perk. Sect. 11. Alſo in ſuch Caſe, if the Woman had been married at the Time of the Delivery of the Deed as an Eſcrol, and her Huſband died, and the Grantee, after his Death, had performed the Condition, the Grant had been void; for the Delivery of the Deed as an Eſcrol, being at a Time when ſhe was a Feme Covert, no ſubſequent Act can make it good.

* Page 649

Perk. Sect. 20. but for this *vide* Head of *Fines and Recoveries.*

* If a Wife by (*a*) Fine grant a Rent out of her Lands, this Grant ſhall not bind the Huſband during the Coverture; but if the Huſband die before he and his Wife reverſe the Fine by Writ of Error, the Wife ſhall be bound for ever.

(*a*) If a Wife alone, or with her Huſband, bargain and ſell her Lands by Deed indented and inrolled, yet it ſhall not bind her; for a Wife cannot be examined by any Court without Writ, and there is no Writ allowed in this Caſe, 2 Inſt. 673. Hob. 225.———That a Feme Covert may make Grants of Copyhold Eſtates, for the ſame Reaſon that an Infant may. 4 Co. 23. 8 Co. 63.

5. Of Grants by Ideots and Perſons of inſane Memory.

Perk. Sect 21. 4 Co. 123. *vide* Tit. *Ideots and Lunaticks.* It ſeems that, by the ſtrict Notions of the Common Law, the Grants of Ideots and Perſons of *non ſane Memory* are good, and that they themſelves cannot avoid them by Pretence of Diſtraction; becauſe if the Excuſe were real, yet it would be repugnant in itſelf, becauſe he did not know or remember the Thing done.

Perk. Sect. 21. But if a Man of *non ſane Memory*, being ſeiſed of a Carve of Land, grant a Rent iſſuing out of the ſame Land in Fee, and die, and his Heir enters, and the Grantee diſtrains for the Rent behind, the Heir ſhall have an Action of Treſpaſs; but if the Grantee had diſtrained in the Life of the Grantor for the Rent behind, the Grantor ſhould not have an Action of Treſpaſs; for he cannot avoid his Deed by diſabling of himſelf.

4 Co. 124. a. *Beverley's* Caſe. Co. Lit. 247. Cro. Eliz. 398, 622. And here we muſt further obſerve, that the Law diſtinguiſhes between the Grants or Acts done by Ideots, &c. in *Pais*, and thoſe acknowledged on Record; that as to the firſt, they are not admitted to diſable themſelves from the Inſecurity, that may ariſe in Contracts from counterfeit Madneſs and Folly; but their Heirs or Executors may avoid ſuch Acts by Pleading the Diſability.

4 Co. 124. 2 Inſt. 483. Co. Lit. 247. Perk. Sect. 24. But neither the Ideot himſelf, nor his Repreſentative, can vacate any Act of his done in a Court of Record, and therefore if a Perſon *Non Compos* grant a Rent by Fine, it ſhall bind him and his Heirs; for though the Judges ought not to admit of a Fine from a Man under that Diſability, yet when it is once received, it ſhall never be reverſed, becauſe the Record and Judgment of the Court being the higheſt Evidence in the Law, the Conuſor muſt be preſumed at that Time capable of Contracting; and therefore the Credit of it is not to be conteſted, nor the Record avoided by any Averment againſt the Truth of it.

Perk. Sect. 25. A Perſon born Deaf, Dumb and Blind, cannot grant, for they cannot underſtand the Signs of Contracting, and by every Grant the Grantor is preſumed to receive ſome Advantage; but if a Perſon be only dumb or deaf, he may contract by Signs, and conſequently may bind himſelf by his Contracts. ‡

‡ Ideots and Lunatics, or their Committees, by Direction of the Chancellor, compelled to convey Truſt Eſtates and Mortgages. 4 G. 2. c. 10.

6. Of Grants by Perſons under Dureſs.

2 Inſt. 483. *vide* Tit. *Dureſs.* The Grants of Perſons under Dureſs are void, that is, if they were made under an Apprehenſion of ſome bodily Hurt, or if the Grantor were impriſoned

prisoned without Cause, and the Grantee refused to release or discharge him, unless he made such Grant.

But menacing to burn Houses, or spoil or carry away the Party's Goods, are not sufficient to avoid the Grant; for if he should suffer what he is threatened with, he may sue and recover Damages in Proportion to the Injury done him. 4 Inst. 483. Perk. Sect. 18.

(B) What Persons may take by Grant. * Page 650

THERE be but few or no Persons excluded from being Grantees, and therefore a Man attainted of Felony, Murder, or Treason, may be a Grantee; so of the King's Villein, an Alien, one outlawed in a Personal Action, or a Bastard, may be Grantees. Perk. Sect. 48.

A Feme Covert may be a Grantee, and therefore if a Rent-charge be granted to a Feme Covert, and the Deed is delivered to her without the Privity or Knowledge of her Husband, and the Husband dies before any Disagreement made by him, and before any Day of Payment, the Grant is good, and shall not be avoided, by saying, that the Husband did not agree, &c. but the Disagreement of the Husband ought to be shewn. Perk. Sect. 43.

If an *Englishman* goes into *France*, and there becomes a Monk, yet he is capable of Taking by a Grant made to him in *England*, because such Profession is not triable; also all such Professions are taken away and declared unlawful, as being contrary to our established Religion. 2 Rol. Abr. 43. said to be resolved by all the Judges at *Serjeants Inn*, 44 Eliz. in *Lay's* Case.

Although (*a*) Aggregate Corporations are invisible and exist only in Supposition of Law, yet are they capable of taking by Grant, for the Benefit of the Members of the Corporation. Co. Lit. 9. Saund. 344. (*a*) So Churchwardens may take Goods for the Benefit of the Church. Rol. Abr. 395. March 66.——But not Lands. 12 H. 7. 27. Keiw. 32. 2. Co. Lit. 3. 2. Salk. 167. pl. 7.——Except in *London*, where the Parson and Churchwardens are a Corporation, and may purchase and demise Lands, &c. Cro. Jac. 532. March 66. Lane 21. 5 Mod. 395. Ld. Raym. 337.

As where the Mayor and Commonalty of *N.* brought an Action of Covenant against the Mayor, Bailiffs and Commonalty of *Derby*, and declared, that the Defendants Predecessors had by their Deed granted to the Plaintiffs Predecessors, that all the Commonalty of *N.* should be discharged of Murage, Pontage, Custom and Toll, for all their Merchandize, &c. within the Vill of *Derby*, and that the Officers of *Derby* had taken Toll and Custom of the Burgesses of *N.* against the Covenant; and it was held, that the Action lay, and that the Grant to the Corporation for the Benefit of the particular Members was good. 48 E. 3. 17. Saund. 344. cited.

If a Feoffment or Grant be made by Deed to a Mayor and Commonalty, or any other Corporation aggregate of many Persons capable to purchase, they have a Fee-simple without the Word *Successors*, because in Judgment of Law they never die. Co. Lit. 90.

So if a Lease be made to them during their Lives; this is equal to a Grant made to them while they continue a Body Politick, which, by Reason of the perpetual Succession of its Members, is in Law looked upon to be for ever. 21 E. 4. 76. Rol. Abr. 843.

If *A.* grants to the Mayor and Burgesses of *D.* the Moiety of a Yardland in the Waste of ——— without describing in what Part it should be, or how Leon. 30.

how it is bounded, the Corporation cannot make their Election by Attorney, but are first to resolve on having the Land, and then they may make a special Warrant of Attorney, reciting the Grant to them, and in which Part of the Waste the Grant should take Effect, and according to such Direction the Attorney is to enter.

* Page 651

* (C) What Name or Description of the Grantor or Grantee will make the Grant certain enough.

Perk. Sect. 36. Gouldf. 122. Hob. 32.

THE Names of Persons at this Day are only Sounds for Distinction-sake, though it is probable they originally imported something more, as some natural Qualities, Features, or Relations; but now there is no other Use of them, but to mark out the Families or Individuals we speak of, and to distinguish them from all others; and therefore in Grants, which are to receive the most benign Interpretation, and most against the Grantor, if there be sufficient shewn to ascertain the Grantor and Grantee, and to distinguish them from all others, the Grant will be good.

Co. Lit. 3. 2 Rol. Abr. 43.

And this we may observe in those Cases, where there are such sufficient Marks of Distinction, that the Grant would be good without any Name at all, consequently a Mistake in the Name of Baptism or Surname, is to be looked upon but as Surplusage, and will not vitiate; as a (*a*) Grant by or to *George*, Bishop of *Norwich*, where his Name is *John*, or to *Henry*, Earl of *Pembroke*, where his Name is *Robert*, is good, for there cannot be more Persons of those Names.

(*a*) But in Pleading in these Cases, the Christian Name ought to be shewn, for the Death of the Individual is a good Plea in Abatement, which often falls out, where the same Office, Dignity, or Relation, continue in another. Co. Lit. 3.

Perk. Sect. 36. 2 Rol. Abr. 44.

So a Grant of an Annuity by an Abbot, by the Name of the Foundation, without his Name of Baptism, is good, if there be not any more Abbots in *England* of the same Name of Foundation.

46 E. 3. 22. b. 2 Rol. Abr. 43. cited.

If a Grant be made to a Man and his Wife, without naming her by the Name of Baptism, yet she shall take.

2 H. 4. 25. 2 Rol. Abr. 43. Co. Lit. 3.

So if a Grant be made to *T.* and *Elen* his Wife, where in Truth her Name is *Emlyn*; yet the Grant is good, for being called the Wife of *T.* reduces it to a sufficient Certainty.

2 Rol. Abr. 44.

If *A.* be created a Herald, and in the Patent he is called *Chester*, a Grant or Obligation made to him by the Name of *Chester* is good, for this sufficiently distinguishes him from all other Men.

Perk. Sect. 37.

If there be Father and Son of the same Name, and the Father grants an Annuity by his Name, without any Addition, it shall be intended the Grant of the Father; and if the Son being of the same Name with his Father, grant an Annuity without any Addition; yet the Grant is Good, for he cannot deny his own Deed.

Co. Lit. 3. 2 Rol. Abr. 43, 4.

A (*b*) Bastard, who is known to be the Son of such a one, may purchase, or be a Grantee by such reputed Name; for all Surnames were originally acquired by Reputation.

(*b*) So a Woman, who hath got the Reputation of being the Wife of such a one, may be a Grantee by that Name, tho' in Truth she was never married to him. Hob. 32.

As where *George Shelly* conveyed Lands to the Uſe of himſelf, the Remainder to *George Shelly* his Son, whereas in truth *George* was born of one *B.* in Matrimony of one *C.* yet was reputed the Son of *George*, and educated by him; though the Boy was but ſix Years old, it was ruled he ſhould take the Remainder, for having gotten by Reputation the Name of *George Shelley*, theſe Words are a certain Deſcription of the Perſon to take the Remainder. Co. Lit. 3.

But if a Remainder be limited to the eldeſt *Iſſue* of *J. S.* whether legitimate or illegitimate, *J. S.* has Iſſue a Baſtard, he ſhall not take this Remainder, for it is not veſted in *J. S.* as it was in the other Caſe, but * is in Contingency, and the certain Time is not defined when this Contingency ſhall happen, for the Baſtard, at his Birth, does not acquire the Reputation of being the Iſſue of *J. S.* and ſince the Baſtard, when firſt in Being, cannot take by virtue of this Limitation, he can never take it; for he cannot be underſtood to be the Perſon deſigned and marked out by theſe Words, if after his Birth it depends on the Uncertainty of popular Reputation, whether he ſhould take the Remainder, or not; and ſuch a Deſignation of the Perſon as contains no Certainty in itſelf, or no Relation to any other certain Matter that may reduce it to Certainty, is a void Limitation. 2 Rol. Abr. 43, 44. *Blonewell* and *Edwards*. * Page 692

But where a Remainder is limited to the eldeſt *Son* of *Jane S.* whether legitimate or illegitimate, and ſhe hath Iſſue a Baſtard, he ſhall take this Remainder, becauſe he acquires the Denomination of her Iſſue by being born of her Body, and ſo it never was uncertain who was deſigned by this Remainder. Noy 35.

If a Grant be made to a Father and his Son, he having but one Son, the Grant is good for the apparent Certainty of it; but if the Father has ſeveral Sons, or if a Grant be made to a Man's Couſin or Friend, theſe are void for Uncertainty. Cro. Jac. 374. Co. Copyh. 95.

It ſeems by the better Opinion of the Books, that a Miſtake of the Chriſtian Name will vitiate the Grant; as where the Grant is without any Chriſtian Name at all, or where (*a*) a wrong Name is made uſe of as *Edmund* for *Edward*; neither can the Party be declared againſt by his right Name, with an Averment, that he made the Deed by a wrong Name, for that would be to ſet up an Averment contrary to the Deed, and contrary to that Sanction allowed by Law to every ſolemn Contract; and therefore if he be impleaded by the Name in the Deed, he may plead that he is another Perſon, and that it is not his Deed. † *Vide* 36 H. 6. 26. Dyer 279. Owen 107. Co. Lit. 3. Cro. Jac. 558, 640. Perk. Sect. 38.

(*a*) But if *J. S.* reciting by his Deed, that his Name is *J. S.* by the ſame Deed grants an Annuity by the Name of *Tho. S.* this is a good Grant; for the Writ ſhall be brought upon the whole Deed, Perk. Sect. 40.—— So if *A.* reciting by her Deed, that ſhe is a Feme Covert, and in Truth ſhe is a Feme Sole, grants an Annuity, *&c.* it is a good Grant; for when ever there is a ſufficient Expreſſion and Signification of the Party's Intent, whatever is redundant and over and above, like all other Surpluſage, though miſtaken, cannot hurt and deſtroy the Force of the Grant, according to the Rule, *Utile per inutile non vitiatur*. Perk. Sect. 40.——So if *J. S.* Knight, reciting by his Deed, that he is a Yeoman, grants an Annuity, the Grant is good. Perk. Sect. 40.——But if a Feme Covert, reciting by her Deed that ſhe is a ſingle Woman, grants an Annuity; this Recital ſhall not bind her, or deprive her of her Privilege of Coverture. Perk. Sect. 41.

[† *Sed qu.* the Law? Few Grants are without valuable Conſideration, and Grants are to be conſtrued moſt ſtrongly againſt the Grantors, for the Benefit of the Grantees; and it would be ſtrange if the Grantor, by his own fraudulent Miſtake, ſhould avoid his Grant. Nor do I ſee any Reaſon why he ſhould not be decl red againſt by the Name ſpecified in his Grant, and that Grant be Evidence that he is as well known by one Name as the other. And *vide infra*.]

But a Miſtake in a Surname does not vitiate the Grant, becauſe there is no Repugnancy that a Perſon ſhould have two different Surnames, ſo that he may be impleaded by the Name in the Deed, and his real Name brought in by an *Alias*, and then he cannot deny the Name in the Deed, becauſe he is eſtopped to ſay any Thing contrary to his own Deed. 3 H. 6. 25. 2 Rol. Abr. 146.

46 E. 3. 22 b.
Co. Lit. 3.
2 Rol. Abr. 43.
Brownl. 147.
Lit. Rep. 182.

Alſo though a Perſon cannot have two Chriſtian Names at one and the ſame Time, yet he may, according to the Inſtitution of the Church, receive one Name at his Baptiſm, and another at his Confirmation, and a Grant made to or by him, by the Name of Confirmation, will be good; for though our Religion allows no Re-baptizing to make double Names yet it does not force Men to abide by the Names given them by their Godfathers, when they come themſelves to make Profeſſion of their Religion.

So if a Man make a Leaſe by a contrary Name to that by which he was baptiſed, yet the Leaſe is good; for this does not take Effect (*a*) al-
*Page 653
together by the Indenture, but partly by the Demiſe; as if *John* by the Name of *Jane* leaſe Lands, admitting that theſe are diſtinct Names, yet the Leaſe is good.

2 Rol. Abr. 42. *Hide* and *Challenor*.

(*a*) So of Things which paſs by Livery, if the Deed of Feoffment be made by a contrary Name of Baptiſm of the Feoffor or Feoffee; yet is the Feoffment good if Livery and Seiſin be made, for it takes Effect by the Livery, and not by the Deed. Perk. Sect. 42.——So if a Man delivers a Horſe by Word, and by contrary Name of Baptiſm makes a Gift of him in Writing; yet the Gift is good by Word, though not by the Writing. Perk. Sect. 42.

Perk. Sect. 56.
(*b*) If *J. S.* hath Iſſue two Sons, and a Grant is made to the firſt Son

If a Rent be granted to *J. S.* or *J. D.* the Grant is void for (*b*) Incertainty, for the Deed is in the Disjunctive; and though the Deed be delivered to *J. S.* yet this cannot make the Grant good; for the Deed was void at firſt, and cannot be made good by the Delivery.

of *J. S.* without Name; this is certain enough. Perk. Sect. 54. Hob. 32.——But if *J. S.* hath not any Iſſue, and a Rent is granted unto him who ſhall be the firſt Iſſue of *J. S.* whether it be Son or Daughter; this Grant is void for Uncertainty. Perk. Sect. 54.

Perk. Sect. 52.
(*c*) A Grant to the Biſhop of *L.* and his Succeſſors, when there is no Biſhop in Being at the Time, or to the Dean and Chapter of *St. Paul's*, or to the Mayor and Commonalty of ſuch a Place, when there is no Dean or Mayor living at the Time of the Grant, is void. Vaugh. 199.

If a Rent, or any Thing elſe that lies in Grant, be granted to the right Heirs of *J. S.* and *J. S.* be alive, this Grant is void; for there is no Perſon (*c*) capable of Taking, as anſwering this Deſcription.

But for this *vide* Head of *Remainder and Reverſion.*

But if a Rent, *&c.* be granted to *A.* for Life, Remainder to the right Heirs of *B.* and *B.* is dead at the Time the Grant is to take Effect; this is a good Grant.

It has been already obſerved, that the Naming the right Names of the Grantor and Grantee is for no other Purpoſe but to aſcertain the Parties and diſtinguiſh them from others; and that if there be a ſufficient Verification to this Purpoſe, the Grant will receive the moſt favourable Interpretation; and it ſeems the ſame Indulgence will be allowed of in the Miſtake of Additions, which are by Law made Part of the Name. By Additions we mean Names of Dignity, which are Marks of Diſtinction, impoſed by public Authority, and always make up the very Name of the Perſon to whom they are given; and theſe are of two Sorts; 1*ſt*, Such as exclude the Surname, ſo that the Perſons may not ſeem to be of any common Family; and ſuch are the Names of Earls, Dukes, *&c.* 2*dly*, Such Marks of Diſtinction as are alſo impoſed by the King, and Parcel of the Name itſelf, but do not exclude the Surname, ſuch as Knight and Baronet.

2 Inſt. 666.
Dyer 88.
Show. 392.

Co. Lit. 3.

As to thoſe Names of Dignity which exclude the Surname, we have already obſerved, that in Grants a Miſtake in the Chriſtian Name will not vitiate the Grant, becauſe there cannot regularly be more than one Perſon of that Name.

Carth. 440.
Ld. Raym. 232.

So a Grant to a Duke's eldeſt Son, by the Name of a *Marquis*, or to the eldeſt Son of a *Marquis*, by the Name of an Earl, *&c.* is good, becauſe of the common Curteſy of *England*, and their Places in Heraldry.

So where a Conveyance was made of a Reverſion to *Ralph Evers*, Knight, Lord *Evers*, and he brought an Action of Covenant, to which the Defendant pleaded, that at the Time of the Grant he was not *cognitus & reputatus per nomen Mil'*, and it was held to be no good Plea; for the Perſon is ſufficiently expreſſed by Lord *Evers*, and the Addition of Knight, though falſe, doth not take away the Deſcription of the true Perſon. Bulſt. 21. Lord *Evers* ver. *Strickland.* Cro. Car. 240. S. C.

But it was adjudged in *C. B.* and affirmed by three Judges in *B. R.* where the Party ſet forth his Title to an Advowſon by virtue of Letters Patent granted to *A. tunc Armigero & poſtea Militi*; and upon *Oyer* of the Letters Patent it appeared, that the Grant was made to *A.* Knight, that it could not be intended the ſame Perſon, becauſe Knight is a Name of Dignity, but Armiger or Eſquire, a Name of Worſhip; and if he is afterwards made a Knight, the Name of Eſquire is thereby extinguiſhed, and conſequently that a Grant made by the King to *A.* Knight, when there was no ſuch Man a Knight, was a void Grant. † * Page 654 Carth. 440. Skin. 651. pl. 1. *The King* ver. *Biſhop of Cheſter.* 5 Mod. 297. 2 Salk. 560. S. C. *& vide* Lit. Rep. 200. S. P. ——But *Rokeſby* Juſt. held, that he might take by a Grant made unto him by the Name of Knight, *& ſic vice verſa, ſi conſtat de perſona, ut res magis valeat, &c.* ——And *note*, this Judgment was reverſed in Parliament, becauſe it was only a Miſtake in the Pleader, the Party being in Truth a Knight at the Time of the Grant. Carth. 441.

† *Vide* the Note, *infra* 653.

As to Grants by and to Corporations, here we ſhall only obſerve, that though the Names of Corporations have a certain and ſignificant Meaning, and are not as arbitrary as thoſe of common Perſons; that yet if there be enough ſaid to ſhew that there is ſuch an artificial Being, and to diſtinguiſh it from all others, the Body Politic is well named, though the Words and Syllables are varied from. 10 Co. 125. Gould. 122. Comp. Incumb. 474. *& vide* Tit. *Corporations*, Letter (C).

As if a Corporation be founded by the Name of the Dean and Chapter of the Cathedral Church in *Oxford*, and they make a Leaſe by the Name of the Dean and Chapter of the Cathedral Church in the Univerſity of *Oxford*; this is well enough, for the (*a*) Place of the Situation is well and ſufficiently ſhewn. Poph. 57. 2 Rol. Abr. 42. S. C.

(*a*) That a Corporation muſt be named of ſuch a Place as will diſtinguiſh its Situation from others, *vide* 10 Co. 29. b. 32. b. And. 196. Rol. Abr. 513. & Moor 228. That a Variance as to the Place is an eſſential Variance. 2 Brownl. 244.

So if the Prior of *St. Michael* in *Coventry* make a Leaſe by the Name of the Dean of *Coventry*, this is good; ſo if they had granted an Annuity or Corrody, and the Name of the Saint had been omitted. 10 Co. 124.

So if a Corporation be inſtituted in Honour of *St. George the Martyr*, and in a Leaſe they omit the Word *Martyr*, it is well enough; for the Name of Dedication is but an empty Sound, and no otherwiſe requiſite than to diſtinguiſh the Corporation from all others. Poph. 59.

If there be an immaterial Addition, this doth not hurt; as if the Preſident and Scholars of *Corpus Chriſti* College in *Oxford* make a Leaſe by the Name of Preſident and Scholars of *Corpus Chriſti* College *in Com. Oxon.* this is good; for *utile per inutile non vitiatur*. Cro. Eliz. 816.

If the Name of the Corporation be expreſſed by Words (*b*) ſynonymous, it is ſufficient; as if a College be inſtituted by the Name of *Gardianus & Scholares Domus ſive Collegii Scholarium de Merton*, and they make a Leaſe by the Name of *Cuſtos & Scholares*, it is good. 10 Co. 125. (*b*) So if the Grant be made by *Præpoſitus & Socii*, where it ſhould be *Scholares*, it is good. 11 Co. 23. ——So if *J. S.* Abbot of *B.* makes a Leaſe by the Name of *J. S. Clericus de B.* it is good. 11 Co. 21. ——And *note*, that generally, if the Name of a Deed doth not import of itſelf the true Name of the Corporation; yet if in Pleading, or by a ſpecial and expreſs Averment, or by the Finding of the Jury it ſhall be made apparent to the Court, that the true Name of the Corporation, and the Name in the Leaſe, Grant, &c. are all one in Effect, it will much enforce the Matter, although that in Words there may be ſome Appearance of Difference. 10 Co. 125. *per Coke.*

(D) Of

(D) Of what Intereſt in the Grantor he may diſpoſe: And herein,

1. Where by Reaſon of Maintenance a Thing cannot be granted or aſſigned over.

21 E. 4. 24. Co. Lit. 214. 1 Rol. Abr. 376. 2 Rol. Abr. 45. and Skin. 6. pl. 7. 26. pl. 1.

THE Common Law hath ſo utter an Abhorrence to any Act that may promote Maintenance, that regularly it will not ſuffer a Poſſibility, Right of Entry, or Thing in Action, or Cauſe of Suit, or Title for a Condition broken, to be granted or aſſigned over.

1. that Arrearages of Rent are not aſſignable.

* Page 655 Co. Lit. 232. 2 Rol. Abr. 46.

* So though a Bond being a Choſe in Action cannot be aſſigned over, ſo as to enable the Aſſignee to ſue in his own Name, yet he has by the Aſſignment ſuch a Title to the Paper and Wax, that he may keep or cancel it.

2 Rol. Abr. 46. Cro. Eliz. 478. pl. 8. 496. pl. 15.

So if an Obligee makes two Executors, and one of them delivers the Obligation to a Stranger in Satisfaction of a Debt which he himſelf owes, and dies; although the Debt does not paſs to him, yet the Parchment or Paper paſſes, and the Grantee in an Action of Detinue brought by the ſurviving Executor may juſtify the Detaining thereof. ‡

‡ *Sed qu. de hoc?* For what real valuable Intereſt could paſs by ſuch Delivery?

2 Rol. Abr. 46.

So a Huſband poſſeſſed of an Obligation in Right of his Wife may aſſign it to a Stranger, and the Aſſignee may juſtify the Detaining thereof againſt the Wife after the Death of the Huſband. §

§ *Qu?*

2 Vern. 595. 3 Chan. Rep. 90.

Alſo in Equity a Bond is aſſignable for a valuable Conſideration paid, and the Aſſignee alone becomes (*a*) intitled to the Money; ſo that if the Obligor, after (*b*) Notice of the Aſſignment, pays the Money to the Obligee, he will be compelled to pay it over again.

(*a*) But the Aſſignee muſt take it ſubject to the ſame Equity that it was in the Hands of the Obligee; as if on a Marriage Treaty, the intended Huſband enters into a Marriage-brokage Bond, which is afterwards aſſigned to Creditors; yet it ſtill remains liable to the ſame Equity, and it is not to be carried into Execution againſt the Obligor. 2 Vern. 428, 692. S. P. and 767. S. P. (*b*) But Payment to the Obligee, without Notice of the Aſſignment is good. Chan. Ca. 232. 2 Vern. 540.

3 Lev. 312. *Stephens* and *Hanham*. 4 Mod. 48. Show. 290.

The Intereſt gained upon an Execution of a Statute or Recognizance cannot, without an actual Entry of the Conuſee to perfect his Security, be granted or aſſigned over to any other Perſon.

2 Salk. 63. pl. 1. S. C. See *ante*, 333. Div. 2. and the Authorities to the laſt Section of p. 686.

2. Where the Grantor muſt have the abſolute Property, ſo that the Grant be not to the Prejudice of a third Perſon.

Perk. Sect. 65.

It is laid down as a general Rule, that a Man cannot grant or charge that which he hath not; and therefore if a Man grant a (*c*) Rent-charge out of the Manor of *Dale*, and in Truth he hath not any Thing in the

(*c*) But where a Man having debauched a young Woman, and intending afterwards to put a Trick on her, made a Settlement on her of 30*l.* a Year for Life, out of an Eſtate he had nothing to do with; yet the Court of Exchequer decreed him to make it good out of an Eſtate he had of his own. Abr. Eq. 87.

Manor of *Dale*, and afterwards he purchaſeth the Manor of *Dale*, yet he ſhall hold it diſcharged.

* A Corrody incertain cannot be granted over, becauſe of the Prejudice that may accrue thereby to the original Grantor; but a Corrody certain may. * Page 656. 21 E. 4. 43. 2 Rol. Abr. 45.

So a Common *ſans* Number in Fee may be granted over, but a Common for (*a*) Life or Years *ſans* Number cannot be granted over, becauſe of the Prejudice it may be to the Tenant of the Land. † 21 E. 4. 84. 2 Rol. Abr. 46. (*a*) That a Leſſee at Will cannot grant over his Term. 22 E. 4. 6. 2 Rol. Abr. 46.

† *Sed qu.*

If the King grant a Warren to *J. S.* and his Heirs in his Manor, the Grantee may grant the Manor with the Warren over to another in Fee, becauſe this Liberty *inhæret ſolo & ſolum ſequitur*. 2 Rol. Abr. 46.

So if the King grant to another and his Heirs, a Fair or Market in certain Manors or Towns, the Grantee may grant over the Manors or Towns, with the Fair or Maket. *Dubitatur*. 2 Rol. Abr. 46.

If a Rent be granted in Tail, the Grantee cannot grant it over while it continues a Rent, becauſe, as ſuch, it may be intailed within the Statute *de donis*; but if the Grantee brings his Writ of Annuity, it is no longer within the Statute, becauſe then it is become a Charge merely Perſonal, without any Relation to the Land out of which it was at firſt granted, and therefore is become a Fee-ſimple conditional, as ſuch a Gift of Lands had been before the Statute; and therefore the Annuity not being within the Statute may be aliened or granted over. Poph. 87. Co. Lit. 19. a. 7 Co. 61. *Nevill's* Caſe.

The Grantee of a Rent-charge in Fee may grant over any Part of it, though it hath been objected to theſe Kind of Grants or Diviſions of Rent-charges, that thereby the Tenant is expoſed to ſeveral Suits and Diſtreſſes for a Thing, which in its original Creation was intire and recoverable upon one Avowry; but the Anſwer to this is, that it is the Tenant's own Choice, whether he will ſubmit himſelf to that Inconvenience, or not, becauſe the Grantee, before the 4 & 5 *Ann. c.* 16. *ſ.* 9. could not take any Benefit of the Grant by Diſtreſs, without the Conſent or Attornment of the Tenant, nor by Aſſiſe, without he obtains Seiſin of it from the Tenant; beſides, ſince the Law allowed of ſuch Sort of Grants, and thereby eſtabliſhed ſuch Sort of Property, it would have been unreaſonable and ſevere to hinder the Proprietor to make a proper Diſtribution of it for the Promotion of his Children, or to provide for the Contingencies of his Family, which were in his View. 9 H. 6. 13. 2 Rol. Abr. 45. Co. Lit. 148. a. but Cro. Eliz. 747. ſeems contrary.

3. Where a bare Right or Poſſibility may be granted or aſſigned over.

If there be a Deviſe of a *Term* to *A.* for Life, Remainder to *B. B.* cannot, in the Life-time of *A.* aſſign or grant over his Intereſt, becauſe he has but a bare Poſſibility, for *A.* may outlive the Number of Years. Dyer 116. 4 Co. 66. 10 Co. 47. b. Raym. 146.

Sid. 188. & *vide* Chan. Caſes 8, 11. Where it is ſaid, that the Truſt of a Poſſibility in the Remainder of a Term is diſpoſable over, but the Poſſibility in Intereſt in the Reverſion of a Term is not aſſignable, & *vide* 2 Vern. 563.

If a Leaſe be made to Baron and Feme for their Lives, the Remainder Co. Lit. 46. 2 Rol. Abr. 48.

So if one deviſe a Term to Baron and Feme for one and twenty Years, Remainder to the Survivor of them; neither Baron nor Feme, during their joint Lives, may grant this Remainder over. Raym. 146.——[*Sed qu.* if it is granted over by Huſband and Wife, and the Huſband ſurvive, ſhall not the Grant be good againſt him?]

to the Executors of the Survivor of them; the Huſband cannot grant over the Term, being but a Poſſibility; for it is uncertain which of them ſhall be the Survivor.

* Page 657

Dyer 129. b. 282. Leon. 167. Cro. Eliz. 173. And. 15. (a) Owen 131. 2 Rol. Abr. 48. *Cadee* and *Oliver*.

* If a Church is void, the void Turn is not grantable by any common Perſon, for it is a mere Spiritual Thing, and annexed to the Perſon of him who is Patron; and during the Time of the Vacation it is a Thing in Right, Power, and Authority, a Thing in Action, and in Effect the Fruit and Execution of the Advowſon, and not the Advowſon itſelf; but (a) whilſt a Church is void, the next Avoidance or Avoidances that ſhall happen, or the Inheritance of the Advowſon, may be granted away.

If a Man acknowledges a Statute in 2000 *l.* to *A.* and afterwards leaſes the Land for twenty-one Years to another, and afterwards leaſes the ſame Lands to another for ninety Years, to commence immediately, and the Land is extended upon the Statute, at 53 *l. per Ann.* the Leſſee for ninety Years may, during the Extent, grant over the Term, although the Extent be till the Damages and Coſts are levied, which may not happen till after the Expiration of the ninety Years; for the Extent is but in Nature of a Leaſe, and by a reaſonable Conſtruction will end before the Term of ninety Years.

2 Rol. Abr. 48, 49.

If a Man grant a Rent-charge with a Clauſe of Diſtreſs, and that if the Diſtreſs be replevied, that the Grantee may enter and hold till Satisfaction, the Grantee may grant over the Rent with this Penalty, although the Penalty is but a Poſſibility; for being annexed to the Rent, it may well paſs together with the Rent.

Moor 27. pl. 88. *Skerne*'s Caſe, by three Judges againſt one.

If a Man make a Leaſe to *B.* for forty Years, and the Leſſor covenants, that if upon his being allowed to view the Premiſſes, and finding them in ſufficient Repair at the Expiration of the forty Years, that the Leſſee ſhall hold them for forty Years longer; and the Leſſee, during the firſt forty Years, grants to *J. S. Totum intereſſe, Terminum & Terminos quæ tunc habuit in Tenementis illis*; this being but a mere Poſſibility cannot be granted or aſſigned over.

2 Rol. Abr. 47. *Southwel* and *Wade*, adjudged.

If a Man grants 200 Faggots of Wood to be taken out of all his Lands, or 20 *s.* in lieu thereof, out of his ſaid Lands, with a Clauſe of Diſtreſs, at the Election of the Grantee to have the one or the other; in this Caſe the Grantee may, without any Election, grant over the Faggots, becauſe he had a preſent Intereſt in them; but the 20 *s.* being given in lieu thereof cannot be granted over before Election.

Moor 691. pl. 955. *Maynard* and *Baſſet*, adjudged.

If a Man ſeiſed of divers Woods bargains and ſells 300 Cords of Wood to *B.* and his Aſſigns, to be taken by the Appointment of the Bargainor; by this Bargain and Sale a preſent Intereſt is veſted in *B.* which he may grant over before any Appointment by the Bargainor.

2 Rol. Abr. 47. and 5 Co. 24. b. S. C. cited.

Hob. 132. *Grantham* and *Hawley*, adjudged. 2 Rol. Abr. 47, 8. S. C. cited.

A Man may grant that which he hath *potentially*, though not *actually*; as if a Leſſor covenants, that it ſhall be lawful for the Leſſee, at the Expiration of the Leaſe, to carry away the Corn growing on the Premiſſes, although by Poſſibility there may be no Corn growing at the Expiration of the Leaſe; yet the Grant is good, for the Grantor had ſuch a Power in him, and the Property ſhall paſs as ſoon as the Corn is extant.

Hob. 132. 2 Rol. Abr. 48.

So if *A.* leaſes Land to *B.* for Years, and grants that he ſhall have the natural Fruit of the Soil, as Graſs, which renews yearly, which ſhall be on the Land at the End of the Term; this Grant is good, and paſſes the Property to the Grantee.

Hob. 132. 2 Rol. Abr. 48.

So a Perſon may grant to another all the Tithe Wool which he ſhall have ſuch a Year, and the Grant is good in its Creation, though it may happen that he had no Tithe Wool in that Year.

But a Man cannot grant all the Wool that ſhall grow upon his Sheep that he ſhall buy afterwards; for there he hath it not actually nor potentially. Hob. 132. 2Rol.Abr.48.

* 4. What Seiſin or Poſſeſſion in the Grantor will enable him to grant it over. * Page 658

* The Grantee of a Common may grant it over before he hath any Seiſin thereof by the Mouths of his Cattle, for the Freehold is in him by the Grant. 36 Aſſ. 3. 2Rol.Abr.47. S. C.

So the Grantee of an Advowſon may grant it over before he has preſented to it; for he can have no Seiſin of it before it becomes void, and by the Grant itſelf he is ſeiſed of the Freehold, which he may grant over. 36 Aſſ. 3. 2Rol.Abr.47. S. C.

So the Grantee of a Rent may grant it over before any Seiſin of the Rent. 2Rol.Abr.47.

If a Common be granted to Huſband and Wife, and to the Heirs of the Huſband, after the Death of the Huſband, his Heir may grant over the Remainder, for the Eſtate was veſted in him. 2Rol.Abr.47.

Leſſee for Years may, before Entry, grant or aſſign over his Intereſt to another; for the Leſſor having done all that is requiſite on his Part to deveſt himſelf of the Poſſeſſion, and paſs it over to the Leſſee, hath thereby transferred ſuch an Intereſt to the Leſſee as he may at any Time reduce into Poſſeſſion by an actual Entry, as well after the Death of the Leſſor as before, and ſuch an Intereſt as will go to his Executors, and conſequently may be granted or aſſigned over before Entry. Co. Lit. 46. b.

If *A.* makes a Leaſe of Lands to *B.* for Life, Remainder to his Executors for Years; in this Caſe the Term veſts in *B.* ſo that he can grant it over; for as an Heir repreſents his Anceſtor as to an Inheritance; ſo an Executor repreſents his Teſtator as to a Chattel. Co. Lit. 54. 2Rol.Abr.47.

5. Where the Grantor's Right, being joined with a Truſt or Confidence, is incapable of being granted or aſſigned over.

A Perſonal Truſt, which one Man repoſes in another, cannot be aſſigned over, however able ſuch Aſſignee may be to execute it. Perk. Sect. 99 —That a Truſter cannot aſſign over his Truſt. 4 Inſt. 85.

Therefore if a Man grant unto another to be his Carver, or Sewer, or Chamberlain, *&c.* theſe cannot be granted over. Perk. Sect. 101. But for this *vide* Head of *Officers*.

A Guardian in Socage may grant the Wardſhip over to another, but ſuch Grant ſhall not be effectual after the Death of the Grantor, becauſe by the Law of Nature ſuch Guardianſhip belongs to the next of Kin. 2Rol.Abr.46. but for this *vide* Vaugh. 180.

If a Man gives his Horſe to another to go to *York*, he muſt go with him himſelf, and not give him to another to go there. 2Rol.Abr.46.

* Page 659 * (E) What Ceremony is requisite to the Perfection of a Grant; and herein, of the Necessity of a Deed.

2 Rol. Abr 62. Co. Lit 169. a.

INcorporeal Inheritances, which lie in (a) Grant, cannot pass from one to another without Deed, because of them no (b) Possession can be delivered; and they are not like Corporeal Inheritances which pass by Livery; and therefore he that claims them must (c) shew a Grant of them, which he cannot do without Deed.

(a) Such as a Reversion or Remainder. 2 Rol. Abr. 62.

So of a Rent-Service or Rent-Charge. 2 Rol. Abr. 62.——So of a Hundred in Gross. 11 H. 4. 89. b.——So of a Corody Common. 12 H. 4. 17.——So of the Profits of a Mill. 18 E. 3. 56. b. (b) And therefore a Horse may be granted without Deed. 42 E. 3. 23. b. Rol. Abr. 62.——So Trees growing may be granted without Deed. 2 Rol. Abr. 62.——So a Licence to hunt in another's Chase may be granted without Deed. 2 Rol. Abr. 62. (c) That where a Jury find that a Thing did pass, it shall be intended that there was a Deed. Godb. 273, 4.

2 Rol. Abr. 62. Cro. Eliz. 163.

An Advowson, or the next Avoidance to a Church will not pass without Deed; but if a Feoffment be made of a Manor, to which an Advowson is appendant, the same will pass without Deed.

2 Rol. Abr. 63. *Sacheverel* and *Porter*.

So if *A.* seised in Fee of Land, to which a Common for Cattle Levant and Couchant on the Land is Appurtenant by Grant made by Deed within Memory, and he makes a Feoffment of the Land without Deed, the Common shall pass as Appurtenant to the Land, although it could not be created without Deed.

2 Rol. Abr. 63. *Tanner* and *Hobbs*.

But if *A.* seised in Fee of Black-Acre, and White-Acre grants Black-Acre to *C.* with Common for his Cattle, Levant and Couchant on White-Acre, this Grant is not good without Deed.

2 Rol. Abr. 62.

If the King grant to *J. S.* the Manor of *D.* and that he shall have *tot, talia tanta & eadem Libertates* in the said Manor, which such an Abbot had before; and the Abbot had in the said Manor *bona & Catalla Felonum, &c.* and afterwards *J. S.* makes a Feoffment of the said Manor to *J. D.* in Fee with the Appurtenances without Deed; this will not pass those Liberties, the Feoffment being without Deed.

2 Rol. Abr 63.

A Person cannot grant his Tithes over to a Stranger for Life or (d) Years, because they lie merely in Grant.

(d) Not for a single Year.

2 Rol. Abr 63. † See 29 Car. 2. c. 3. Estates of Land, *&c.* made by Parol, without Writing signed by the Parties, or some one by them duly authorized, shall amount to Leases at Will only, except Leases for three Years.

But a Parson may lease his Rectory for Years by Word without Deed, by which the Tithes will pass as annexed to the Rectory. †

2 Rol. Abr. 63.

(e) And if the Lease be made to the Parishioner and his Assigns, the Assignee of the Land shall take Advantage of it. 2 Rol. Abr. 63.

Also a Parson may by Parol Lease to a Parishioner his own Tithes for a Year, Years or for Life, for a valuable Consideration, and the Parishioner shall have them by way of (e) Retainer; for the Grant being for a valuable Consideration is but in Nature of a Composition between the Parson and Parishioner.

2 Rol. Abr. 63. 4. *Mountjoy* and *Tendrue*.

If *A.* seised of Land in Fee grant the Pasture of the Land to *B.* for Years, and *B.* licenses *C.* to put in his Cattle, this Lease of the Pasture is good without Deed, and so is the Licence also; for this is a Lease of the Land

to Paſture, and not like Common of Paſture, which cannot be granted without Deed.

The Wardſhip of the Body might be granted without Deed, becauſe it was an original Chattel, *i. e.* a new Intereſt in a Thing wherein no one had an Eſtate before. Co. Lit. 85. 2 Rol. Abr. 62.

* But the Wardſhip of an Advowſon, *&c.* was not grantable without Deed, becauſe it was not an original Chattel, but was derived out of the Inheritance of a Thing lying in Grant. * Page 660 Co. Lit. 85.

A Leaſe for Years, made by a Corporation Aggregate, might at Law be aſſigned without Deed, though it could not be made (*a*) without Deed; for though ſuch Corporation cannot make an Eſtate without Deed, yet an Eſtate, when made by them, has the ſame Properties with thoſe of the like Nature made by others. Co. Lit. 85.

(*a*) That a Corporation ſole, ſuch as a Biſhop, *&c.* may take a Thing without Deed, as a natural Perſon may; but a Corporation aggregate, ſuch as a Dean and Chapter, Mayor and Commonalty, *&c.* cannot take any Thing without Deed. Co. Lit. 94. b. 2 Rol. Abr. 61.—[See *infra*, 659. n.]

(F) What Words are ſufficient to create a good Grant.

HERE it may be obſerved, that in many Caſes, without expreſs Words, the Law creates a good Grant; becauſe it is the Deſign of the Law to render all Contracts binding and effectual ſo far as the Intention of the Parties may be gathered from the Deed, and ſuch Interpretation is made ſtrongeſt againſt the Grantor, becauſe he is preſumed to receive a valuable Conſideration for what he parts with. 2 Rol. Abr. 56.

As if a Leſſor grant to the Leſſee by theſe Words, *that at the End of the Term it ſhall be lawful for him to take the Corn growing to his own Uſe*; this from the Intention of the Parties, and common Uſe of ſuch Words, amounts to a good Grant, and transfers the Property to the Leſſee; as a Leaſe without Impeachment of Waſte gives the Leſſee a Property in the Trees. Hob. 132. 2 Rol Abr. 56. S. C. cited.

So if a Man by Indenture demiſes to *J. S.* the Manor of *D.* and bargains and ſells to him all the Woods and Trees, *&c.* on the ſaid Manor, to be felled and carried away at his Pleaſure, *Habendum* the ſaid Manor for Life, this is an abſolute Sale of the Woods and Trees; for the Intention of the Grantor appears by the diſtinct Clauſe in the Premiſſes, and leaving the Woods and Trees out in the *Habendum*. 2 Rol. Abr. 56. *Rawles* and *Maſon*, & *vide* Moor 831. pl. 117.

If a Man obliges himſelf to *J. S.* in an Annual Rent of 10*l. percipiendum annuatim de Manerio de D.* and bindeth the ſaid Manor, and all the Chattels therein to a Diſtreſs, this amounts to a good Grant of the Rent, and *J. S.* may diſtrain for it. 2 Rol. Abr. 424.

If *A.* grants and agrees with *B.* his Heirs and Aſſigns, that it ſhall be lawful for them at all Times afterwards to have and uſe a Way by and through a Cloſe of *A.*'s, this amounts to a good Grant of the Way, and not a Covenant only for the Enjoyment of it. 3 Lev. 305. *Holmes* and *Seller*.

The Words *dedi & conceſſi* are general Words, and may amount to a Grant, Feoffment, Gift, Releaſe, Confirmation, Surrender, *&c.* Co. Lit. 301. 2 Saund. 96, 7. S. P. cited; and that though the Jury find *quod conceſſit*, yet the Court may adjudge a Releaſe according to the Operation it has in Law.

Co. Lit. 302. *& vide* Lit. Rep. 200. That in Grants of Things which lie in Grant, there are eſſential Words which muſt be made Uſe of.

But a Releaſe, Confirmation, or Surrender cannot amount to a Grant, nor a Surrender to a Confirmation or Releaſe, for theſe are peculiar Conveyances deſtined to a Special End.

* Page 661 * (G) **Where a Thing ſhall be ſaid to paſs by Grant or ſome other Conveyance.**

Moor 496. For this *vide* 2 Rol. Abr. 56. and Tit. *Feoffment*.

IF a Feoffment be made of a Manor in Leaſe for Years, and Livery is made without Ouſter of the Leſſee, by which the Feoffment is void, yet if the Leſſee attorns, this ſhall be good as a Grant of the Reverſion. †

† By 4 & 5 Ann. c. 16. ſ. 9. Grants are good without Attornment.

Cro. Jac. 189. *Beaudley* and *Brook*.

If *A.* by Indenture inrolled bargains and ſells Lands to *B.* and his Heirs, with a Way over other of the Lands of *A.* this is void as to the Way, for nothing but an Uſe paſſes by the Deed; and there can be no Uſe of a Thing not *in eſſe*, as a Way, Common, *&c.* before they are created.

2 Co. 35. *Hayward's* Caſe.

A Man demiſes, bargains, and ſells a Manor, Part in Demeſne and Part in Tenants Hands for ſeventeen Years, the Party may chuſe either to take it by way of Leaſe at Common Law, and then the Tenants muſt attorn, or by way of Bargain and Sale without Attornment; and this agrees with the Policy of the Common Law, to take every Man's Grant, ſo as to paſs an Intereſt as ſhall be moſt advantageous for the Grantee; and ſince in this Caſe the Words allow a double Way of taking it, the Grantee ſhall be Judge, which is moſt beneficial.

Co. Lit. 147.

If *A.* bargains and ſells Land to *B.* by Indenture, and before Inrolment they both join in a Grant of a Rent-charge to *C.* this after the Inrolment ſhall be conſtrued the Grant of *B.* and the Confirmation of *A.* becauſe when the Bargain and Sale is inrolled, it has the Effect of a Deed inrolled from the making thereof, and therefore it muſt be the Grant of *B.* who had the Land at the Time of the Grant made; but if the Deed had never been inrolled, then it ſhould have been the Grant of *A.* and Confirmation of *B.* becauſe the Land never paſſed from *A.* the Deed being ineffectual and void without Inrolment.

Plow. 140. Co. 76. 6 Co. 15. a.

If Tenant for Life, and he in Reverſion join in a Conveyance without Deed, this to avoid a Forfeiture ſhall be conſtrued a Surrender of the Eſtate for Life, and the Conveyance of him in Reverſion; for it cannot be a Grant or Confirmation of him in Reverſion for want of a Deed.

Co. 76. Plow. 140.

But if Tenant for Life, and he in Reverſion join in a Feoffment by Deed, then each paſſes only his own Eſtate; the Tenant for Life the Freehold in Poſſeſſion, and he in Reverſion his Reverſion; and this cannot be a Forfeiture, becauſe he in Reverſion joined in a proper Conveyance to transfer his Reverſion, and having paſſed it to another has no Intereſt left to intitle him to take Advantage of the Forfeiture.

(H) Where

(H) Where Grants ſhall be ſaid to be good, or void, for Uncertainty: And herein,

1. What ſhall be a ſufficient Deſcription of the Thing granted, notwithſtanding any Miſrecital thereof.

THE very Matter and Subſtance of every Grant being nothing elſe, as my Lord *Hobart* ſays, but a Declaration of the Owner's Will to transfer a Thing to another; if by any Words his Intention appears to paſs the Thing, a ſlight Miſtake or Error in the Deſcription will not vitiate the Grant. Hob. 229.

* As where the *Subchantor*, and *Vicars Choral* of *Litchfield*, made a Grant to *Humphry Peto* of 78 Acres of Glebe, and of their Tithes Predial and Perſonal, and alſo of the Tithe of the Glebe, all which late were in the Occupation of *Margaret Peto*, which was not true; yet the Grant was adjudged good, for the Words *all which* are not Words of Reſtriction, unleſs when the Clauſe is general, and the Sentence intire, but not when it is diſtinct. * Page 662 Cro. Car. 548. 2 Mod. 3, 4. cited, Moor 881. S. P. reſolved.

But where the Thing is not granted by an expreſs Name, there if a Falſity is in the Deſcription of that Thing, the Grant is void; as if *A.* grant Lands lately let to *D.* in ſuch a Pariſh, and the Lands were not let to *D.* and were alſo in another Pariſh, the Grant is void, becauſe the Lands are not particularly named. 2 Mod. 3.

If *A.* grants and confirms to *B.* a Rent of 5 *l.* to be taken out of his Lands, which Rent *B.* has of the Grant of his Father; though *B.* never had any ſuch Rent from his Father, yet this Grant of *A.*'s ſhall be good to create a Rent-charge in *B.* for it is evidently the Intention of *A.* that *B.* ſhall have a Rent of 5 *l.* out of his Land; and a Miſtake or Error in the Deſcription of the Thing (*a*) referred to, ſhall not render the true Deſign of the Contract ineffectual and void. Bro. Tit. *Grant* 69, 73. 2 Rol. Abr. 425. *& vide* Godb. 237.

(*a*) But if a Man grant all his Lands which he hath by Deſcent from his Father in *D.* the Land which he hath from his Mother does not paſs. 2 Rol. Abr. 50.

If a Man make a Leaſe of eight Tenements in *D.* by ſeveral Leaſes, and afterwards by Deed, reciting ſeven of the ſaid Leaſes, grants the Reverſion to *J. S.* with all Lands, Houſes, and Buildings in *D.* and the Grantor has only theſe eight Tenements in *D.* the Reverſion of the eighth Tenement not recited ſhall paſs, for the Words *all Lands*, &c. cannot otherwiſe be ſatisfied. 2 Rol. Abr. 49. *Hagget* and *Giles*.

A Biſhop grants all his Farms and Hereditaments of *Weſtdown* in *Weſtdown* in the County of *Somerſet*; the Biſhop has a Rectory which extends itſelf into the County of *Devon*, and it was held, that by Force of the Word *Hereditament* the Rectory paſſed, (*b*) but that for ſo much only as lay in the County of *Somerſet*, but that as to that in *Devon* it was void for Incertainty. Moor 176. pl. 310.

(*b*) If a Man grants his Manor of *D.* in the County of *M.* and the Manor extends itſelf into another County, no more paſſes than what lies in the County of *M.* 2 Rol. Abr. 50.——[But *qu.* in caſe of a Deviſe, if the Intention of the Teſtator will not govern?]

If a Man hath Lands in *D.* and *S.* Part of which Lands his Father had by Purchaſe, and Part by Deſcent, and he grants *omnia Terras & Tenementa in D. & S. & Modo in Tenura J. S. &c. vel aliquorum aliorum, & quæ G. Pater meus perquiſivit de J. D. & aliis*, the Lands which his Father held by Purchaſe only ſhall paſs. 2 Rol. Abr. 51.

2Rol.Abr. 52. *Robinſon* ver. *Button.*

If a Man leaſe his Lands by a certain Name, as *Blackacre* in the Pariſh *de Maria Loades in Civitate Gloceſter*, the Land lying in *Maria Loades* ſhall paſs, although it be not ſituated in the City of *Gloceſter*, for there was a ſufficient Certainty before expreſſed.

2Rol.Abr. 52. *Wolliſon* and *Bambridge.*

So if the Lord licenſe his Copyholder for Life to leaſe *Blackacre* in the Tenure of *J. S.* for five Years, and *Blackacre* is not in the Tenure of *J. S.* but of the Copyholder himſelf; yet this amounts to a good Licence, for the Lands being particularly named, reduces it to a ſufficient Certainty.

Co. Lit. 4. 2Rol.Abr. 54.

If a Man grant all his Land called *D.* in the Tenure, Occupation or Poſſeſſion of *J. S.* and *J. S.* hath Part of the Lands in *D.* by Leaſe, and as to the other Part he only depaſtures his Cattle there, yet all ſhall paſs by the Grant; for whether his Occupation be by Right or Wrong is not material, the Words being made uſe of to deſcribe the Thing granted.

* Page 663 2Rol.Abr. 45. 6 Co. 67.

* If a Manor conſiſt of Copyhold Tenants only, and there are no Freehold Tenants, without which in Strictneſs there can be no Manor, yet this being known by the Name of a Manor will paſs by that Name.

Hob. 121. *Withes* and *Caſſon.*

A. made a Leaſe for Years, *habend' a feſto Purificationis*, and after by Deed, reciting that he had made a Leaſe to commence *a feſto Annunciationis*, granted the Reverſion to another, and the Grant was held good; and that the Miſrecital of the particular Eſtate was not material ſo long as he had a Reverſion in him.

2Rol.Abr. 44. *Miller* and *Manwaring.*

A. ſeiſed of the Manor of *B.* in Right of his Wife, makes a Leaſe thereof for Years, which upon the Death of the Huſband and Wife becomes void; and notwithſtanding the Leſſee continues in Poſſeſſion, and the Heir of the Wife, to whom the Land deſcended, reciting the ſaid Leaſe grants that *J. S.* after the Forfeiture, Expiration, or other Determination of the ſaid Leaſe, ſhall hold and enjoy the ſaid Manor, *&c.* for ſixty Years; this Grant is void, and ſhall not take Effect *in præſenti*, or at the Expiration of the ſaid recited Term.

Bendl. pl. 72. And. 3. Dyer 116. pl. 70. Plow. 148. a. Rol.Abr. 849. Cro.Car. 399. Jon. 355. Co.Lit. 46. b. Lev. 77. Keb. 360. 2 Leon. 11. pl. 17. Vaugh. 73. 2 Lev. 242. Lev. 234. Sid. 460. 2 Keb. 322. Vent. 83.

But as to this Matter, it ſeems by the better Authority of the Books, that if *A.* reciting that *B.* hath a Leaſe for Years of ſuch Lands, demiſes the ſame Lands to *C.* for Years, to begin after the End or Determination of the ſaid Leaſe to *B.* where in Truth *B.* hath not any Leaſe at all of thoſe Lands, the Leaſe to *C.* ſhall begin preſently, for in Judgment of Law a void Limitation, and no Limitation, is all one; ſo if he recites a Leaſe, which in Conſtruction of Law appears after to be void, or miſrecites a good Leaſe in a Point material, *Habend'* from the End of the ſaid Leaſe, this new Leaſe ſhall begin preſently; though where the firſt Leaſe is good in Law, and only miſrecited in a Point material, the new Leaſe can begin preſently, only in Enumeration of Years, not in Intereſt, till the End of the firſt Leaſe; for in theſe Caſes, the Commencement of this new Leaſe being referred to a Thing which is not, cannot be any ways aſcertained or governed thereby, and then it is as if no ſuch Recital had been, which would have left the Leaſe to begin preſently, as the ſtrongeſt Conſtruction againſt the Leſſor, ſince there is nothing now to aſcertain or determine its Beginning at any other Time.

2Rol.Abr. 55. *Halſwell* and *Aylesworth.*

King *H.* 8. in the 31ſt Year of his Reign leaſed Lands to one for twenty-one Years, and after granted the Reverſion to a Biſhop, who reciting all the Lands contained in the Letters Patent, and the Land itſelf before leaſed by Name, and reciting the Letters Patent thus; That whereas *H.* 8. by his Letters Patent dated 20 *H.* 8. where in Truth they were dated 31 *H.* 8. and alſo miſreciting the Day of the Date, grants all the Lands, Tenements, *&c.* to the *firſt Leſſee* for a certain Number of Years, *poſt expirationem hujuſmodi Literarum Patentium*; in this Caſe it ſeems, that the Date being miſtaken, and the Commencement of the new Leaſe referred to the Expiration of the ſaid Letters Patent, when in Truth there were no ſuch Letters

Patent as were recited, the ſecond Leaſe ſhall begin preſently, and ſo by Acceptance thereof will amount to a Surrender of the firſt; *aliter* it would have been, if the ſecond Leaſe had been limited to begin after the End of the firſt Term generally.

2. Where a Defect in the Deſcription may be aided by Relation to a Thing certain.

If a Grant be made of ſuch Liberties as ſuch a Town enjoys, the Grant is good, being capable of being reduced to a Certainty; for when the Act of Diſpoſal relates to another Thing, that Thing becomes in a manner Part of the Diſpoſition; and the Standard referred to being certain, the Grant by Relation thereto becomes certain, according to the common Maxim, *id certum eſt quod certum reddi poteſt.* Hob. 174. Godb. 245. 2Rol.Abr.49. * Page 664

But if a Man grant to another ſo many of his Trees as may be reaſonably ſpared, this Grant is void, for there is no Standard to reduce it to a Certainty. Moor 880. Hob. 168. Dav. 36.

If one makes a Leaſe for Years to another for ſo many Years as *J. S.* ſhall name, this at the Beginning is uncertain; but when *J. S.* hath named the Years, this aſcertains the Commencement and Continuace of the Leaſe accordingly, but if the Leaſe had been made for ſo many Years as the Executors of the Leſſor ſhould name, this could not be made good by any Nomination, becauſe to every Leaſe there ought to be a Leſſor and Leſſee; and here the Nomination, which aſcertains the Commencement of the Leaſe, not being appointed till after the Death of the Leſſor, makes the Leaſe defective in one of the main Parts of it, *viz.* the Want of a Leſſor, and therefore of Conſequence muſt be void; which is alſo the Reaſon, that in the firſt Caſe the Nomination ought to be made in the Life-time of the Leſſor, and not by *J. S.* after his Death, for then it will be void. 2 Leon. 86. Godb. 25. Co.Lit. 45.b. Co. 155. 6 Co. 35. Plow. 6. b. 273. b.

(*a*) If *A.* lets Lands to *B.* for ſo many Years as *B.* hath in the Manor of *D.* and *B.* hath then a Term for ten Years in that Manor, this makes *A.*'s Leaſe to him good, and fixes the Meaſure and Continuance thereof, ſo that *B.* ſhall have the Lands demiſed for ten Years. So (*b*) a Leaſe to one during the Minority of *J. S.* who is then ten Years of Age, is a good Leaſe for eleven Years, if *J. S.* ſo long live; for if he dies ſooner, that determines the Leaſe, ſince nothing appears to extend it beyond his Life, and his Minority ceaſes at his Death. (*a*) Co. Lit. 45. b. 6 Co. 35. Plow. 273. (*b*) Plow. 522. 3 Co. 19. b.

But if a Woman be *enſeint* with a Son, and a Leaſe is made till ſuch Iſſue *in Ventre ſa mere* ſhall come to full Age, this is a Leaſe only at Will; for it is uncertain when or whether the Son will ever be born, and conſequently the Beginning, Continuance and Ending of this Leaſe is uncertain; and therefore it cannot be ſaid to be any Leaſe for Years, ſince it is to begin preſently as a Leaſe; and yet nothing appears in the Deed itſelf, nor is there ſuch a Reference to any collateral Circumſtance, as may then meaſure the Continuance thereof. 6 Co. 35. b.

3. Where by an Election given to the Grantee, he may reduce an uncertain Grant to a Certainty.

If *A.* ſeiſed of a great Waſte, grants the Moiety of a Yard-Land lying in the Waſte, without aſcertaining what Part, or the ſpecial Name of the Land, or how bounded, this may be reduced to a Certainty by the Election of the Grantee; but it is otherwiſe in the Caſe of the King's Grant, for there can be no Election in his Caſe, and therefore the Grant is void for Incertainty. Leon. 30. Noy 29. Co. 86.

Keilw. 84. 2 Co. 36. So if a Man grant twenty Acres Parcel of his Manor, without any other Deſcription of them, yet the Grant is not void, for an Acre is a Thing certain, and the Situation may be reduced to a Certainty by the Election of the (*a*) Grantee.

(*a*) That the Election muſt be made in the Life-time of the Parties, and cannot be made by the Heir or Executor. Co. Lit. 145. a 2 Co. 37. a. Hob. 174. Leon. 254.

2 Co. 36. Keilw. 84. But if a Man ſell 20*l.* worth of his Land, Parcel of a Manor, this is void, it being neither certain in itſelf, nor reducible to any Certainty, for no Man is made Judge of the Value.

*Page 665 5 Co. 24. *Palmer*'s Caſe. Cro. Eliz 819. Moor 691. Jon. 276. S. C. Hob. 179. * If a Man grant 600 Cords of Wood out of a large Wood, the Grantee hath Election to take them, when, and in what Part of the Wood he pleaſes, without any Appointment of the Grantor, and conſequently may aſſign his Intereſt in them to a third Perſon, and he ſhall have the like Election. Like Point.

5 Co. 24. in *Palmer*'s Caſe. But if one grant to me 1000 Cords of Wood, to be taken at my Election, and the Grantor or a Stranger cuts down Part of the Wood, I can take no Part of that which is cut down, but muſt ſupply myſelf out of the Reſidue ſtill remaining.

Vent. 271. *Motteram* and *Jolly*. 2 Lev 142. S. C. adjudged. But if *A.* covenants with *B.* that he ſhall have twenty of the beſt Trees in the Wood of *A.* to be taken at the Election of *B.* within ſuch a Time, it is a Breach of the Covenant in *A.* to cut down any of the Trees within that Time, becauſe the Latitude of Election which *B.* had is thereby abridged.

2 Rol Abr. 47. *Southwel* and *Wade*. If a Man grant to another 200 Faggots of Wood out of all his Lands, or 20 *s.* in lieu thereof out of his ſaid Lands, *Habendum* the 200 Faggots, or 20 *s.* to him and his Heirs, with Clauſe of Diſtreſs for the one or the other, at the Election of the Grantee; in this Caſe the Grantee hath an Intereſt veſted in him in the Faggots before any Election made by him; but as to the 20 *s.* being given in lieu thereof, he hath no Intereſt till he hath made his Election.

Co. Lit. 35. a. 45, 6. b. Rol. Abr. 849. If *A.* ſeiſed of Lands grants to *B.* that when *B.* pays 20 *s.* that from thenceforth he ſhall have and occupy the Lands for twenty-one Years, and after *B.* pays the twenty Shillings, this is become a good Leaſe for twenty-one Years from the Time of ſuch Payment made; for though the Commencement of it was contingent and uncertain, and depended upon *B.*'s Election to pay the twenty Shillings; yet after he hath paid them, this takes off all Uncertainty, and fixes the Commencement and Continuance of the Leaſe.

(I) How Grants are to be expounded: And herein,

1. How to be conſtrued where there appears a Repugnancy in the Words.

2 Rol. Abr. 65. Co. Lit. 146. GRANTS are to be conſtrued according to the Intention of the Parties; and if there appears any Doubt or Repugnancy in the Words, ſuch (*b*) Conſtruction is to be made as is moſt ſtrong againſt the Grantor,

(*b*) That the Word *Grant*

Grantor, becauſe he is preſumed to have received a valuable Conſideration for what he parts with. implies a Warranty. Cro. Jac. 233. 4.——That in Deeds, ſubſequent Clauſes, which are general, ſhall be governed by precedent Clauſes, which are more particular. 4 Mod. 69.———That Words of a known Signification, but ſo placed in the Context of a Deed that they make it repugnant and ſenſeleſs, are to be rejected equally with Words of no known Signification. Vaugh. 176.

Therefore if a Thing be granted generally, and there comes a *Viz.* which deſtroys the Grant, it is void, being repugnant to the Thing firſt granted. Moor 880.

As if there be a Demiſe of a Parſonage with the Lands and Woods, except the Woods; this Exception is void; for the Woods being ſpecially granted in the Premiſſes cannot be reſtrained afterwards; *ſecus* if the Woods had not been ſpecially granted. Moor 881.

* So if a Leaſe for Years be made to a Man and his Aſſigns, provided that he ſhall not aſſign; this Proviſo is void, being repugnant to the Premiſſes, though it would be good, had the Word *Aſſigns* been left out. † * Page 666 Moor 811. † But a Proviſo, that he ſhould not aſſign without Licence of the Leſſor, had been good.

If a Man grant a Rent out of his Land, with Clauſe of Diſtreſs, and by a Proviſo in the Deed, or by Deed of Defeaſance provides, that the Grant, nor any Thing therein contained, ſhall be conſtrued to extend to charge his Perſon by Writ of Annuity; in this Caſe the Perſon of the Grantor is not chargeable, becauſe the Charge upon the Perſon ariſing only from the Manner of conſtruing Grants, which for the Conſideration given ought to be extended as far as the Words will bear againſt the Grantor, there can be no Room for ſuch Conſtruction, when by the expreſs Words of the Grant the Perſon of the Grantor is not charged; for no Implication ſhall be admitted to overthrow an expreſs Clauſe in the Deed. Lit. Sect. 220. Poph 87. 6 Co. 87. a.

But if the Proviſo had been alſo, that the Grant, nor any Thing therein contained, ſhould charge the Land, that Proviſo had been void as repugnant to the Grant. Co. Lit. 146. a.

So if a Man grant a Rent-charge out of the Manor of *Dale*, in which the Grantor has no Intereſt, with a Proviſo that the Grant ſhall not charge his Perſon; this Proviſo is void, becauſe the Grantor having nothing in the Manor of *Dale* could not by any Act of his charge it; and conſequently the Grantee having no Remedy for his Annuity but againſt the Perſon of the Grantor, the Proviſo to exempt his Perſon is void, as rendering the whole Grant ineffectual; and if in this Caſe the Grantor had been ſeiſed of the Manor, and had granted a Rent-charge out of it *for the Life* of the *Grantee*, with a Proviſo that the Grant ſhould not charge his Perſon, though the Grantee himſelf could have no Remedy but by Diſtreſs, becauſe that Remedy being open to him, the Proviſo is to exonerate the Perſon, yet upon the Death of the Grantee his Executor may have an Action of Debt againſt the Grantor for the Arrears, becauſe the Executor has no other Remedy for the Recovery of them; for he cannot diſtrain after the Grant is determined, and therefore the Proviſo to exempt the Perſon is void againſt the Executor, as rendering the Grant uſeleſs and ineffectual. Co. Lit. 146. 6 Co. 41. 8 Co. 65. b.

If one makes a Leaſe for ten Years at the Will of the Leſſor; this is a good Leaſe for ten Years certain, and the laſt Words are void for Repugnancy. So if one lets Lands at Will for a Year *& ſic de anno in annum*; this is a Leaſe only at Will by the firſt Words, and the laſt Words being repugnant ſhall not control them, or add any more Certainty to its Continuance. 14 H. 8. 13. Bro. Tit. *Leaſes* 13, 22.

But if the *Viz.* or Proviſo be only explanatory, and not repugnant to the Grant, it will be good; as if a Leaſe be made of three Manors, rendering Moor 880.

10*l.*

10 *l.* Rent, *viz.* 5 *l.* out of one, and 5 *l.* out of another; this is good, and the Third ſhall be diſcharged.

Moor 880. So in Caſe of a Feoffment of two Acres, *Habendum* the one in Fee, and the other in Tail; the *Habendum* only explains the Manner of Taking, but does not reſtrain the Gift.

Moor 880. So if an Advowſon be granted, *viz.* to preſent every ſecond Turn; this is good, the *Viz.* being only explanatory.

Co. Lit 183. b. And note as a general Rule, that where it is impoſſible the Grant ſhould take Effect according to the Letter, there the Law ſhall make ſuch Conſtruction as the Gift by Poſſibility may take Effect.

* Page 667 * 2. Where the Premiſſes differ from the *Habendum*, and therein how far the *Habendum* may enlarge or abridge the Grant in the Premiſſes.

Co. Lit. 6. But for this *vide* Tit. *Feoffment*, Letter (C). The Office of the Premiſſes of the Deed is to name the Grantor and Grantee, and the Thing to be granted or conveyed; and of this it muſt be obſerved as regularly true; *1ſt*, That no Perſon not named in the Premiſſes of the Deed can take any Thing by the Deed, though he be afterwards named in the *Habendum*, becauſe it is the Premiſſes of the Deed that make the Gift, and therefore when the Lands, *&c.* are given to one in the Premiſſes, the *Habendum* cannot give any Share of them to (*a*) another, becauſe that would be to retract the Gift already made, and conſequently to make the Deed contrary and repugnant in itſelf.

(*a*) But a Man not named in the Premiſſes may take an Eſtate in Remainder by Limitation in the *Habendum*. 2 Rol. Abr. 68. Hob. 313. Cro. Jac. 564.

2 Rol. Abr. 65. 2*dly*, That the *Habendum* cannot paſs any Thing that is not expreſsly mentioned or contained by Implication in the Premiſſes of the Deed, becauſe the Premiſſes being Part of the Deed by which the Thing is granted, and conſequently that makes the Gift, it follows, that the *Habendum*, which only limits the Certainty and Extent of the Eſtate in the Thing given, cannot increaſe or multiply the Gift; becauſe it were abſurd to ſay that the Grantee ſhould hold a Thing which was never given to him.

Salk. 346. If a Termor grant a Term of 1000 Years to the Grantee, his Executors, Adminiſtrators and Aſſigns, *Habendum* after the Death of the Grantor and his Wife, for the Reſidue of the Term of 1000 Years, in this Caſe the *Habendum* being repugnant to the Premiſſes is void, and the Grantee ſhall have the Term preſently.

3. How the Words of a Grant are to be conſtrued as to the Things intended to be granted.

Hob. 304. If a Prebend, who has an Advowſon annexed to his Prebendary, make a Leaſe for Years of ſeveral Parcels thereof, together with all Commodities, Emoluments, Profits, and Advantages to the Prebendary belonging, theſe General Words will not paſs the Advowſon, for they ſignify Things (*b*) gainful, and Words in Grants ſhall be conſtrued according to a reaſonable and eaſy Senſe, and not ſtrained to Things unlikely or unuſual.

(*b*) So an Appropriation will not paſs by the Name of an Advowſon.

So

44 E. 3. 33. ——And for this Reaſon it was held by two Judges againſt two, that if a Prebendary having a peculiar Juriſdiction make a Leaſe of his Prebend, with all Profits, Commodities, Advantages, *&c.* thereto belonging, the Eccleſiaſtical Juriſdiction did not thereby paſs to the Leſſee, ſo that he might make a Commiſſary, being a Thing annexed to the Spiritual Perſon, and not to the Corps of the Prebend. Lev. 125.

So if a Man grant all his Woods and Trees, Apple Trees will not paſs. Hob. 304.

My Lord *Coke* ſays, that by a Grant of (*a*) *Veſtura Terræ*, the Under-wood and Sweepage paſs, but not the Soil, Timber-Trees or Mines, nor do theſe paſs by a Grant of the Herbage, though Livery and Seiſin be made. Co. Lit. 4.

(*a*) But it hath been ſince holden, that the Grant of *Veſtura Terræ* with Livery paſſes the Soil, and that the Grant of *prima veſtura* for no certain Time paſſes the firſt Cutting only, but that from ſuch a Day to ſuch a Day, it paſſes the Soil. Vent. 393.

* A Grant of *ſeparalis Piſcaria* paſſes neither Water nor Soil; but a Grant of the Water paſſes both the Water and Piſcary, but not the Soil. * Page 668 Co. Lit. 4. Dav. 55.

But a Grant of *Stagnum* or *Gurges* paſſes both Water and Soil. Co. Lit. 5. Vaugh. 108.

General Words, as Honour, Iſle, Caſtle, will paſs Things compound; as Honour or Caſtle will paſs divers Manors or Things ſimple of different Natures; as Fearm or Farm will paſs Houſes, Lands, Tenements, a Plowland or ſo much as one Plow can till; an Oxgang, or ſo much as one Ox can till, may paſs Arable, Meadow, Paſture, and Wood, *&c.* neceſſary for ſuch Tillage. Co. Lit. 5.

A Grant of a Grange paſſes a Barn or Stable with its Curtilage. Co. Lit. 5.

So a Grant of a Houſe paſſes the Houſe, Orchard, and Curtilage. Co. Lit. 5.

So if a Man grant a Foreſt, Warren, Chaſe or Vivary, by theſe Words both the Ground and Privilege paſs. Co. Lit. 5.

A Grant of a (*b*) Boilery of Salt paſſes the Soil; by the Grant of *Ovile* a Sheep-coat, and not a Sheep-walk paſſes. (*b*) Co. Lit. 4. 2 Rol. Abr. 2. Godb. 273.

If a Man grant all his Lands and Tenements, by theſe Words a (*c*) Common in groſs doth not paſs. 29 Aſſ. 9. 2 Rol. Abr. 57.

(*c*) But by the Grant of a Tenement a Reverſion paſſes. 37 H. 6. 5. That by a Grant of all a Man's Lands and Hereditaments Copyholds will not paſs. Owen 37.——But if a Man grants all his Lands and Tenements in *D.* a Leaſe for Years paſſes. Plow. 424. *cont.* Bro. Tit. *Grant*, 155. *& vide* Godb. 183. S. P. but no Reſolution.——So if a Man grant all his Lands and Tenements† in *D.* a Rent-charge which he has iſſuing out of Lands there paſſes. 2 Rol. Abr. 57.

† See *ante* 667, n.

By a Grant of Land the Houſes and Buildings thereupon paſs. 2 Rol Abr. 57. Palm. 320.

If *A.* demiſe Lands, and grants that the Leſſee ſhall have Houſe-boot in other Lands of the Leſſor's not demiſed, the Leſſee may, beſides thoſe granted, take Houſe-boot, *&c.* on the demiſed Premiſſes. § Moor 6. pl. 23. § See *infra*, 671.

If Leſſee for Years of the Pawnage of a Park grants all his Goods and Chattels, Moveables and Immoveables within the ſaid Park, by theſe Words the Pawnage paſſes. 3 Leon. 19.

If a Perſon grant an Acre called *two Acres*, an Acre only paſſes. Cro. Eliz 633.

If a Man grants (*d*) *omnia bona ſua*, Trees growing do not paſs; otherwiſe if they had been cut down at the Time of the Grant. 18 E. 4. 16. 2 Rol. Abr. 58.

(*d*) So of a Grant *de omnibus averiis ſuis*, Deer will not paſs. 2 Rol. Abr. 57.

125. Keb. 538, 639.——Yet an Advowſon will be contained under the Name of a Tenement, and therefore a Licence to purchaſe Lands and Tenements in Mortmain extends to Advowſons. Dyer 350.——So Advowſons paſs by the Name of all Hereditaments lying where the Church lieth. Dyer 322.——That the Word *Tenement* paſſes any Thing whereof a Man may be ſeiſed *ut de Libero Tenemento*; Hereditament any Thing wherein a Man may have an Inheritance. Co. Lit. 6, a.

11 Co. 50. *Liford's* Caſe. If a Man leaſe Lands for Life, excepting the Trees growing, and afterward he grants the Reverſion to another, by the Grant of the Reverſion the Trees paſs, for they are annexed thereto.

11 H. 6. 7. If a Man grant all his Chattles, a Term which he hath in Extent on a Statute-Merchant paſſes; for this is but a Chattel.

Dyer 25. 2Rol Abr. 58. If a Man grant all his (*a*) Goods and Chattels, an Obligation in which *J. S.* is bound to him paſſes hereby, and by theſe Words he hath an Intereſt in the Parchment or Paper, although the Debt itſelf being a Choſe in Action cannot be granted or aſſigned over.

(*a*) That a Deviſe by theſe Words will not carry Debts due to the Teſtator. Dyer 59. b. pl. 15.

9 H. 6. 52. b. 2Rol. Abr. 58. If a Man grant *omnia bona & catalla ſua*, a Term for Years which he hath in Right of his Wife hereby paſſes.

For this *vide* 2Rol. Abr. 58. Noy 106. So if a Man grants *omnia bona & catalla ſua*, the Goods which he hath as Executor ſhall paſs, as well as his own proper Goods.

4 Leon. 22. 1 Leon. 263.

Sid. 420. Vent. 32. Saund. 274. A Grant of *bona & catalla felonum* will not carry the Goods of a *Felo de ſe*.

* Page 669 * 4. Where a Thing ſhall be ſaid to paſs as appendant, appurtenant, or incident.

10 Co. 64. *Whiſtler's* Caſe 2Rol Abr 60. Gouldſ. 42. Style 78. Co. Lit. 307. a. It ſeems agreed, that ſeveral Things will paſs as appendant or appurtenant to the Principal Thing granted, without any expreſs Mention of them; as if a (*b*) Man grant a Manor to which an Advowſon is appendant or Villain regardant, without ſaying *cum pertinentiis*, yet theſe paſs as (*c*) appendant or appurtenant to the Manor.

(*b*) But this muſt be underſtood of a Grant by a common Perſon; for if the King grants ſuch a Manor, or grants a Manor *cum pertinentiis*, yet the Advowſon does not paſs. Plow. 251 10 Co. 64. (*c*) Here *note*, as regularly true, that nothing can be appendant or appurtenant, unleſs it agree in Quality and Nature to the Thing whereunto it is appendant or appurtenant; as a Thing corporeal cannot properly be appendant to a Thing corporeal, nor a Thing incorporeal to a Thing incorporeal; but Things incorporeal which lie in Grant, as Advowſons, Villains, Commons, and the like, may be appendant to Things corporeal, as a Manor-houſe or Lands; or Things corporeal to Things incorporeal, as Lands to an Office; ‡ alſo they muſt agree in Nature and Quality; for a Common of Turbary or of Eſtovers cannot be appendant or appurtenant to Land; but to a Houſe to be ſpent there; nor a Leet that is Temporal, to a Church or Chapel which is Eccleſiaſtical; neither can a Nobleman, Eſquire, &c. claim a Seat in a Church by Preſcription, as appendant or belonging to Land, but to a Houſe, becauſe ſuch a Seat belongeth to the Houſe in reſpect of the Inheritance thereof. Co. Lit. 121. b. 122. a.——Alſo the Thing to which another is appendant muſt be of perpetual Subſiſtence; and therefore an Advowſon which is ſaid to be appendant to a Manor, is in Truth appendant to the Demeſnes of the Manor, which are of perpetual Subſiſtence and Continuance, and not to Rents or Services, which are ſubject to Extinguiſhment and Deſtruction. Co. Lit. 122. a.

‡ *Vide infra.*

Co Lit. 121. a. So if a Man at this Day grant to a Man and his Heirs Common in ſuch a Moor for his Beaſts *Levant* and *Couchant* upon his Manor, or if he grant to another Common of Eſtovers or Turbary in Fee-ſimple, to be burnt or ſpent within his Manor; by theſe Grants thoſe Commons are appurtenant to the Manor, and ſhall paſs by the Grant thereof.

2 Rol. Abr. 60, 61. *Sacheverel* and *Porter*. So if *A.* ſeiſed of 100 Acres of Land to which a Common for Cattle levant and couchant is appurtenant, by Grant made thereof within Time of Memory, and *A.* grants ten of the ſaid Acres only, without ſaying *cum pertinentiis*; yet a proportionable Common for the Cattle *levant* and *couchant* on theſe ten Acres ſhall paſs; for being a Common appurtenant it is in its Nature apportionable.

But

But if *A.* grant the third Part of a Manor to which an Advowſon is appendant, though he adds *cum pertinentiis*, yet the Advowſon does not paſs unleſs it be expreſly mentioned. Savil 103. *Long* ver. Biſhop of *Glouceſter*.

By a Grant of a Meſſuage *ſive Tenementum*, only the Houſe and Circuit thereof paſſes, but not the Garden, for theſe are diſtinct; for in a *Præcipe quod reddat* the Demand muſt be *de uno Meſſuagio & uno Gardino*, and the Word *Tenement*, as here uſed, is only ſynonymous to the Word *Meſſuage*; but had it been a Grant of a Meſſuage and Tenement it might be otherwiſe. Moor 24. pl. 82. *per Dyer* and *Weſton*, contrary to Brown, but Weſton held, that the Garden would paſs by the Name of Meſſuage, with an Averment, that they were occupied together.

Where a Houſe or Land belongs to an Office, or a Chamber to a Corrody, the Office or Corrody being granted by Deed, the Houſes and Land follow as incident or belonging to it without Livery, becauſe the Office is the Principal, and the Land but appertaining to it. Vaugh. 178.

If a Man grant his Saddle with all Things thereunto belonging, Stirrups, Girths, and the like do paſs; ſo if a Man grant his Viol, the Strings and Bow will paſs. Vaugh. 109.

By a Grant of a Houſe *cum pertinentiis*, a Conduit which conveys Water to the Houſes paſſes, and the Owner may, without alledging a Preſcription or Grant, enter upon the Soil of another to repair it; but this muſt be done in convenient Time. Moor 682. *Browne* and *Nichols*.

* It was found by Special Verdict, that *A.* was ſeiſed of a Mill in Fee, and that he built a Kiln at the End of the Cloſe wherein the Mill ſtood, and then granted the Mill *cum pertinentiis*; and if the Kiln paſſed was the Queſtion; and the Court held clearly, that if it had been found in the Special Verdict, that the Kiln had been neceſſary to the Mill, that then it ſhould paſs by a Grant of the Mill; ſo if it were erected for the Uſe of the Mill, as Sluices, though never ſo far off; ſo a Dove-houſe to a Dwelling-houſe; but as it was here barely found, there was no colour to adjudge it to paſs. *Page 670 Sid. 211. Lev. 131. Keb. 736. S. C. *Archer* and *Bennet*.

If a Man grants to another the Uſe of a Pump, the Grantee as incident to the Grant may enter on the Ground of the Grantor to repair it; for this Privilege is given to him as incident to the Grant. Saund. 322.

So if a Man licenſe another to lay Pipes of Lead on his Ground to convey Water to his Ciſtern, although the Ground is not hereby granted, yet the Grantee may enter thereon to repair the Pipes. Saund. 323.

If a Man grant the Fiſh in his Water, the Grantee may fiſh within, but he cannot cut the Banks. Hob. 234. 2 Rol. Abr. 60.

So if a Man grant or reſerve Wood, it implies a Liberty to take and carry it away. Hob. 234. 2 Rol. Abr. 60.

5. What Eſtate or Intereſt ſhall be ſaid to be granted.

It is holden by Chief Juſtice *Holt*, that if a Termor grants the Land, the Grantee is but Tenant at Will; for it does not appear that the Grantor meant to paſs his whole Intereſt, and that this is enough to ſatisfy the Grant. 1 Salk. 346.

Alſo it was adjudged in *B. R.* that if a Termor for 1000 Years, by Deed reciting the original Leaſe of the Lands, grants the ſaid Lands, together with the ſaid (*a*) recited Leaſe, to the Grantee, his Executors, Adminiſtrators, and Salk. 346. *Germain & Uxor* ver. *Orchard*. (*a*) But *per* Holt, the Word *Leaſe* would paſs the Term, but here it is the recited Leaſe, which can ſignify nothing but the Deed; alſo he agreed, that if a Termor deviſe the Land, all the Term paſſes; for the Deviſee cannot be Tenant at

and Aſſigns, and all Writings relating to the Premiſſes, *Habendum* to the Grantee, his Executors, *&c.* after the Death of the Grantor and his Wife, for the Reſidue of the Term of 1000 Years, that hereby the Term does not paſs.

at Will, because the Deviſor muſt die before the Deviſe can take Effect, and one cannot be Tenant at Will to a dead Man. Salk. 346.

Salk. 346. adjudged in the Exchequer-Chamber, and affirmed in the Houſe of Lords.

But this Judgment was reverſed in the Exchequer-Chamber, where it was held, that by the Grant of the Lands in the Premiſſes to the Grantee, his Executors, Adminiſtrators, and Aſſigns, the whole Term of 1000 Years was transferred; and ſince by the Premiſſes the whole Term paſſed preſently, but by the *Habendum* not till after the Death of the Grantor and his Wife they held that *ex conſequenti* the *Habendum* was repugnant to the Premiſſes, and void.

Rol. Abr. 845. Co. Lit. 42. b. 8 Co. 85.

If a Man by Deed grant a Rent-charge, Reverſion, Common, or any Thing elſe which lies in Grant, without mentioning any particular Eſtate, the Grantee hath an Eſtate for Term of his own Life, becauſe a Man's own Act is taken moſt ſtrongly againſt himſelf; and where the Words of the Deed will bear two Senſes without Injury to any one, the Purchaſer deſerves the moſt Favour and the Conſtruction that moſt enlarges his Intereſt is to be preferred; beſides, being granted to him, it cannot be ſuppoſed out of him as long as the ſame Perſon continues.

Moor 876. pl. 1227. *Wilkins* ver. *Perrat.*

If *A.* grant a Rent-charge to *B.* and his Heir, *Habendum* to him and his Heirs, to the Uſe of him and his Heirs for the Life of *J. S.* this is only a deſcendible Eſtate for the Life of *J. S.* and not a Fee-ſimple.

If an Office be granted to a Man to have and enjoy ſo long as he ſhall behave himſelf well in it, the Grantee hath an Intereſt for Life in the * Office; for ſince nothing but his Miſbehaviour can determine his Intereſt, no Man can prefix a ſhorter Time than his Life, ſince it muſt be his own Act, (which the Law does not preſume to foreſee,) which can make his Eſtate of ſhorter Continuance.

* Page 671

Co. Lit. 42. a. Rol. Abr. 844. 1 Show. 523, 531. Show. P. Caſes 161. 4 Mod. 173.

Co. Lit. 42. a.

If the King grants an Office at Will, and grants a Rent to the Patentee for his Life, for the Exerciſe of his Office; this is no abſolute Eſtate for Life; becauſe the Rent being granted on Account of the Office and in Diſcharge of the Duty of the Place, whenever his Intereſt in the Office ceaſes, the Rent is determined, becauſe it was at firſt granted for the Exerciſe of the Office, which he is no farther concerned in.

Moor 6. pl. 23.

If a Man make a Leaſe for forty Years, and grants that the Leſſee ſhall have Houſe-boot, Fire-boot and Cart-boot, in other Lands of the Grantor's not demiſed, though it is not ſaid for how long, yet the Grantee ſhall have ſuch Privilege during the Continuance of the Leaſe, and ſuch Privilege ſhall go to his Executors and Aſſigns.

6. At what Time the Thing granted becomes veſted, and when the Grantee muſt take the ſame.

2 Rol. Abr. 64. *Southwel* and *Wade.*

If a Man grant a Thing to be taken yearly, and the Grantee neglects to take it for one Year, he cannot take double the Quantity the next; as if a Man grant to another and his Heirs 200 (*a*) Faggots of Wood, to be taken yearly, and the Grantee neglects to take any for the firſt Year, he cannot the next take 400 Faggots; for by this Means he might deſtroy all the Woods of the Grantor.

(*a*) So if a Man grant Common for ten Head of Cattle yearly, the Grantee, if he neglects to feed the Common for one Year, cannot put on double the Number the next. 27 H. 6. 10.

But if the Grantor be to render the Thing, as if *A.* grants 200 Faggots of Wood to be taken yearly out of all his Lands, with Clauſe of Diſtreſs, and the Grantor is to cut and make up the Faggots and carry them to the Houſe of the Grantee; if the Grantor neglects to do this for the firſt or any one Year, the Grantee ſhall have double the Quantity the next; for in this Caſe the Grantor was to do the firſt Act, and ſhall not have any Advantage by his Neglect. 2 Rol. Abr. 65.

He who hath the next Avoidance of a Church, muſt preſent to the next that happens after ſuch Grant, at his Peril. 7 Co. 28. Bulſt. 26.

If a Man grants all his Trees to be taken within five Years, the Grantee cannot take any after the Expiration of the five Years; for this is in Nature of a Condition annexed to the Grant; but if the Grant had been of the Trees, with Covenants either on the Part of the Grantor or Grantee, that they ſhould be taken away in five Years, there the Grantee may take them after the Expiration of five Years, and the Grantor muſt purſue his Remedy by Action of Covenant. Moor 882.

So if a Man grant Corn growing, and the Grantee does not take it away in a reaſonable Time, by which the Grantor receives a Prejudice, he may have an Action on the Caſe. † Moor 882. *per Hutton.*

† So for not taking away Tithes in due Time, whereby the Occupier of the Land is prejudiced.

*Guardian.

*Page 672

A (*a*) Guardian is one appointed by the Wiſdom and Policy of the Law to take Care of a Perſon and his Affairs, who by Reaſon of his (*b*) Imbecillity and Want of Underſtanding is incapable of acting for his (*c*) own Intereſt; and it ſeems that by our (*d*) Law his Office originally was to inſtruct the Ward in the Arts of War, as alſo thoſe of Huſbandry and Tillage, that when he came of Age he might be the better able to perform thoſe Services to his Lord, whereby he held his own Land.

(*a*) For the Derivation and ſeveral Significations of the Word *Guardian, vide* 2 Inſt. 12, 13, 564, 5.

(*b*) And therefore *Bracton*, l. 2. c. 38. f. 86. treating thereof, ſays *De illis, qui minores ſunt & infra ætatem, & quos oportet eſſe ſub tutela & cura aliorum, eo quod ſe ipſos regere non norunt, & quorum quidam debent eſſe ſub cuſtodia Domini cum Terris & Tenementis, quæ ſunt de Feodo eorum, & quidam ſub cuſtodia Parentum & Proximorum Conſanguineorum, ut prædict. eſt, & quibus dantur Cuſtodes aliquando de jure de antiquo Feoffamento, & aliquando Curatores ab Homine.*——So *Fleta*, c. 9. f. 4. *Quidam ſub cuſtodia Parentum & Proximorum Conſanguineorum, & illis dantur Cuſtodes de jure Gentium.*

(*c*) And therefore their Authority and Intereſt extends only to ſuch Things as may be for the Benefit and Advantage of the Infant. Co. Lit. 89. a

(*d*) In the Civil Law they are called *Curators* or *Guardians* Vaugh. 244. Swinb. 194.——But if the Spiritual Court appoint a Guardian or Curator to an Infant, who has a real Eſtate, ſuch Appointment is void. 2 Lev. 162, 217.——[The Eccleſiaſtical Courts ought not to appoint Guardians *ex officio*, without a Suit inſtituted; for it is breaking in upon the Juriſdiction of Chancery; and *Semb.* that a *Quo Warranto* will lie. 3 Atk. 631. See 3 V. 15. n.——A Guardian may be appointed by Chancery, though no Suit is depending. 3 Atkyns 813.——The Court never appoints a Guardian to a Woman after Marriage. 1 Vezey 157. —— See *poſt.* 679.]

Guardian.

Under this head we ſhall conſider,

(A) The ſeveral Kinds of Guardians. 673.

And herein,

1. Of the ſeveral Kinds of Guardians by the Common Law. 673.
2. Of Guardians by Cuſtom. 675.
3. Of Guardians by Statute. 675.

(B) What Perſons may be Guardians, and are intitled thereto. 678.

(C) By what Authority Guardians are appointed, and herein of the proper Juriſdiction in reſtraining and puniſhing Abuſes by Guardians and others, in relation to Infants. 679.

(D) Of the Manner of appointing and admitting a Guardian. 680.

(E) At what Time the Authority of a Guardian ceaſes, and what Acts will determine it. 681.

(F) Of the Guardian's Intereſt in the Body and Lands of the Ward, and his Remedy for the ſame. 682.

(G) What Things a Guardian may lawfully do, and which will bind the Infant. 682.

(H) Of the Infant's Remedy againſt his Guardian for Abuſes by him. 685.

(I) Of obliging a Guardian to account, and what Allowances he ſhall have. 687.

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*Page 673 * (A) **The ſeveral Kinds of Guardians:** And herein,

1. Of the ſeveral Kinds of Guardians by the Common Law.

THERE are four (*a*) Kinds of Guardians by the Common Law, *viz.* Guardian in Chivalry, Socage, Nature, and Nurture.

Co. Lit. 88. b.

(*a*) That there is a Guardian in Chivalry and Guardian in Socage; and again Guardian in Chivalry is twofold, Guardian *in Droit*, that is to ſay in his own Right; and Guardian *in Fait*; as where the King or Lord aſſigneth over the Cuſtody to another; alſo both theſe are either Guardians by Right, or Guardians by Claim and Poſſeſſion without Right; likewiſe Guardian in Socage is twofold, *viz.* Guardian by Right, who is called *Tutor Proprius*; and Guardian by Poſſeſſion and Claim, who is called *Tutor Alienus*. 2 Inſt. 305.

1. As

Guardian.

1. As to Guardian in Chivalry, it is to be obſerved, that by the Common Law, if Tenant by Knights-Service had died, his Heir Male being under the Age of twenty-one Years, the Lord ſhould have the Land holden of him till ſuch Heir had arrived to that Age, becauſe till then he was not intended to be able to do ſuch Service; and ſuch Lord had likewiſe the Cuſtody of the Body of the Infant to breed him up and inure him to Martial Diſcipline, and was therefore called Guardian in Chivalry. Lit. Sect. 103 Co. Lit. 74, 75. 2 Inſt. 12, 13.

So if an Heir Female were unmarried, and under fourteen at her Anceſtor's Death, the Lord was Guardian till ſhe arrived to that Age; alſo by *Weſtm.* 2. *cap.* 22. the Lord ſhould have had the Land till ſhe were ſixteen to tender convenable Marriage to her; and if the Lord died within the two Years, the Law gave the ſame Intereſt to his Executors and Adminiſtrators. Co. Lit. 76.

Wardſhip was due to the Lord in reſpect of the Tenure; therefore if the Lord had releaſed his Seigniory to his Ward, or the Seigniory had deſcended to him, he ſhould have been out of Ward, for *ceſſante Cauſa ceſſat Effectus.* Co. Lit. 75. a. 2 Rol. Abr. 36.

An Heir who had been in Ward by reaſon of a Tenure *in Capite*, when he came of Age, muſt have ſued Livery, *i. e.* to have had the Lands delivered to him by the King, the Expence of which was half a Year's Profit of his Lands holden; but if the Heir had been of Age at his Anceſtor's Death, he ſhould have paid for Land in Poſſeſſion a Year's Profit for the King's Primier Seiſin and Livery, and for Reverſions expectant on Freeholds half a Year's Profit, and the King ſhould have had all the meſne Profits till Tender of Livery were made; ſo if a Tender were made, and not duly purſued. Co. Lit. 78. a.

By the Statute of (*a*) *Merton*, *cap.* 6. if the Lord diſparaged his (*b*) Male Ward under fourteen, he ſhould have loſt the Ward, and the whole Profit thereof ſhould have been converted to the Ward's Benefit; the Lord was ſaid to diſparage the Heir by marrying him to the Daughter of a Villain, Burgeſs, one attainted of Felony, to a Baſtard or Alien, one wanting Hand or Foot, deformed, paralytick, conſumptive, *&c.* Co. Lit. 80.

(*a*) On this Statute *Littleton* holds, that no Action could be brought, becauſe none was ever brought. Lit. Sect. 108.——And the Reaſon hereof, ſays my Lord *Coke* in his Comment, is *Quia periculoſum exiſtimandum eſt, quod bonorum Virorum non comprobatur exemplo*; not, ſays he, that a Statute can be antiquated, but it may be expounded by Non-uſe. Co. Lit. 81. b. (*b*) But there never was any Forfeiture of the Marriage of an Heir Female. Co. Lit, 82. b.

On the Death of Guardian by Knight's-Service, the Executors ſhould have had the Wardſhip of the Heir, for they had it to their own Uſe, and might have granted or aſſigned it over; and therefore were not at all accountable to the Infant when he came of Age. Co. Lit. 90.

* But this Sort of Guardianſhip being a Sort of Dominion of Maſters over Servants and Vaſſals, introduced among the *Gothick* Nations to breed them to Arms; it was deemed a great Burden, and therefore is now fallen by the 12 *Car.* 2. *cap.* 24. by which all Tenures by Knights-Service, and Socage *in Capite*, are turned into common Socage, and diſcharged of Homage, Livery, Primier Seiſin, Wardſhip, *&c.* which were at Law incident to ſuch Tenures, and *Aids pur file marrier & pur faire fitz Chivalier.* * Page 674

2. By the Common Law, if Tenant in Socage die, his Heir being under fourteen, whether he be his Iſſue, or Couſin Male or Female, the next of Blood to the Heir, to whom the Inheritance cannot deſcend, ſhall be Guardian of his Body and Land till his Age of fourteen; and although the Nature of Socage Tenure be in ſome Meaſure changed from what it originally was, yet it is ſtill called Socage Tenure, and the Guardian in Socage is ſtill only where Lands of that Kind (as moſt of the Lands in *England* now are) deſcend to the Heir within Age; and though the Heir after fourteen may chuſe his own Guardian, who ſhall continue till he is twenty- Co. Lit. 87.

one, yet as well the Guardian before fourteen, as he, whom the Infant ſhall think fit to chuſe after fourteen, are both of the ſame Nature, and have the ſame Office and Employment aſſigned to them by the Law, without any Intervention or Direction of the Infant himſelf; for they were therefore appointed, becauſe the Infant, in regard of his Minority, was ſuppoſed incapable of managing himſelf and his Eſtate, and conſequenntly derive their Authority not from the Infant, but from the Law; and that is the Reaſon they tranſact all Affairs in their own Name, and not in the Name of the Infant, as they would be obliged to do, if their Authority were derived from him.

Co. Lit 90. a. Hence the Law has inveſted them not with a bare Authority only, but alſo with an Intereſt till the Guardianſhip ceaſes; and to prevent their Abuſe of this Authority and Intereſt, the Law has made them accountable to the Infant, either when he comes to the Age of fourteen Years, or at any Time after, as he thinks fit; and therefore are not to have any Thing to their own Uſe, as the Guardian in *Chivalry* had.

Co. Lit. 84. 9 E. 4 53. 27 Aſſ. pl. 73. 33 H. 6. 55. Rait. Ent. 263. 3. Guardian by Nature, who is the Father or Mother; and here we muſt obſerve, that by the Common Law every Father hath (*a*) Right of Guardianſhip of the Body of his Son and (*b*) Heir until he attain to the Age of (*c*) twenty one Years.

(*a*) The Father being Guardian in Socage ſhall account with the Son for the Profits; for otherwiſe it would be more for the Son's Advantage to have another for his Guardian than his Father. Co. Lit. 88.——And the true Reaſon of Guardianſhip is not with reſpect to the Benefit of the Lord by Tenure, but with reſpect to the good Education of the Infant. Carth. 386.——But where the Father had the Cuſtody of the Body of his Heir Apparent, in reſpect of his natural Right, he ſhould render no Account to the Heir; for what the Father might receive on ſuch Account, would otherwiſe have belonged not to the Heir, but to the Guardian in Knights Service. Co. Lit, 88. (*b*) The true Reaſon why, by the Law of *England*, the Father hath not the Guardianſhip of his younger Children, is, becauſe by our Law the younger Children cannot inherit any Thing from their Father. Carth. 386. *per Holt* C. J. (*c*) That the Guardianſhip of the Father, which is a Guardianſhip by Nature, continues till the Son and Heir Apparent attain to the Age of twenty-one Years, but that is with reſpect to the Body only. Carth. 386. *per Holt*.

3 Co. 37. *Ratcliffe's* Caſe. Co. Lit. 75, 84. Dyer 189. Vaugh. 180. And therefore, when Tenures in Knights-Service were in Being, the Guardian in Chivalry could not have the Cuſtody of the Body of the Heir as long as his Father was living; but all, which ſuch Guardian could have, was the Cuſtody of the Lands which were deſcended to the Infant from his Mother or other Collateral Anceſtor; and therefore the Father had an Action of Treſpaſs for taking away his Son and Heir *quare Filium & Hæredem rapuit*, though he was not in Propriety of Speech counted the (*d*) Guardian.

(*d*) And therefore the Writ *de Cuſtodiâ Terræ & Hæredis* did not lie, becauſe the Father was not complete Guardian. Fitz. Tit. *Garde* 32.

* Page 675 Lit Sect. 114. Co. Lit. 84. * But neither the Mother, nor any Collateral Anceſtor could have had the Cuſtody of their Heir Apparent before the Lord; for though they may have an Action of Treſpaſs *quare Conſanguineum & Hæredem rapuit*, yet they can have it only againſt a Stranger, and not againſt Guardian in Chivalry.

Co. Lit. 88. 4. Guardian by Nurture, who hath only the Care of the Perſon and Education of the Infant, and hath nothing to do with his Lands merely in Virtue of his Office; for ſuch Guardian may be, though the Infant hath no Lands at all, which a Guardian in Socage cannot. ‡

‡ If a rich Uncle takes three Infant Nieces into his Houſe, and leaves them large Fortunes, and they remain in the Houſe with one of the Executors, the Court will not, on Petition of their Father, order them to be delivered over to him. *Hopkins*'s Caſe, M. 1732. 3 Peere Williams 152.——Children have a natural Right to tha Care of their Mother, and the Court will order a Grandfather to deliver them up to her. *Melliſh* v. *De Coſta*. M. 1737. 2 Atkyns 14.

2. Of Guardians by Cuſtom.

By the Cuſtom of the City of *London*, the Cuſtody and Guardianſhip of Orphans, under Age, unmarried, belongs to the City. But for this *vide* Tit. *Cuſtoms of London*, Letter (B).

By the Cuſtom of *Kent*, where any Tenant died, his Heir within Age, the Lord of the Manor might and did commit the Guardianſhip to the next Relation in the Court of Juſtice, within whoſe Juriſdiction the Land was; but the Lord was bound on all Occaſions to call him to an Account; and if he did not ſee that the Accounts were fair, the Lord himſelf was bound to anſwer it. This Province the Chancellor hath taken from inferior Courts ſince the Conqueſt, only in *Kent*, where theſe Cuſtoms are continued; but the Cuſtom is not uſed even in *Kent* at this Day, becauſe the Lords in giving Tutors do it at their own Peril in the Account; and therefore every Man thinks it dangerous to intermeddle. Lamb. 611, 612, 624, 5.

This Guardian appointed by the Lord is to have the ſame Allowance, and no other, with the Guardian in Socage at Common Law, and is ſubject, as has been ſaid, to the Account of the Heir for his Receipts, and to the Diſtreſs of the Lord for the ſame Cauſe. Lamb. 624.

If Copyhold Lands deſcend to an Infant within the Age of fourteen Years, the next of Kin, to whom the Lands cannot deſcend, ſhall be Guardian both of the Infant's Land and Eſtate, if by the Cuſtom of a Manor it does not belong to another. 2 Rol. Abr. 40. 2 Lutw. 1188. S. P. ſaid to be reſolved.

And therefore if a Copyhold deſcend to a Lunatick, or an Infant within the Age of fourteen, the Lord, without a Special Cuſtom for that Purpoſe, hath no Power of appointing a Guardian. Hob. 215. Hutt. 16, 17. 2 Lutw. 1188.

3. Of Guardians by Statute.

By the Common Law, no Perſon could appoint (*a*) a Guardian, becauſe the Law had appointed one, whether the Father was Tenant by Knights-Service or in Socage. 3 Co. 37. 3 Inſt. 62.

(*a*) But by Common Law, Tenant in Socage of Age might have diſpoſed of his Land by Deed, or laſt Will, in Truſt for his Heir; but not the Cuſtody and Tuition of his Heir, for the Law gave that to the next of Kin to whom the Land could not deſcend. Vaugh. 178.

The firſt Statute, that gave the Father a Power of appointing, was the 4 & 5 *W. & M. cap.* 8. which provides under ſevere Penalties, ſuch as Fine and Impriſonment for Years, "That no Body ſhall take away any "Maid or Woman-Child unmarried, being within the Age of ſixteen "Years, out of or from the Poſſeſſion, Cuſtody or Governance, and againſt "the Will of the Father of ſuch Maid or Woman-Child, or of ſuch Per-"ſon or Perſons to whom the Father of ſuch Maid or Woman-Child by "his laſt Will and Teſtament, or by any other Act in his Life-time, hath or "* ſhall appoint, aſſign, bequeath, give, or grant the Order, Keeping, "Education and Governance of ſuch Maid or Woman-Child. Sid. Rep. 362. A Baſtard is within this Statute. 2 Stra. 1162. * Page 676

In the Conſtruction of this Statute it hath been holden, that if two Perſons are appointed Guardians by Authority of this Statute, and one of them dies, the Guardianſhip will not ſurvive, becauſe the Statute gives an Authority to a Special Purpoſe, and makes the Raviſher Criminal within the Words of it; and being a Penal Law ought to be conſtrued ſtrictly. ‡ Poph. 204.

‡ See *infra*, 677, as to the ſurviving of the Guardianſhip, the Caſe from Vaugh. 181.

Guardian.

The 12 *Car.* 2. *cap.* 24. enacts, "That where any Perſon hath or ſhall "have any Child or Children under the Age of twenty-one Years, and not "married at the Time of his Death, it ſhall and may be lawful to and for "the Father of ſuch Child or Children, whether born at the Time of the "Deceaſe of the Father, or at that Time *in Ventra ſa mere*, or whether "ſuch Father be within the Age of one and twenty Years, or of full Age, "by his Deed executed in his Life-time, or by his laſt Will and Teſta-"ment in Writing, in the Preſence of two or more credible Witneſſes, to "diſpoſe of the Cuſtody and Tuition of ſuch Child or Children, for and "during ſuch Time as he or they ſhall reſpectively remain under the Age "of twenty-one Years, or any leſſer Time, to any Perſon or Perſons in "Poſſeſſion or Remainder, other than Popiſh Recuſants; and ſuch Diſpo-"ſition of the Cuſtody of ſuch Child or Children, ſhall be good and ef-"fectual againſt all and every Perſon or Perſons claiming the Cuſtody or "Tuition of ſuch Child or Children as Guardian in Socage, or otherwiſe, "and ſuch Perſon or Perſons to whom the Cuſtody of ſuch Child or Chil-"dren hath been, or ſhall be diſpoſed or deviſed as aforeſaid, ſhall and may "maintain an Action of Raviſhment of Ward or Treſpaſs againſt any Per-"ſon or Perſons which ſhall wrongfully take away or detain ſuch Child or "Children, for the Recovery of ſuch Child or Children, and ſhall and "may recover Damages for the ſame in the ſaid Action, for the Uſe and "Benefit of ſuch Child or Children.

"And ſuch Perſon or Perſons, to whom the Cuſtody of ſuch Child or "Children hath been, or ſhall be ſo diſpoſed or deviſed, ſhall and may "take into his or their Cuſtody, to the Uſe of ſuch Child or Children, "the Profits of all Lands, Tenements and Hereditaments of ſuch Child "or Children, and alſo the Cuſtody, Tuition and Management of the "Goods and Chattels and Perſonal Eſtate of ſuch Child or Children till "their reſpective Age of one and twenty Years, or any leſſer Time, ac-"cording to ſuch Diſpoſition aforeſaid, and may bring ſuch Action or "Actions in relation thereto, as by Law a Guardian in common Socage "might do."

In the Conſtruction of this Statute the following Opinions have been holden:

Vaugh. 179. 1. That a Teſtamentary Guardian, or one formed according to this Statute, comes *in loco Parentis*, and is the ſame in Office and Intereſt with a Guardian in Socage, and differs only as to the *Modus habendi*, or in a few particular Circumſtances; as firſt, that it may be held for a longer Time, *viz.* till the Heir attains the Age of twenty-one, where before it was but to fourteen: Secondly, it may be by other Perſons held; for before it was, the next of Kindred not inheritable could have it; now who the Father names ſhall have it.

Vaugh. 178. 2. That though neither before nor ſince this Statute a Perſon under Age may deviſe his Lands, yet a Perſon under Age may, within this Act, diſpoſe of the Cuſtody of his Child, and ſuch Diſpoſition draws after it the Land, *&c.* as incident to the Cuſtody.

* Page 677 Vaugh. 179. * 3. That an Infant hath the ſame Remedy againſt a Teſtamentary Guardian, as he had againſt a Guardian in Socage, though the Statute ſpeaks only of Remedies for the Guardian.

Vaugh. 184. 4. If the Father being of Age deviſe his Land to *J. S.* during the Minority of his Son and Heir, in Truſt for his Heir. and for his Maintenance and Education until he be of Age, this is no Deviſing the Cuſtody within this Statute, for he might have done this before the Statute.

Vaugh. 184, 5. 5. If a Man deviſe the Cuſtody of his Heir Apparent to *J. S.* and mentions no Time, either during his Minority, or for any other Time, this is a good Deviſe of the Cuſtody within the Act, if the Heir be

under fourteen at the Death of the Father, becauſe by the Deviſe the *Modus habendi Cuſtodiam* is changed only as to the Perſon, and left the ſame as it was as to the Time; but if *above fourteen* at the Father's Death, then the Deviſe of the Cuſtody is merely void for the Incertainty; for the Act did not intend every Heir ſhould be in Cuſtody until one and twenty, *Non ut tamdiu, ſed ne diutius*; therefore he ſhall be in this Cuſtody but ſo long as the Father appoints, and if he appoint no Time, there is no Cuſtody.

6. That this Teſtamentary Guardian hath the Cuſtody not only of the Lands deſcended or left by the Father, but of all Lands and Goods any way acquired or purchaſed by the Infant, which the Guardian in Socage had not. Vaugh. 185, 6.

7. That this Guardian cannot aſſign or transfer the Guardianſhip over to another, neither ſhall it upon his Death go to his Executors or Adminiſtrators; for though it be an Intereſt, yet it is an Intereſt joined with a Truſt, which the Teſtator might think thoſe Perſons incapable of executing, though he placed that Truſt and Confidence in the Guardian himſelf; but it ſeems, that if two or more are made Guardians, and one of them die, the Survivor or Survivors ſhall ſtill continue Guardians, for from the Nature of the Thing the Authority muſt be joint and ſeveral; alſo, were it otherwiſe, the more Guardians were appointed for the Security of the Infant, the leſs ſecure he would be, becauſe upon the Death of any one of them the Guardianſhip would be at an End. Vaugh. 181.

8. That if a Perſon, appointed Guardian purſuant to this Statute, die or refuſe to take upon himſelf the Guardianſhip, the Lord Chancellor may appoint a proper Guardian. Abr. Eq. 260.

9. Alſo if a Perſon, appointed Guardian purſuant to this Statute, becomes a Lunatick, or is otherwiſe incapacitated to execute the Truſt repoſed in him; or if he abuſes the Truſt, by doing any Thing prejudicial either to the Perſon of the Infant, or his Eſtate, it ſeems, that the Court of Chancery may either totally remove him, and appoint another Guardian, or elſe impoſe ſuch Terms on him, by obliging him to give Security, *&c.* as will effectually hinder him from doing any Thing prejudicial to the Infant; but in what particular Inſtances of this Kind a Court of Equity will interpoſe, does not ſeem to be clearly agreed. *Vide* 2 Chan. Ca. 237. 3 Chan. Rep. 58. 2 Sid. 424. Vern. 442. Abr. Eq. 260, 261.

10. That a Copyholder is not within this Statute to diſpoſe of the Cuſtody of his Infant Heir, becauſe of the Meanneſs of his Eſtate, and the Prejudice that would accrue to the Lord of the Manor; and therefore the Lord, or thoſe intitled by the Cuſtom, ſhall have the Cuſtody of him. 3 Lev. 495. *Clench* and *Cudmore*, and 2 Lutw. 1181. Comp. 243. S. C.

And *Note*, that both by the 4 & 5 *P. & M. c.* 8. and by this Statute, there are expreſs Savings with reſpect to the City of *London* and other Towns, as to the Cuſtody of Orphans. Sid. 363.

[A Baſtard is within the Statute of 4 & 5 *P. & M. cap.* 8. *Rex* ver. *Cornforth*, *H.* 15 *Geo.* 2. *Stra.* 1162.——As to 12 *Car.* 2. *cap.* 24. If there are four teſtamentary Guardians of the Children of a Preſbyterian, and one of them has put them to a School, to be educated according to the Church of *England*, the Court will not order them to be delivered to the other three. 3 *Peere Williams* 51.——If a Mother, by Will, appoints a Guardian, it is void; and the Infant (being fourteen) ſhall chuſe a Guardian in Court. 3 *Atk.* 519.———A *teſtamentary Guardian* cannot make a Leaſe of Infant's Lands; and ſuch Leaſe is abſolutely void. 2 *Wilſ.* 129, 135.]

* Page 678 * (B) What Perſons may be Guardians, and are intitled thereto.

Co. Lit. 88. 2 Mod. 176. HERE in the firſt Place we muſt take Notice, that there can be no Guardian in Socage but where Lands of that Nature deſcend to the Heir.

Co. Lit. 87. Therefore if a Man die ſeiſed of a Rent-charge, Common, or ſuch like Inheritances, which lie not in Tenure, (and diſpoſe not of the Cuſtody of his Child, the Heir may chooſe his Guardian; if he be be ſo young that he can make no Choice, it is moſt fit that his next Couſin, to whom the Inheritance cannot deſcend, ſhould have the Cuſtody of him, and whoever takes the Rent, *&c.* is chargeable in Account; but if he have any Socage Land, the Socage Guardian ſhall take the Rent charges, *&c.* in his Cuſtody.

F. N. B. 143. So the Wife's Heir ſhall not be in Ward during the Life of Tenant by the Curteſy, becauſe by his Continuance of his Wife's Eſtate the Deſcent to the Heir is interrupted.

Co. Lit. 87. This ſeems to have been the Common Law, and is confirmed by by 28 E. 1. c. 1. By our Law the next of Blood, to whom the Inheritance cannot deſcend, is intitled to the Guardianſhip; as if the Land deſcend from the Father, the Mother, or other next Couſin of the Mother's Side, ſhall be Guardian in Socage, *& ſic e converſo*, where Lands deſcend from the Mother; but the *(a)* Civil Law appoints him to be Guardian that is to inherit next, which our Law ſays, is *committere ovem Lupo.*

(*a*) The Rule in the Civil Law is, *ubi ſucceſſionis Emolumentum, ibi & tutelæ onus eſſe debet.*

Co. Lit. 88. If the younger Brother die ſeiſed in Tail, leaving Iſſue under fourteen, the Elder, not the Middle Brother, ſhall be his Guardian in Socage, for in equal Degree the Law prefers him.

Co. Lit. 88. But if Tenant in Tail have no Brother or Siſter, and die, leaving Iſſue under fourteen, the next Couſin of the Father's or Mother's Side that firſt ſeiſes the Heir ſhall have the Cuſtody of him; for the Relation on both Sides is equal, and no Cauſe appears wherefore either ſhould be preferred; and he that firſt takes Care of the Heir ſhews himſelf to be moſt concerned for his Intereſt.

Co. Lit. 88. But if Donees in Frank-Marriage die, their Iſſue being under fourteen, the next Couſin of the Part of the Donee that was the Cauſe of the Gift (being not inheritable to the Donor's Reverſion) ſhall have the Cuſtody.

Co. Lit. 88. b. *A.* ſeiſed of ſome Lands as Heir to his Father, and of others as Heir to his Mother, dies, leaving Iſſue under fourteen, the next Couſin of either Side, that firſt ſeiſes the Body of the Heir, ſhall have the Cuſtody of him; and the next Couſin of the Father's Part ſhall enter into the Lands of the Mother's Part, *& ſic e converſo.*

Cro. Eliz. 825. 2 And. 171. Moor 635. 2 Jon. 17. If a Woman hath Iſſue a Son by a former Huſband, and ſhe marries a ſecond Huſband, ſeiſed of Socage Land, by whom ſhe has Iſſue another Son, and the Huſband and Wife die, leaving Iſſue the ſaid Son under the Age of fourteen, his Brother of the Half Blood ſhall be Guardian in Socage, *(b)* as next of Kin to whom the Inheritance cannot deſcend.

(*b*) That the elder Brother of the Half Blood ſhall not be Guardian in Socage to the younger Brother, being Heir to the Father of Borough *Engliſh* Lands; for the Rule is, that no Perſon, who can by any Poſſibility inherit, ſhall be Guardian. Co Lit. 88.

* If *A.* be Guardian in (*a*) Socage of *B.* under fourteen, he ſhall be Guardian in Socage of another Infant, whom *B.* ought to be Guardian of, as being his next Couſin *pur cauſe de Gard*, and an Action of Account lies againſt him. * Page 679

Co. Lit. 88. b.

(*a*) But a Teſtamentary Guardian, purſuant to the 12 Car. 2. c. 24. though his Ward happens as next of Kin to be intitled to the Guardianſhip of another Infant, yet he ſhall not be Guardian *pur cauſe de Gard*; for he is neither an Hereditament, or Goods or Chattels of the firſt Infant. Vaugh. 184.

An Infant, Ideot, Lunatic, *non compos*, one Blind and Dumb, Deaf and Dumb, or Leper removed, cannot be Guardian in Socage. Co. Lit. 88. b.

(C) By what Authority Guardians are appointed; and herein, of the proper Juriſdiction in reſtraining and puniſhing Abuſes by Guardians, and others, in relation to Infants.

IT is clearly agreed, that the King as *Pater Patriæ* is univerſal Guardian of all Infants, Ideots and Lunatics, who cannot take Care of themſelves; and as this Care cannot be exerciſed otherwiſe than by appointing them proper Curators or Committees, it ſeems alſo agreed, that the King may, as he hath done, delegate that Authority to his Chancellor; and that therefore at (*b*) this Day the Court of Chancery is the only proper Court, which hath Juriſdiction in appointing and removing Guardians, and in preventing them and others from abuſing their Perſons or Eſtates.

2 Inſt. 14. 4 Co. 126. *Beverley's* Caſe, and in Staundf. Præ. 37. it is ſaid, that the King has the Protection of all his Subjects, and of all their Goods, Lands and Tenements; and ſo of ſuch as cannot govern themſelves, nor order their Lands and Tenements, his Grace, as Father, muſt take upon him to provide for them, that they themſelves and their Things may be preſerved. (*b*) Alſo it ſeems, that when Tenures were in Being, and that till the Court of Wards was erected, the whole Juriſdiction of the King's Wards, where the Lands were held in Chivalry or Knights Service, was under the Juriſdiction of the Court of Chancery; ſo likewiſe in relation to Subjects, this Court determined touching the Wardſhips of the Body, who was the prior and who was the poſterior Lord.——And in Palm. 252. it is ſaid, that if a Guardian be made by Writ out of Chancery, or by the Direction of the Court, his Authority cannot be revoked by the Infant, but that that Court will make him anſwer for any Act of his to the Prejudice of the Infant.

And as the Court of Chancery is now inveſted with this Authority, hence in every Day's Practice we find that Court determining as to the Right of Guardianſhip, who is the next of Kin, and who the moſt proper Guardian; as alſo Orders made, on Petition or Motion, for the Proviſion of Infants during any Diſpute herein; as likewiſe Guardians removed or compelled to give Security; they and others puniſhed for Abuſes committed on Infants, and effectual Care taken to prevent any Abuſes intended them in their Perſons or Eſtates; all ſuch Wrongs and Injuries being reckoned a Contempt of that Court, that hath by an eſtabliſhed Juriſdiction the Protection of all Perſons under natural Diſabilities.

2 Mod. 177. Eq. Caſ. Abr. 260. Gilb. Eq. Rep. 172. 8 Mod. 214. 9 Mod. 116, 135. Pre. Ch. 106. Ld. Raym. 131. 2 Ld. Raym. 1334.

Wil. Rep. 703. pl. 205. 2 Wil. Rep. 112, 561. pl. 185. 3 Wil. Rep. 116. pl. 26. 118, 154. Vern. 442. 2 Vern. 249, 471, 606. Caſ. Temp. Talb. 58. Stra. 168. 2 Stra. 982, 1076.

But it is clear, that the Eccleſiaſtical Court hath not any Juriſdiction with regard to a Guardian in Socage, or Teſtamentary Guardian; and therefore where Sir *Henry Wood* having deviſed the Guardianſhip of his Daughter, by his Will in Writing, according to the 12 *Car.* 2. *c.* 24. to the

Vent. 207. Lady *Cheſter's* Caſe.

the Lady *Cheſter* his Siſter; the Ducheſs of *Cleveland*, to whoſe Son this Daughter, * being about eight Years old, was contracted, pretending that Sir *Henry Wood* by Word revoked this Diſpoſition of the Guardianſhip, ſued in the Prerogative Court to have this Nuncupative Codicil proved; and the Court granted a Prohibition; for they are not to prove a Will concerning the Guardianſhip of a Child, which is a Thing of a Temporal Nature, and of which the Courts at *Weſtminſter* are to judge, whether it be purſuant to the Statute or not.

* Page 680

(D) Of the Manner of appointing and admitting a Guardian.

Abr. Eq. 260. *Lloyd* and *Carew.*

IT is ſaid, that in Chancery a Guardian cannot be otherwiſe appointed than (*a*) by bringing the Infant into Court, or his praying a Commiſſion to have a Guardian aſſigned him.

(*a*) It is ſaid that the Court cannot appoint a Guardian, unleſs the Heir be in Perſon before them. 2 Leon. 189. & *vide* Comb. 256, 330, 1.

Vide Head of *Infancy and Age.*

Regularly an Infant is to ſue both at Common Law and in Chancery, by his *Prochein Amy* (*b*) or Guardian; but he muſt always defend by Guardian, who is to be (*c*) admitted by the Court.

(*b*) That in an Ejectment againſt an Infant, the Defendant cannot appear by *Prochein Amy*, for a Guardian and *Prochein Amy* are diſtinct, and the Suit by *Prochein Amy* was not before the Statute of *Weſtm.* 1. c. 47. and *Weſtm.* 2. c. 15. and is given in Caſe of Neceſſity, where an Infant is to ſue his Guardian, or is eloined, or that the Guardian will not ſue for him. Cro. Jac. 640.——But for the Difference between a *Prochein Amy* and Guardian *vide* Palm. 296. 2 Inſt. 260, 390. (*c*) For the Regularity of ſuch Admiſſion *vide* 3 Co. 53. b. Cro. Eliz. 156. 2 Inſt. 261. Cro. Jac. 641. Palm. 296. Sid. 173, 342, 446. Mod. 48. Vent. 73. 2 Saund. 94. 2 Keb. 627. *Vide* 2 Danv. Abr. 572. (G). Lev. 224. 3 Mod. 236. 2 Vern. 342. Pre. Ch. 376. 8 Mod. 25. Fitzgib 1, 114, 164, 2 Wil. Rep. 119. 3 Wil. Rep. 140. pl. 32. 2 Barnes's Notes C. P. 326. Stra. 78, 114, 304, 445. 2 Will. Rep. 297. pl. 80. Sel. Caſ. Temp. King C. & Hardw. C. J. 49. 2 Stra. 1076.

Stil. 369. Bridg. 74. Rol. Rep. 303.

The reſpective Courts, in which the Suit is commenced, muſt aſſign a (*d*) proper Guardian to the Infant; and therefore if an Infant is ſued, the Plaintiff muſt move to have a proper Guardian aſſigned him.

(*d*) That the Courſe hath been to allow ſome of the Officers of the Court, *&c.* who by reaſon of their Skill make the beſt Guardians, and *Prochein Amys* for the Advantage of the Infant. 2 Inſt. 261.——That the Court of Chancery may aſſign one of the Six Clerks to be Guardian to an Infant. 2 Chan. Ca. 163.——But if there be a Guardian appointed by the Father, or *ex proviſione Legis*, as Guardian in Socage, who acts accordingly, he only ſhall be admitted to ſue for the Infant, unleſs he hath miſdemeaned himſelf. Sid. 424. *per Keling* C. J.——That the Court may diſcharge one Guardian and appoint another. Stil. 456.——That a Huſband can't diſavow a Guardian made by the Court for his Wife. Vent. 185.

And as no Infant can bring his Bill but by *Prochein Amy*, ſo he muſt take Care of it; for if the Bill is diſmiſſed, the *Prochein Amy* muſt (*e*) pay the Coſts thereof.

(*e*) And therefore any Perſon may bring a Bill, as *Prochein Amy* to an Infant without his Conſent, becauſe it is at his Peril that he brings it to be anſwerable for the Event. Abr. Eq. 72. *Andrews* and *Cradock.*

Where a Bill is brought againſt an Infant (if in Town) he muſt appear in Court, and have a Guardian aſſigned him, by whom he may defend the Suit; if in the Country, he ſues out a Commiſſion to aſſign a Guardian, and put in his Anſwer; and whether he Pleads, Anſwers, or Demurs,

ſtill it muſt be done by his Guardian; for if it is the Plea, Anſwer, or Demurrer of the Infant, without doing of it by the Guardian, it will be irregular.

* But where the Infant neglects to appear, or to have a Guardian aſſigned, it is a Motion of Courſe (he being in Contempt to an Attachment) to pray for a Meſſenger to bring him into Court, and when he is there, the Court always aſſigns him a Guardian; but it is (*a*) doubted, whether this can be done againſt a Peer of the Realm who is an Infant, and whoſe Perſon is ſacred.

* Page 681

(*a*) *Vide* Tit. *Privilege.*

(E) At what Time the Authority of a Guardian ceaſes, and what Acts will determine it.

THE Authority of a Guardian in Chivalry did not determine till the Heir, if a Male, came to the Age of twenty-one Years; becauſe it was preſumed, that till that Age he was not capable of doing Knight-Service, and attending his Lord in the Wars; the Guardianſhip of an Heir Female determined at her Age of fourteen at Common Law, but by *Weſtm.* 1. the Lord had the Wardſhip till ſhe attained the Age of ſixteen, to tender her convenable Marriage; the Authority of a Guardian in (*b*) Socage ceaſes at the Age of fourteen, at which Age the Infant may call his Guardian to an Account, and may chuſe a new Guardian.

Lit. Sect. 103. Co. Lit. 75. 2 Inſt. 135.

(*b*) As to the Guardianſhip of the Father, ſee *ante*, 674. n.——That committing Waſte is a Forfeiture of the Father's Guardianſhip. Hard. 69.

If a Guardian in Socage die, the Guardianſhip ſhall go to the next of Kin of the Infant, to whom the Inheritance cannot deſcend, and ſhall not go to the Executors of the Guardian, becauſe they can take nothing but what the Teſtator had to his own Uſe; beſides, the Law gives the Guardianſhip to ſuch Perſons as are preſumed to have moſt Affection for the Infant; and therefore will not intruſt Executors with it, who may happen to be Strangers.

Plow. 293. b. 2 Inſt. 260. Co. Lit. 89. S. P.

If a Feme Infant, who is in Ward, marries, at Common Law the Guardianſhip is determined, becauſe the Huſband is immediately on the Marriage become her Guardian; and it would be inconſiſtent, that ſhe ſhould at the ſame Time be under the Power of another Guardian. §

2 Inſt. 260.

§ See *ante*, 672. n.

If a Feme Guardian in Socage marries, the Huſband becomes Guardian in Right of his Wife; but if ſhe dies, the Guardianſhip ceaſes as to him, and ſhall go to the next of Kin to the Infant.

Plow. 294. a. Co. Lit. 89. a. S. P.

A Guardian in Socage ſhall not forfeit his Intereſt by Outlawry, or Attainder of Felony, or Treaſon; becauſe he hath nothing to his own Uſe, but to the Uſe of the Heir.

Co. Lit. 88. b. Godb. 316.

(F) Of

* Page 682 * (F) Of the Guardian's Intereſt in the Body and Lands of the Ward, and his Remedy for the ſame.

2 Inſt. 90. 9 Co. 72. As the Law hath inveſted Guardians not with a bare Authority only, but alſo with an Intereſt till the Guardianſhip ceaſes, ſo it hath provided ſeveral Remedies for Guardians againſt thoſe who violate that Intereſt; and therefore at Common Law there were Remedies both Droitural and Poſſeſſory, to recover the Guardianſhip.

2 Inſt. 90. As at Common Law there was the Writ *de Cuſtodia Terræ & Hæredis*, called the Writ of Right of Ward, wherein the Guardian recovered the Cuſtody of Body and Lands; but if the Ward were married, then the Guardian was driven to this Action of Treſpaſs, *Quare ſe intruſit Maritagio non ſatisfact.* But this was remedied by the Statute of *Merton, cap.* 6. which provides, that in the Writ of Right of Ward, the Plaintiff ſhall recover the Value of the Marriage.

2 Inſt. 90, 438. 9 Co. 72. *Huſſey's* Caſe. Hob. 94. Alſo at Common Law an Action of Treſpaſs lay for the Guardian, which was a Poſſeſſory Action; and in this at Common Law he could only recover Damages for his Ward, and not the Ward itſelf; but the Statute of (*a*) *Weſtm.* 2. *cap.* 35. gives a Writ of Raviſhment of Ward, in which the Plaintiff recovered the Body of the Heir, and not Damages only.

(*a*) And by the Equity of this Statute, a Writ of Raviſhment lay for the Guardian in Socage, as a Writ *in conſimili caſu*. Co. Lit. 87. b. 89. a. F. N. B. 139.——And it ſeems, that a Teſtamentary Guardian may, by 12 Car. 2. c. 24. which gives ſuch Guardian the ſame Remedies that a Guardian in Socage had, have a Writ of Raviſhment of Ward. 3 Keb. 446. ‡

‡ See 3 V. 15. n.

5 Keb. 446. If upon a *Habeas Corpus* an Infant be brought into Court, and it appears, that the Queſtion is touching the Right of Guardianſhip, the Court cannot deliver the Infant to the Guardian; for he may have a Writ of Raviſhment of Ward.

(G) What Things a Guardian may lawfully do, and which will bind the Infant.

Co. Lit. 88, 89. Lit. Sect. 123, 124. (*b*) May avow in his own Name. Vaugh. 18. † FROM the Authority and Intereſt, which the Policy of the Law has inveſted Guardians with, it appears, that a Guardian may do ſeveral Acts which will bind the Infant; ſuch as making Leaſes for Years, which he may do in his own (*b*) Name, and ſuch Leſſee may maintain Ejectment thereupon.

† *Cont.* as to a Teſtamentary Guardian, ſee *ante*, 677. n.

Bro. Tit. *Gard.* 70. Tit. *Garden* 19. Therefore if a Guardian in Socage makes Leaſe for Years, to continue beyond the Time of his Guardianſhip, ſuch Leaſes ſeem not to be abſolutely void by the Infant's coming of Age, but only voidable by him, if he thinks

fit; for they were not derived barely out of the Intereſt of the Guardian, or to be meaſured thereby, but take Effect alſo by virtue of his Authority, which for the Time was general and abſolute; and therefore all lawful Acts done during the Continuance of that Authority are good, and may ſubſiſt after the Authority itſelf by which they were done, is determined; and conſequently the Infant, when he comes of Age, may, by Acceptance of Rent, * or other Act, if he thinks fit, make ſuch Leaſes good and unavoidable; but a Guardian *pur Nurture* cannot make any Leaſes for Years, either in his own Name, or in the Name of the Infant; for he hath only the Care of the Perſon and Education of the Infant, and hath nothing to do with his Lands.

2 Rol. Abr. 41. *Briſden* and *Huſſey*. Cro. Jac. 55, 98. *Shopland* and *Ridler*.

* Page 683

A. lets Lands to *B.* for four Years, and died, and the Lands being holden in Socage, and the Heir under fourteen, the Guardian in Socage, by Indenture, before the firſt Leaſe was expired, lets the ſame Lands in his own Name to *B.* for eight Years; and if by this Acceptance of a new Leaſe from the Guardian in Socage the firſt Leaſe was ſurrendered, was the Queſtion; and it is ſaid to be holden by the Court, that it was ſurrendered; or if it could not be properly called a Surrender, for Want of a Reverſion in the Guardian in Socage, yet they held, that at leaſt the firſt Leaſe was thereby (*a*) determined by Admittance of the Leſſor's Power to make ſuch preſent Leaſe, which, if the firſt ſhould ſtand in the Way, he could not do.

Leon. 158, 322. 4 Leon. 7. Owen 45, 56. *Willis* and *Whitewood*.

(*a*) In Hutton 105. this Caſe is cited, and there ſaid, that in Strictneſs it could not amount to a Surrender properly ſo called, but that however it amounted to a Determination.

In Ejectment the Caſe was, that one *A.* deviſed Lands to *B.* his Son in Tail, with divers Remainders over, and makes one *C.* Overſeer of his Will, and willed that he ſhould have the Education of his Son till he came to twenty-one, and to receive, ſet and let for the ſaid *B.* the ſaid Lands ſo given him, and thereof to account to the ſaid *B.* being allowed his Charges, *&c.* *C.* makes a Leaſe for ſeven Years in his own Name, with Reſervation of Rent to himſelf, and this Leaſe, by Computation, was to continue Half a Year after *B.*'s attaining his full Age; and if this Leaſe was good for any Part of the Term was the Queſtion, *C.* being dead, and *B.* not of Age. And it was argued to be good for the whole Term, or at leaſt during the Minority of the Son, and only void for ſo much as exceeded the full Age of the Son; and that *C.* had an Intereſt in the Land, and not a bare Authority only; for then all Leaſes muſt have been made in the Name of the Infant, and ſo he might avoid them whenever he thought fit, which the Teſtator never intended to impower him to do; but *Popham*, *Clench*, and *Fenner* held, that as this Deviſe is, *C.* was but a Guardian for Nurture, and could not make Leaſes at his own Will and Pleaſure, for then he might make them for an Hundred Years; but here he can only make Leaſes at Will; for there is no other Time certain appointed, and he is but in the Nature of a Bailiff, and accountable; and therefore it was adjudged that the Leaſe was void; from which Caſe it appears, that if the Authority had been ſufficient to enable him to have made Leaſes for Years, ſuch Leaſes made by him, during the Continuance of that Authority, would not have determined therewith, but ſhould have ſubſiſted during the whole Term for which they were made; and the Infant in ſuch Caſe could not when he came of Age have avoided them, as he may Leaſes made by his Guardian in Socage, if he thinks fit; becauſe the Leſſee would have been in by the Will and Deviſe, not by the Guardian *pur Nurture*.

Cro. Eliz. 678, 734. *Piggot* and *Garniſh*.

If a Woman who is Guardian in Socage to her Son marries again, and her Huſband and ſhe join in a Leaſe of the Infant's Lands, this Leaſe upon the Death of the Huſband becomes void; for the Intereſt ſhe had in the Lands was in Right of the Infant, and therefore ſhall not bind her, as thoſe

Plow. 293. *Oſborne's* Caſe.

Acts ſhall in which ſhe joins with her Huſband in parting with her own Poſſeſſions.

A Guardian in Socage may grant Copyhold Eſtates in his own Name, and ſuch Grant ſhall bind the Heir, for he is *Dominus pro tempore*, and * ſhall take the Profits to his own Uſe, though he ſhall account for them, and he ſhall keep Courts in his own Name.

* Page 684

Cro. Jac. 55, 99. Poph. 127. Owen 115. Godb. 145. Rol. Abr. 499. 2 Rol. Abr. 42.

Mich. 8 W. 3. In *C. B. Lade* and *Barker*. Alſo it hath been reſolved, that a Guardian in Socage may grant Copyholds in Reverſion, according to the Cuſtom of the Manor, and that ſuch Grants ſhall be good, though they come into Poſſeſſion during the Nonage of the Infant.

2 Rol. Abr. 256. A Guardian or *Prochein Amy* may make Partition in Behalf of an Infant, and it will bind the Infant, if equal; for the Guardian is appointed by the Law to take Care of the Inheritance of the Infant; and this Separation and Diviſion of his Part from what belongs to another is ſo far from being a Prejudice to the Infant, that it is really for his Benefit and Advantage.

Co. Lit. 17. b. 89. a. 29 E. 3. 5. As the Authority and Intereſt of a Guardian extends only to ſuch Things as may be for the Benefit and Advantage of the Infant, and whereof he may give an Account; on this Foundation it is held, that a Guardian cannot preſent to any Benefice in Right of the Heir, becauſe he can make no Advantage thereof (for that would be Simony); and conſequently has nothing therein whereof he can give an Account, and therefore the (*a*) Infant himſelf ſhall preſent thereto.

(*a*) But in Cro. Jac. 99. it is ſaid, that if the Heir be within the Age of Diſcretion, the Guardian may preſent in his Name.——But *Parſon's Law*, c. 10. f. 76. makes a *Quære* hereof, and ſuppoſeth that it muſt be intended of a Guardian by Knight-Service, and not a Guardian in Socage.———And in 3 Inſt. 156. it is ſaid by my Lord *Coke*, that the Heir ſhall preſent of what Age ſoever he be, and not the Guardian.

42 E. 3. 130. But yet a Preſentment made by the Guardian in the Name of the Heir, is a good Title to the Heir in a *Quare Impedit*.

Hob. 132. Alſo a Guardian in Socage of a Manor to which an Advowſon is appendant, if he be diſturbed, ſhall have a *Quare Impedit* in his own Name, although he can make no Advantage thereof.

Carth. 79. 3 Mod. 259. 2 Vent. 72. Ld. Raym. 311. Prec. Ch. 229. 9 Mod. 103. 153. If a Guardian puts in an Anſwer to a Bill in Chancery for an Infant, on Oath, ſuch Anſwer ſhall not conclude the Infant, nor be (*b*) read in Evidence againſt him; for the Effect of an Infant's Anſwer to a Bill in Chancery is to no other Purpoſe than to make proper Parties, ſo as to have an Opportunity to take Depoſitions, and to examine Witneſſes to prove the Matter in Queſtion.

Gilb. Eq. Rep. 4. Will. Rep. 504. pl. 145. 2 Will. Rep. 387, 401. pl. 126. 519, (643). pl. 202. 3 Will. Rep. 237. Stra. 506, 548. 2 Stra. 1026. Show. 89. S. C. *Eccleſton* and *Petty*. (*b*) If an Infant put in an Anſwer by Guardian, and there is a Decree againſt him, without any Day given him to ſhew Cauſe, ſuch Anſwer ſhall not be read or admitted as Evidence againſt him when he comes of Age; but if a ſuperannuated Defendant puts in an Anſwer by his Guardian, it ſhall be read againſt him at any Time after, for he is ſuppoſed to grow worſe, and is not to have a Day to ſhew Cauſe. Abr. Eq. 281. *Leving* and *Caverley*.

Abr. Equ. 261, 262. *Palmer* and *Danby*. An Eſtate having deſcended to an Infant, ſubject to Incumbrances; and the Queſtion being, whether a Guardian might, without the Direction of a Court of Equity, apply the Profits to diſcharge the Incumbrances, or the Intereſt of them, or whether they ſhould not be accounted Perſonal Eſtate, and ſo the Adminiſtrator of the Infant be intitled to them, if the Infant died in his Minority; it was held by the Court, that a Guardian, without any Direction, may pay the Intereſt of any (*c*) real Incumbrance, and the Prin-

(*c*) That a Guardian ſhould pay off a Judgment with the Profits of the Infant's Eſtate. 2 Chan. Ca. 197. & *vide* Chan. Ca. 156. Vern. 436.

cipal of a Mortgage; becauſe that is a direct and immediate Charge on the Land, but not any other real Incumbrance.

And therefore where a Widow, who was Guardian to her Son, received the Rents and Profits of his Eſtate, and paid off Debts by Specialty, but took Aſſignments of the Bonds, the Son dying in his Minority, ſhe brought her Bill againſt the Defendant the Heir, for a Diſcovery of Aſſets by Deſcent to ſatisfy the Money due by Bond, ſhe claiming the Profits as Adminiſtratrix to her Son; and it was held by the Court, that *the Guardian was not compellable to apply the Profits of the Eſtate of the Infant Heir to pay off the Bond Debts. 2 Vern. 606. *Waters* and *Ebral*. *Page 685

If a Guardian borrows Money of *A.* to pay off an Incumbrance on the Infant's Eſtate, and promiſes to give *A.* Security for his Money, but dies before it is done, though *A.*'s Money is applied to pay off the Incumbrance, yet the Court will not decree him Satisfaction out of the Infant's Eſtate; but if the Sum diſburſed exceeds the Profits of the Eſtate, for ſo much *A.* ſhall have an Account as for Money due to the Guardian, and it ſhall be raiſed out of the Infant's Eſtate. 2 Vern. 480. *Hooper* and *Eyles*.

A Guardian to an Infant, having a conſiderable Sum of Money in his Hands that was raiſed out of the Infant's Eſtate, lays out, with the Conſent of his Grandmother, 3000*l.* in a Purchaſe of Lands which lay contiguous to the Infant's Eſtate, and takes the Purchaſe in the Name of *J. S.* for his Benefit, if when he came of Age he ſhould agree thereto, and allow that Money on Account; the Infant dying in his Minority, it was held by my Lord Chancellor *C. B. Atkins* and *J. Lutwyche*, againſt the Opinion of the Maſter of the Rolls, that though neither the Heir nor Adminiſtrator of the Infant were intitled to the Lands, yet the Guardian muſt account for this 3000*l.* to the Adminiſtrator of the Infant; and that it was not in the (*a*) Power of the Guardian, without the Direction of this Court, to turn the Perſonal into Real Eſtate, by which it would deſcend to the Heir; and that the Objection, that an Infant may make a Will at ſeventeen of his Perſonal Eſtate, but not of his Real, was not anſwered. Vern. 403, 435. *Earl of Winchelſea* ver. *Norcliff*.

(*a*) Where the Committee of a Lunatic inveſted Part of the Lunatic's Perſonal Eſtate in a Purchaſe of Lands made in the Lunatic's Name; and it was held, that they had exceeded their Power, by changing the Perſonal Eſtate into a Real, and thereby defeating the next of Kin in favour of the Heirs at Law; and therefore the Court decreed, that the purchaſed Lands ſhould be ſold, and the Money divided amongſt the next of Kin, according to the Statute of Diſtributions. 2 Vern. 192. *Awdley* and *Awdley*.

A Mother, as Guardian to her Infant Son, had out of his Perſonal Eſtate paid off a Mortgage; the Infant afterwards died, and the Eſtate deſcended to a remote Heir, and then the Mother would have had back the Money, but the Court denied her any Relief. 2 Vern. 193. *Zouch* and *Lloyd* cited.

(H) Of the Infant's Remedy againſt his Guardian for Abuſes by him.

AT Common Law, both a Prohibition of Waſte and an Action of Waſte lay againſt a Guardian in Chivalry and a Guardian in Socage, for a voluntary, but not for permiſſive Waſte, or Waſte done by a (*b*) Stranger. 2 Inſt. 305.

(*b*) But if there be two Jointenants of a Ward, and the one doth Waſte; this is the Waſte of both, for he is no Stranger. 3 E. 3. 18.

If a Guardian ſuffereth a Stranger to cut down Timber-Trees, or to proſtrate any of the Houſes, and doth not, according to his Duty and Office 3 Inſt. 305.

Office as Guardian, endeavour to keep and preſerve the Inheritance of the Ward in his Cuſtody and Keeping, and doth not prohibit and withſtand the Wrong-doer; this ſhall be taken in Law for his Conſent, according to the Rule, *Qui non prohibet quod prohibere poteſt aſſentire videtur*; and if ſuch Waſte and Deſtruction be done without the Knowledge of the Guardian, or with ſuch Force that he could not withſtand, then ought the Guardian to cauſe an Aſſiſe to be brought againſt ſuch Wrong-doers, by the Heir,
* Page 686 * wherein he ſhall recover the Freehold, and Damages for ſuch Wrong and Diſheriſon.

2 Inſt. 305. And if the Heir brings his Action of Waſte within Age, the Judgment, according to the Statute of *Gloceſter*, 6 *Ed.* 1. *cap.* 5. ſhall not only be to recover *Locum vaſtatum*, but the Guardian ſhall loſe the whole Wardſhip, and yield to the Heir ſingle Damages, if the Wardſhip be not ſufficient to ſatisfy the Damages.

2 Inſt. 305. If the Guardian doth Waſte, and after aſſigneth over his Intereſt, an Action of Waſte lieth againſt the Grantor in the *Tenet*.

2 Inſt. 306. Alſo if the Waſte be committed ſo near the Time of the Infant's coming of Age, that he could not conveniently bring his Action of Waſte during his Minority; yet after the Determination of the Guardian's Intereſt, he may bring his Action of Waſte, and in ſuch Caſe, as he cannot recover the Wardſhip which is ended, he ſhall by the Statute of *Gloceſter* recover treble Damages.

2 Inſt. 413. By *Weſtm.* 2. *cap.* 5. If Leſſee for Years, or Guardian alien in Fee, the Remedy for recovering the Freehold ſhall be by an Aſſiſe of *Novel Diſſeiſin*, and both the Feoffor and Feoffee ſhall be eſteemed Diſſeiſors, and the Survivor of them ſhall be liable to this Remedy. So if either happens to die, he that ſurvives may be conſtrued a Diſſeiſor, and as ſuch liable to this Action.

Not only Guardians in Chivalry, but in Socage, and by Nurture, come within this Law of *Weſtm.* 2. So alſo their Alienations not only in Fee, but in Tail, or for Life, are within the Act.

Bro. *Diſſeiſin* 95. If a Guardian accepts of a Feoffment from his Ward, the Ward may bring an Aſſiſe againſt him as a Diſſeiſor; for the Guardian acts contrary to his Duty, when he aſſents to any Alienation made by his Infant; for it is his Duty to protect the Inheritance of his Ward, and to deliver it up to him at full Age, and not to bring it into his own Family.

Co. Lit. 57. b. 271. a. 2 Inſt. 134. If a Guardian, after the full Age of the Heir, continues in Poſſeſſion, he is an Abator, and an Aſſiſe of *Mortdanceſtor* lies againſt him by the Heir; but he cannot be deemed a Diſſeiſor, becauſe he does not actually ouſt the Heir of his Freehold, which is required in a Diſſeiſin, but holds him out by an intermediate Entry between him and his Anceſtor, which makes the Diſtinction between an Abatement and a Diſſeiſin.

Rol. Abr. 731. But for this *vide* Tit. *Fines and Recoveries.* If an Infant appears by Guardian and ſuffers a Recovery, this ſhall bind him; and one of the Reaſons hereof is, that if the Recovery be to the Prejudice of the Infant, he has his (*a*) Remedy for it againſt his Guardian, and may re-imburſe himſelf out of his Pocket, to whom the Law had committed the Care of him.

(*a*) If a Guardian faint pleads or miſpleads, the Infant hath an Action againſt him. Dyer 104. b. Mod. 48, 49. 8 Mod. 25. 9 Mod. 103, 153. Fitzgib. 1, 114. Gilb. Eq. Rep. 16. Ld. Raym. 113, 232, 600. Vern. 461. Eq. Ca. Abr. 283. Stra. 445. 2 Stra. 1076. Will. Rep. 536. pl. 136. 2 Will. Rep. 119, 244, 297. pl. 80. 387, 519, 549. pl. 180. (643). pl. 202. 3 Will. Rep. 206. pl. 51. 208, 235.——A Guardian ſuffered a Dowreſs to recover at Law, by not ſetting up a Term which was created for protecting a Purchaſer, and the Infant was relieved in Equity. Preced. Chan. 151.

Guardian.

* (I) Of obliging a Guardian to account, and what Allowances he ſhall have.

* Page 687

BY the (*a*) Common Law, Guardians in Socage are accountable to the Infant, either when he comes to the Age of (*b*) fourteen Years, or at any Time after, as he thinks fit.

Co. Lit. 87.

(*a*) At Common Law, Executors could not have an Action of Account, nor could any but the King have ſuch an Action againſt them; for Matters of Account lie ſo much in Privity between the Parties, that thoſe who are Strangers thereto can neither tell what Allowances ought to be made by the one Party, or what might be alledged in Diſcharge of the other; but by *Weſtm.* 2. *cap.* 23. if the Heir make his Will, (which it ſeems to be agreed he may now do at the Age of fourteen) his Executors ſhall have an Action of Account againſt Guardian in Socage; and by 25 E. 3. c. 5. Executors of Executors may have ſuch an Action; and by 31 E. 3. c. 11. Adminiſtrators; and by 4 & 5 Ann. c. 16. an Action of Account lies againſt the Executors of a Guardian, Bailiff or Receiver. Co. Lit. 87. (*b*) That an Infant may by his *Procbein Amy* call his Guardian to an Account even during his Minority. 2 Vern. 342.

But the Guardian, on his Account, ſhall have Allowance of all reaſonable Expences; and if he is (*c*) robbed of the Rents and Profits of the Land without his Default or Negligence, he ſhall be diſcharged thereof upon his Account; for he is in the Nature of a Bailiff or Servant to the Infant, and undertakes no otherwiſe than for his Diligence and Fidelity.

Co. Lit. 89. a.

(*c*) So if the Infant's Eſtate ſuffers by Thunder, Lightning and Tempeſt, or other inevitable Accidents. 8 Co. 84.

If a Man enters as Guardian into the Lands of an Infant, who has no Title to be Guardian, it is at the (*d*) Election of the Infant to make him a Diſſeiſor on Account of his wrongful Entry upon, and actual Ouſter of, ſuch Infant, or elſe diſſemble the Wrong, and call him to an Account as Guardian.

Rol. Abr. 661. Cro. Car. 221.

(*d*) If Guardian in Socage occupy after the Heir attain to the Age of fourteen Years, he may be charged as Bailiff. 2 Inſt. 380.

If a Man during a Perſon's Infancy receives the Profits of an Infant's Eſtate, and continues to do ſo for ſeveral Years after the Infant comes of Age, before any Entry is made on him; yet he ſhall (*e*) account for the Profits throughout, and not during the Infancy only.

Abr. Eq. 280. *Yallop* and *Holworthy*.

(*e*) That if a Man intrude upon an Infant, he ſhall receive the Profits but as Guardian, and the Infant ſhall have an Account againſt him in Chancery. Vern. 295.

A Receiver to the Guardian of an Infant, who has had his Account allowed him by the Guardian, ſhall not be obliged to account over again to the Infant when he comes of Age.

Preced. Chan. 535.

If a Guardian takes a Bond for the Arrears of Rent, he thereby makes it his own Debt, and ſhall be charged with it.

2 Chan. Rep. 97. *Wale* and *Buckley*.

If a Guardian to an Infant, whoſe Lands are incumbred to the Value of 600 *l.* buys it off with 100 *l.* of the Infant's Money, he ſhall not charge the Infant with the 600 *l.*

2 Chan. 243.

The End of the SECOND VOLUME.